



**Ochieng Okuku v Bidwood Suites Hotel (Employment and Labour Relations Cause 2180 of 2017) [2022] KEELRC 4011 (KLR) (26 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4011 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 2180 OF 2017**

**JK GAKERI, J  
SEPTEMBER 26, 2022**

**BETWEEN**

**DAVID OCHIENG OKUKU ..... CLAIMANT**

**AND**

**BIDWOOD SUITES HOTEL ..... RESPONDENT**

**JUDGMENT**

1. The Claimant initiated this claim by a Memorandum of Claim dated November 2, 2017 and filed on even date alleging unfair, wrongful and illegal termination of employment by the Respondent and non-payment of terminal dues.
2. It is the Claimant's case that he joined the respondent's employment on November 18, 2014 on permanent terms and worked as Head of Maintenance until December 14, 2016 when his employment was terminated and worked for 8 hours 6 days a week at a monthly salary of Kshs 90,275/= and 24 working days annual leave.
3. The Claimant avers that his employment was terminated for no reason and unprocedurally.
4. The Claimant prays for;
  - i. A declaration that the decision by the respondent to terminate the claimant's employment was procedurally unfair and illegal.
  - ii. An order for compensation equivalent to 12 months salary of Kshs 1,083,300/=.
  - iii. Accrued leave for 2 years and one (1) month Kshs 188,073/=.
  - iv. An order for payment of service pay for 2 years and one (1) month Kshs 97,798/=
  - v. Interest on (ii), (iii) and (iv) above at court rates.



- vi. Damages for unfair, unlawful dismissal.
- vii. Costs of the suit.

### **Respondent's case**

5. The respondent filed its Reply to Memorandum of claim on February 5, 2018.
6. The respondent denies that it terminated the claimant's employment unlawfully or unfairly or it violated the provisions of the *Employment Act*, 2007. It also denies that claimant is entitled to compensation. It avers that termination of the Claimant's employment was mutual and the respondent issued a certificate of service.
7. The respondent prays for dismissal of the suit with costs.
8. On May 24, 2022 when the matter was slated for hearing, both parties agreed that the matter proceeds by way of written submissions.

### **Claimant's evidence**

9. The claimant's undated written statement on record replicates the memorandum of claim.
10. Documents on record show that the respondent engaged the claimant for an indefinite period effective November 18, 2014 as its Head of Maintenance at a consolidated monthly salary of Kshs 80,218/=, lunch allowance of Kshs 1,820/= and three (3) months probationary period. The contract was terminable by one (1) month's notice of either party.
11. The claimant was entitled to annual leave of 24 days and only a maximum of 10 days could be carried forward from the previous year, excess days were deemed forfeited. An annual leave travelling allowance was also payable.
12. Copies of payslips for September, October, November and December, 2016, reveal that the claimant received a monthly service charge.
13. Finally, the certificate of service on record shows that the claimant was an employee of the respondent from November 18, 2014 to December 14, 2016.

### **Respondent's evidence**

14. RWI, Naomi Njenga's written statement dated September 3, 2019 confirms the claimant's employment by the respondent on November 18, 2014 at gross salary of Kshs 60,000/= which was raised to Kshs 79,245/= effective June, 2015. That the claimant's employment was terminated in compliance with the law.
15. The respondent's bundle of documents has two earlier employment contracts dated November 14, 2018 containing the claimant's Identification Number signed by Omar Talib as Management Bidwood Suite Hotel Ltd on November 14, 2014 and a further contract dated February 15, 2015 signed by the claimant on March 10, 2015. The Claimant provided the latest of the contracts.
16. By letter dated December 14, 2016, the respondent terminated the claimant's employment and was paid one-month notice and leave arrears.
17. The respondent filed a supplementary witness statement stating that the claimant was a habitual absentee and his gross salary as at the date of dismissal was Kshs 81,647/= and all statutory deductions were made. That he was paid for all outstanding leave days at Kshs 48,996/=.



## Claimant's submissions

18. The claimant identifies four issues for determination, namely; reason for termination of employment/dismissal, procedure employed by the respondent and the prayers sought.
19. As regards sufficiency of the reason for termination, reliance is made on the provisions of section 43 of the *Employment Act* and the decision in *Benjamin Mule Kimoli V Parbay Siyani Construction Ltd (2015) eKLR* to urge that the respondent did not have a valid reason to terminate the claimant's employment. Contents of the Memorandum of Reply are also cited to buttress the submission.
20. It is further urged that the claimant was condemned unheard contrary to the provisions of section 41 of the *Employment Act*, 2007.
21. Section 45(2) of the *Employment Act* is also relied upon on procedural aspects of the termination.
22. Similarly, the decision in *Loice Otieno V Kenya Commercial Bank Ltd (2013) eKLR* is cited to submit that natural justice and procedural fairness was now part of Kenya's employment law and instant dismissals are a thing of the past.
23. It is submitted that the respondent had no evidence of the dates when the claimant was out of work without leave or the number of hours. The decision in *Kenya Electrical Trade & Allied Workers Union V Kenya Power & Lighting Co Ltd (2014) eKLR* is relied upon to urge that strict proof of absenteeism is imperative failing which the termination is deemed unfair. The court is urged to find that the claim of absenteeism was unsubstantiated.
24. It is the claimant's submission that employees in the Hotel Industry work in shifts and do not have regular or standard reporting time.
25. As to whether fair procedure was followed, it is submitted that the claimant was dismissed from employment without a hearing. The decisions in *Mary Chemweno Kiptui v Kenya Pipeline Co Ltd (2014) eKLR* and the Standard Group Ltd V Jenny Luesby (2018) eKLR are relied upon to underscore the need to comply with the provisions of section 41 of the *Employment Act*.
26. Similarly, the decisions in *Walter Ogal Anuro v Teachers Service Commission (2012) eKLR* and *Kenfreight (EA) Ltd V Benson K Nguti (2016) eKLR* are cited to urge that the claimant's termination from employment was unfair.
27. As regards the reliefs sought, it is submitted that the claimant is entitled to the declaration sought and 12 months compensation. The decisions in *Wilberforce Ojiambo Oundo V Regent Management Ltd (2013) eKLR* and *Kenfreight (EA) Ltd V Benson K Nguti (Supra)* are relied upon to urge that the award of 12 months compensation would be proper exercise of discretion.
28. On leave days, it is submitted that the claimant was entitled to 42 leave days but the contract of employment gave him 48 days. That in 2016, he had 30 days and took 10. That he had 22 leave days uncompensated.
29. On service pay, it is submitted that from 2010 to 2022, the current employer was Lavington Hotel and the respondent adduced no evidence of payment of NSSF contributions. The decision in *Wycliffe Makboba Ouma V Security Guards Services Ltd (2014) eKLR* is relied upon to urge that section 35(6) (d) of the *Employment Act* does not exclude payment of service if the claimant was not a contributor.
30. The decision in *Cesar Warui V Sirona Hotel Ltd (2018) eKLR* is also relied upon.



31. As regards damages for unfair and unlawful dismissal, it is urged that the claimant is entitled to damages as his livelihood was disrupted being the sole breadwinner, mental anguish and economic hardship. No authority is relied upon to buttress the submission.

### **Respondent's submissions**

32. The respondent isolates two issues for determination;
- i. Whether the claimant was unfairly terminated from employment.
  - ii. Who should bear the costs of this suit.
33. As to whether the claimant was unfairly terminated from employment, reliance is made on the Court of Appeal decision in [\*Kenneth Nyaga Mwige V Austin Kiguta & 2 others \(2015\) eKLR\*](#) to underscore the essence of proof of documents on record.
34. The respondent submitted that the claimant had not complied with the principles enunciated in the Kenneth Nyaga Mwige case (Supra), that the statement of claim is unsupported. In addition, the witness statement is undated contrary to Order 2 Rule 16 of the [\*Civil Procedure Rules, 2010\*](#).
35. Reliance is also made on order 18 Rule 2(2) of the Civil Procedure Rule, 2010.
36. It is in the respondent's submission that section 36 of the [\*Employment Act\*](#) allows parties to a contract of service to terminate the same without notice by payment in lieu and the respondent paid one month's salary, all pending payments and the claimant acknowledged receipt and signed.
37. The respondent further argues that the separation in this case was mutual and the claimant was content and would not be lodging a claim.
38. On absenteeism, the respondent argues that the claimant was a habitual absentee having been away for 873 hours equivalent to 109 days a duration of 3<sup>1</sup>/<sub>2</sub> months' worth Kshs 296,698/= according to the respondent.
39. The decision in [\*Robinstone Otieno Okeyo V Mega Pack \(K\) Ltd \(2020\) eKLR\*](#) is relied upon to urge that the respondent documented the claimant's attendance.
40. On leave, the respondent submits that the claimant was fully paid for the outstanding leave days, a sum of Kshs 48,996/=.
41. As regards service pay, the respondent submits that the prayer should be dismissed as the claimant's NSSF statement shows a different employer and for the duration the claimant was employed by the respondent, NSSF payments were made.
42. Reliance is made on section 35(6)(d) of the [\*Employment Act\*](#) and the decision in [\*Rhoda Nyatuka Isena V Coptic Hospital \(2021\) eKLR\*](#) where the court relied on the decision in [\*Hassanath Wanjiku V Vanela House of Coffees \(2018\) eKLR\*](#) on the award of service pay.
43. On costs, the respondent relies on the Supreme Court decision in [\*Jasbir Singh Rai & 3 others V Tarlochan Singh Rai & 4 others \(2014\) eKLR\*](#) to urge that costs follow the event. That the respondent should be awarded costs upon dismissal of the suit.

### **Determination**

44. The issues for determination are;
- i. Whether termination of the claimant's employment was unfair.



- ii. Whether the claimant waived his right to pursue further claims against the respondent.
  - iii. Whether the claimant is entitled to the remedies sought.
45. As to whether termination of the claimant's contract of employment was unfair, the springboard are the relevant provisions of the *Employment Act*, 2007.
46. Section 45(2) of the *Employment Act* provides;
- A termination of employment by an employer is unfair if the employer fails to prove –
- a. That the reason for the termination is valid;
  - b. That the reason for the termination is a fair reason –
    - i. Related to the employee's conduct, capacity or compatibility; or
    - ii. Based on the Operational requirements of the employer; and
  - c. That the employment was terminated in accordance with fair procedure.
47. This provision is reinforced by the provisions of section 41, 43, 44 and 47(5) of the Act which address the procedural aspects of termination, burden of proof of the employer, grounds of summary dismissal and justification of the grounds of termination respectively. Cumulatively, these provisions are emphatic that for a termination of employment to pass as fair, it must be substantively justifiable and procedurally fair and courts have held as much (see *CMC Aviation Ltd V Mohammed Noor (2015) eKLR*, *Standard Group Ltd V Jenny Luesby (2018) eKLR*, *Walter Ogal Anuro V Teachers Service Commission (2015) eKLR*.)
48. In *Walter Ogal Anuro V Teachers Service Commission (Supra)*, Ndolo J stated;
- ' However, for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness.'
49. Based on the foregoing, I will now to examine the circumstances in which the claimant's employment was terminated by the respondent.

### **Reason for termination**

50. From the contents of the termination letter dated December 14, 2016, it is evident that the respondent gave no specific reason to justify termination of the claimant's employment.
51. The letters reads in part;
- ' I am sad to inform you of the management's decision to end your employment with Bidwood Suites Hotel effective immediately.
- The company will pay you one month pay in lieu of notice and pending vacation days and you will be issued with a certificate of service.'
52. The respondent had not previously issued a notice to show cause and the termination took effect as soon as the letter was received.
53. In his submissions, counsel for the respondent addressed the issue of claimant's attendance at length stating that the claimant was away from the place of work for a total of 109 days. This submission



is supported by documentary evidence that show that the claimant's attendance was questionable although the respondent neither issued a warning letter nor notice to show cause.

54. The related allegation of poor execution of his duties is unsupported by a performance appraisal record. The court is in agreement with the claimant's submission that none of these allegations was pleaded by the respondent.
55. Section 43(2) of the *Employment Act* provides;  
The reason or reasons for termination of a contract are matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.
56. The respondent tendered no evidence of the claimant's attendance record for 2016 or performance for perusal by the court. Needless to emphasize, the reason for termination of employment cannot be given after the termination has taken effect (See *Mary Chemweno Kiptui*) (Supra).
57. In sum, the respondent has not demonstrated that it had a valid and fair reason to terminate the claimant's employment as required by law.

### **Procedure**

58. Section 41 of the *Employment Act* is categorical on the procedural precepts to be complied with by the employer before termination of employment or summary dismissal.
59. In *Postal Corporation of Kenya V Andrew K Tanui (2019) eKLR*, the Court of Appeal summarised the steps to be complied with as follows;  

' Four elements must thus be discernible for the procedure to pass muster;

  - i. An explanation of the grounds of termination in a language understood by the employee;
  - ii. The reason for which the employer is considering termination;
  - iii. Entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;
  - iv. Hearing and considering any representations made by the employee and the person chosen by the employee."
60. The court is guided by these sentiments.
61. According to the respondent, the separation was mutual and the Claimant was paid one month's salary in lieu of notice amongst other payments.
62. In contrast, the letter dated December 14, 2016 is reference as Termination of Employment, and its opening sentence is as follows; 'I am sad to inform you of the management's decision to end your employment with Bidwood Suites Hotel effective immediately' This cannot pass a mutual separation.
63. It requires no gainsaying that the respondent did not meet the threshold prescribed by section 41 of the *Employment Act*.
64. For the above stated reasons, it is the finding of the court that the respondent has failed to demonstrate that termination of the claimant's employment was conducted in accordance with a fair procedure.



65. The overall finding of the court is that termination of the claimant's employment was neither substantively justifiable nor procedurally fair and a declaration to that effect hereby issues.
66. As to whether the claimant waived his right to pursue further claims against the respondent, it is not in dispute that the claimant received the sum of Kshs 126,153/= through cheque No xxxx dated December 14, 2016 and executed a settlement agreement of even date. His signature was appended on December 15, 2016.
67. In addition, the Claimant's payslip for December, 2016 tabulates the specific items the claimant was paid for amounting to Kshs 174,179.00 and a net of Kshs 126,153.00. The respondent submits that the separation was mutually done and the parties signed the letter of discharge. The claimant acknowledged receipt of final dues and received a certificate of service.
68. The principles governing the import and effect of settlement agreement or discharge vouchers have been formulated by the Court of Appeal in several decisions.
69. In *Krystalline Salt Ltd V Kwekwe Mwakele and 67 others*, the Court of Appeal expressed itself as follows;
- ' It is important to bear in mind that in Kenya, employment is governed by the general law of contract as much as by the principles of common law now enacted and regulated by the *Employment Act* and other related statutes. In that sense, employment is seen as an individual relationship negotiated between the employee and the employer according to their needs.'
70. In *Damodar Jibhabhai & Co Ltd & another V Eustace Sisal Estates Ltd (1967) EA 153*, Sir Charles Newbold P stated as follows;
- ' The function of courts is to enforce and give effect to the intention of the parties as expressed in their agreement'
71. In a similar vein, in *Coastal Bottlers Ltd V Kimathi Mithika (2018) eKLR*, the Court of Appeal stated;
- ' Whether or not, a settlement agreement or discharge voucher bars a party thereto from making further claims depends on the circumstances of each case. A court faced with such an issue, in our view, should address its mind firstly, on the import of such a discharge/agreement; and secondly, whether the same was voluntarily executed by the parties concerned.'
72. In *Thomas De La Rue (K) Ltd V David Opondo Mutelema (2013) eKLR*, the court emphasized that;
- ' The court has, in each and every case, to make a determination, if the issue is raised, whether the discharge voucher was freely and willingly executed when the employee was seized of all the relevant information and knowledge.'
73. The court is bound and guided by the foregoing sentiments of the Court of Appeal.
74. At common law, what is created by agreement may be extinguished by agreement. This principle is encapsulated by the latin phrase *eodem modo quo oritur, oedema modo dissolvitur*.



75. In the instant case, the settlement agreement between the claimant and the respondent dated December 14, 2016 states in part;

' I David Ochieng Okuku have received Kshs 126,153/= (Kenya shillings one hundred and twenty six thousand one hundred and fifty three only) in cheque towards the full and final settlement of all my terminal dues including salary, leave encashment and/or other claims in relation with my employment with Bidwood Suites Hotel.

I agree and confirm receipt of the above mentioned amount as my full final dues with Bidwood suites.

I David Ochieng Okuku have read, understood and agreed with the contents of this letter and confirm that all my terminal dues have been paid in full and would never raise any claim of any pending dues in future.'

76. Notably, the foregoing settlement agreement is silent on claims other than those relating to terminal dues.

77. The claimant did not submit on the import on this document or contest its authenticity and the claimant's undated statement makes no reference to it.

78. Guided by the foregoing authorities, the court is persuaded that the parties agreed that payment of the sum of Kshs 126,153/= in the settlement agreement would discharge the respondent from further claim for any pending dues under the contract of employment.

79. Instructively, the settlement agreement dated December 14, 2016 makes no reference to claims other than pending dues which are based on the employment contract as opposed to those occasioned by an unfair termination of employment.

80. The last paragraph of the agreement clearly shows that the claimant appreciated the nature of the agreement and no evidence of the duress, misrepresentation or mistake or undue influence has been provided.

81. In the courts view, this was a binding agreement between the claimant and the respondent and the claimant confirmed receipt of full and final dues from the respondent.

82. In *Trinity Prime Investment Ltd V Lion of Kenya Insurance Co Ltd (2015)eKLR*, the Court of Appeal had this to say about a discharge voucher.

' The execution of the discharge voucher, we agree with the learned judge constituted a complete contract, even if payment by it was less than the total loss sum, the appellant accepted it because he wanted payment quickly and execution of the voucher was free of misrepresentation, fraud or other'

83. In the instance case, the claimant confirmed that he had read, understood and consented to the contents of the letter and was thus seized of the relevant information and knowledge.

84. From the foregoing, it is clear that whereas the settlement agreement fully discharged the respondent from liability in relation to terminal dues including salary, leave encashment and other claims in relation to his employment, it did extinguish the Claimant's rights to pursue other claims against the respondent.

85. Put in the alternative, the claimant did not waive his right to lodge further claims against the respondent.



86. On reliefs, having found that the claimant did not waive his right to pursue other claims against the respondent, the prayer for compensation is sustainable.

**(a) Having found that termination of the Claimant's employment was unfair for non-compliance with the provisions of the Employment Act, the Claimant is entitled to the discretionary relief provided by section 49(1)(c) of the Employment Act.**

87. In determining the quantum of compensation, the court has taken into consideration the following;

- i. The Claimant was an employee of the respondent for 2 years, a relatively short time.
- ii. The Claimant did not appeal the decision by the respondent to terminate his employment.
- iii. The Claimant did not manifest his wish to continue working for the respondent.
- iv. The Claimant had no record of misconduct though his attendance record for 2015 was questionable.

88. In light of the foregoing, the court is satisfied that the equivalent of 2 month's salary is fair, Kshs 180,550/=.

**b. Outstanding leave days were paid for under the settlement agreement. The prayer is declined.**

**c. Service pay**

89. The copies of payslips on record show that the respondent was deducting and remitting NSSF contributions. This is evidenced by the NSSF statement on record, the employers name notwithstanding. The Claimant was a member of the NSSF. The prayer is declined as ordained by section 35(6)(d) of the Employment Act, 2007.

**d. Damages for unfair, unlawful dismissal**

90. The claimant led no evidence to establish this prayer. It is disallowed.

91. In conclusion, judgement is entered for the claimant against the respondent as follows;

- a. Equivalence of 2 months salary, Kshs 180,550/=
- b. Costs of the suit.
- c. Interest at court rates from the date hereof till payment in full.

92. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 26<sup>TH</sup> DAY OF SEPTEMBER 2022.**

**DR. JACOB GAKERI**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments



and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

**JUDGE**

