



REPUBLIC OF KENYA



KENYA LAW
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**Mutunga v Kartar Singh and Dhupar Company Limited (Cause
2450 of 2016) [2022] KEELRC 3970 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3970 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2450 OF 2016
MA ONYANGO, J
SEPTEMBER 22, 2022**

BETWEEN

BONIFACE MUSEMBI MUTUNGA CLAIMANT

AND

KARTAR SINGH AND DHUPAR COMPANY LIMITED RESPONDENT

JUDGMENT

1. By way of a Memorandum of Claim dated 25th November, 2016 and filed in Court on 29th November, 2016, the Claimant herein instituted the instant suit seeking the following reliefs: -
 - a) A declaration that the Respondent's termination/dismissal of the Claimant's employment was illegal, unlawful, unfair and inhumane and that the Claimant is entitled to his due terminal benefits and damages.
 - b) An Order for the Respondent to pay the Claimant his terminal dues and compensatory damages totaling to Kshs.364,140.00/- and comprising of the following: -
 - i. Salary for one month in lieu of notice Kshs.9,100.00
 - ii. Untaken leave days for 8 years Kshs.72,800.00
 - iii. Terminal dues 8 years Kshs.42,000.00
 - iv. House allowance at 1,365 x 12 months x 8 years Kshs.131,040.00
 - v. Compensation for loss of employment for 12 months Kshs.109,200.00Total Kshs.364,140.00
 - c) An Order for the Respondent to pay the Claimant's costs for this Claim plus interest thereon.



2. In his Memorandum of Claim, the Claimant avers that he was employed by the Respondent in the year 2008, in the position of a casual labourer, earning a daily wage of Kshs.350 that was paid as a monthly salary of Kshs.9,100 less house allowance.
3. The Claimant further avers that he was subsequently transferred to a site in Embakasi and was not allocated any transport allowance. He maintains that he did demand for the transport allowance and as a result the Respondent summarily terminated his employment.
4. He contends that the Respondent's actions were unlawful and unfair for the following reasons that: -
 - i. No notice to show cause letter was issued to the Claimant demanding a response on the charges (if any) levelled against him;
 - ii. He had done nothing wrong to warrant his summary dismissal;
 - iii. The Respondent failed to follow due process.
5. The Claimant maintains that during the subsistence of his employment with the Respondent he performed his duties diligently, effectively and to the Respondent's satisfaction and that he was never involved in any disciplinary issues or issued any warning prior to his unlawful and untimely termination.
6. The Claimant urged this Court to find his Claim as against the Respondent merited and to allow it in terms of the reliefs sought therein.

Respondent's Case

7. The Respondent filed its response to the memorandum of claim dated 30th January, 2017 and filed in Court on 1st February, 2017 in which the Respondent admits engaging the Claimant in the manner outlined in the Memorandum of Claim. It however, maintained that the Claimant's termination was lawful and fair contrary to the Claimant's contention that the same was unlawful and unfair.
8. The Respondent denies that it is indebted to the Claimant in any way insisting that the sums claimed in the Memorandum of Claim are fictitious and lack any legal basis and/or justification. It is on this basis that the Respondent urges this Court to find the Claim without merit and dismiss it with costs to the Respondent.

Evidence

9. The suit was heard on 30th November, 2021 with the Claimant testifying on his own behalf. The Respondent's case was closed without it calling any witnesses.

Claimant's Case

10. The Claimant testified as CW1 and adopted his witness statement filed in Court on 29th November, 2016 as his evidence in chief. He further produced as exhibits the List and Bundle of documents filed in Court on 26th November, 2016.
11. CW1 testified that he was under the Respondent's employment from the year 2008 until 15th July, 2016 when his employment was unfairly terminated.



12. He insists that the termination was effected after he was transferred from Kibera to Embakasi and was expected to report for duty at 7:30 am. He further stated that the Respondent indicated that there would be no increment to his salary despite the change.
13. CW1 testified that he was not accorded any disciplinary hearing prior to his termination. He maintained that he is entitled to the reliefs sought in his Memorandum of Claim and urged this Court to allow his claim as prayed.
14. The Claimant also sought to be issued with a certificate of service for the duration he was under the Respondent's employment.
15. On cross-examination CW1 maintained that his employment was indeed terminated by the Respondent and that he had not in any way left the Respondent's employment on his own motion.
16. He further testified that his transfer to the Respondent's site in Embakasi was upon completion of construction work at the Kibera site where he worked.
17. CW1 further stated that he was entitled to all the reliefs sought in his Memorandum of Claim and that he was a member of NSSF.
18. On re-examination, CW1 maintained that he had not taken any leave in the 8 years he was under the Respondent's employment and was therefore entitled to compensation under the head.
19. On further re-examination the Claimant stated that no evidence had been adduced by the Respondent to prove that he had been paid any of the sums pleaded and is therefore entitled to compensation as sought.
20. He insisted that his termination was as a result of his transfer from one of the Respondent's sites to another with no provision of transport allowance from the Respondent to cover for the additional costs of transport.
21. Parties filed and exchanged their written submissions to the claim herein.

Claimant's Submissions

22. In his submissions, the Claimant maintained that his termination was unlawful and unfair as the Respondent did not have a valid and justifiable reason to terminate his employment contrary to the mandatory provisions of Section 43 and 45 of the [Employment Act, 2007](#).
23. The Claimant further submits that no evidence has been adduced that he had absconded lawful duty and as a result the Respondent cannot rely on the same as a reason for termination. To buttress this argument the Claimant relied on the Court findings in the cases of [Simon Mbiti Mbane v Inter Security Services Limited](#) (2018) eKLR and [Joseph Nzioka v Smart Coating Limited](#) (2017) eKLR where the Courts held that prior to the termination of an employee who has absconded duties such an employee should be accorded an opportunity to show cause why his employment should not be terminated for absconding duties.
24. The Claimant further submitted that his termination was procedurally unfair as he was not accorded a fair hearing as envisaged under the provisions of Section 41 of the [Employment Act, 2007](#). For emphasis, the Claimant relied on the cases of *Fancy Jeruto Cherop & Nancy Jepkemoi Kiyai v Hotel Cathay Limited* Cause No. 20 of 2017 and [Standard Group Limited v Jenny Luesby](#) (2018) eKLR all on procedural fairness in termination of an employment contract.



25. On specific reliefs sought, the Claimant submitted that he is entitled to one month's salary in lieu of notice by dint of the provisions of Section 35 of the *Employment Act*, 2007.
26. With regard to unpaid leave days, the Claimant submitted that he is entitled to compensation under this head the Respondent having failed to produce evidence to show that he had proceeded on leave.
27. The Claimant further submits that he is entitled to payment of house allowance there being no evidence adduced indicating that the same was paid by the Respondent.
28. The Claimant urged this Court to allow his prayer for compensation for his unlawful and unfair termination to the maximum of 12 months having shown that his termination was unlawful and un-procedural. The Claimant relies on the provisions of Section 49 and 50 of the *Employment Act*, 2007.
29. He further submitted that he is entitled to the issuance of a certificate of service for the duration he was under the Respondent's employment by dint of the provisions of Section 51 of the *Employment Act*, 2007.
30. The Claimant submits that he is also entitled to costs of this suit the demand letters having been drawn and served upon the Respondent who failed and/or ignored to pay the terminal dues owed.
31. In conclusion the Claimant urged this Court to find his Claim with merit and to allow it in terms of the reliefs sought therein.

Respondent's Submissions

32. In its submissions, the Respondent denied terminating the Claimant's employment maintaining that he absconded lawful duties following his transfer to a different site and is therefore not entitled to any of the reliefs sought in his claim.
33. The Respondent further submits that it was not bound by any provision of the *Employment Act*, 2007 to provide to the Claimant transport allowance and that the salary received was above the minimum wage making it easy for the Claimant to cater for his own transportation costs.
34. The Respondent further submitted that the Claimant was not entitled to payment of salary in lieu of notice after having absconded lawful duties and that it was clear that the parties did not agree on this issue. For emphasis the Respondent relied on the Court of Appeal decision in the case of *Heritage Insurance Company Limited v Christopher Onyango & 23 Other* (2018) eKLR where the Court held that a verbal notice of termination would suffice.
35. On the claim for leave days untaken, the Respondent submits that the amount Claimant is exaggerated and urged this Court to dismiss it in its entirety.
36. The Respondent further submitted that the Claimant is not entitled to terminal dues for 8 years work or service pay as pleaded after having admitted to being a fully paid member of National Social Security Fund. To fortify this argument the Respondent relied on the Court findings in the case of *Kennedy Nyanguncha Omanga v Bob Morgan Services Limited* (2013) eKLR where the Court declined a prayer for service pay where an employee was a registered member of NSSF in line with the provisions of Section 35 (5) of the *Employment Act*, 2007.
37. The Respondent further submits that the Claimant is not entitled to the claim for severance pay this case having not arisen from a redundancy.
38. In conclusion the Respondent submits that the entire Claim against it is without merit and urged this Court to dismiss it with costs to the Respondent.



Analysis and determination

39. Having considered the facts of this cause, evidence, submissions and authorities cited by the parties, there is no dispute that the Claimant was employed by the Respondent between the year 2008 and 15th July, 2016. It is further not in dispute that the Claimant's employment was terminated was following a transfer from his duty post in Kibera to Embakasi. The Issues for determination therefore are:
- a. Whether the termination of the Claimant's employment was valid both procedurally and substantively;
 - b. Whether the Claimant is entitled to the reliefs sought

The Law

40. Under Section 45(2) of the *Employment Act* termination of an employee's contract of service is unfair where the employer fails to prove that it was founded and/or grounded on a valid reason which relate to the employee's conduct, capacity or compatibility and that while arriving at the decision to terminate the services of such an employee fair procedure was followed.
41. The statutory burden for a complaint of unfair termination of employment or wrongful dismissal is contained in section 47(5) of the *Employment Act*. The Section provides that –
- “For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

Reason for Termination

42. From the evidence on record, it is apparent that there is no letter of termination issued to the Claimant. He however maintained that his termination was precipitated by his requests for transport allowance after he was transferred from the Respondent's Kibera site to another site in Embakasi.
43. The Respondent on the other hand maintained that it was not bound by any provision of the law to provide the Claimant with any transport allowance. It in fact avers that Claimant on his own motion absconded lawful duties following his transfer to the Embakasi site.
44. This Court has on several occasions pronounced itself on the procedure where a member of staff is believed to have absconded lawful duties.
45. It is the duty of the Respondent to show this Court the efforts made to contact the Claimant for purposes of enquiring his whereabouts. I refer to the case of *Simon Mbiti Mbane v Inter Security Services Limited* (2018) eKLR where the Court held that where there is an allegation of absconding duty, the employer must demonstrate the efforts made to contact such an employee without success.
46. No evidence was tabled by the Respondent to prove that it had tried to contact the Claimant during the period it claims that he had absconded duties. Indeed, the Respondent did not adduce any evidence either to support its averments or controvert the testimony of the Claimant. I therefore make a finding that the claim for absconding duty has not been proved.
47. In the circumstances, this Court finds that there was no valid reason for the termination of the Claimant's employment contract.



Procedure followed

48. The Claimant maintained that he was not accorded an opportunity to defend himself of the allegations levelled against him. He submitted that the Respondent failed to follow due process as set out in Sections 41, 43 and 45 of the *Employment Act*, 2007 therefore urging this Court to find that the termination of his employment was unfair for failure to comply with the procedure in the Act.
49. The Claimant further submits that he not served with any notice to show cause requiring a response as to why disciplinary action should not be taken against him prior to the termination or dismissal.
50. No evidence has been adduced by the Respondent herein in terms of disciplinary hearing meeting minutes to prove that the Claimant was duly accorded a hearing in line with the provisions of Section 41 of the *Employment Act*, 2007 which provides as follows:

“An employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.”

[Emphasis mine]

51. In the case of *Francis Mbugua Boro v Smartchip Dynamics Ltd* (2017) eKLR the Court held that: -

“...It was mandatory for the respondent to conduct a hearing (either through correspondence or face to face) as part of procedural fairness in terms of Section 41(2) of the *Employment Act* 2007 and Missing that essential ingredient and a hearing the court teaches the conclusion that the summary dismissal of the claimant was procedurally unfair.”

52. From the foregoing, I therefore find that the Claimant’s termination was indeed unlawful and unfair.

Whether the Claimant is entitled to the reliefs sought

53. Having found that the Claimant’s termination was both procedurally and substantively unfair and I find that termination was unlawful and unfair.
54. The Claimant prayed for payment of his terminal dues totaling to Kshs.364,140/- broken down as follows:

i. Salary in lieu of notice

55. The Claimant is entitled to compensation under this head. He sought for payment of Kshs.9,100/- being one month’s salary in lieu of notice. Having found his termination unlawful and unfair he is entitled to salary in lieu of notice by dint of Section 36 and 49(1) of the *Employment Act*, 2007. I accordingly award him the same at Kshs.9,100/-.

ii. Unpaid leave days for 8 days totaling to Kshs.72,800/-

56. In his evidence the Claimant testified that he did not take leave during the period of his engagement with the Respondent (8 years) a fact that was denied by the Respondent. No records were availed by the Respondent to rebut this assertion. In the circumstances the prayer is allowed. I award the Claimant Kshs.72,800/- being equivalent to 21 days leave for each year worked based on his daily wage of Kshs.350/- as pleaded by the Claimant.



iii. Terminal dues for 8 years

57. The Claimant claims for 8 years' terminal dues. The Respondent maintains that the Claimant is not entitled to any relief under this head on the ground that he admitted in his testimony of having been a member of NSSF.
58. The Claimant does not state what terminal dues is. There is no head of benefit known as terminal dues known to the law as terminal dues refers to the benefits that an employee is entitled to upon termination of employment and is composed of several times such a notice, leave, gratuity or retirement benefits, last salary and any allowances. I thus dismiss the prayer as it has not been specified or proved.

iv. House allowance

59. Under the Regulation of Wages Orders, daily wages are inclusive of all allowances. Thus in order to determine whether or not an employee who earns daily wages is entitled to house allowance, one has to compare if the wages earned, if aggregated into a monthly wage would be less than basic pay plus 15% house allowance. The Claimant has not proved that what he was paid was not inclusive of house allowance. The prayer therefore fails and is disallowed.

v. Compensation for loss of employment for 12 months totaling to Kshs.109,200/-

60. Taking into account the Claimant's length of service and the Respondent's conduct in the termination transaction, I find that an award of 8 months' salary as compensation is reasonable compensation under this head. I accordingly award the Claimant of Kshs.72,800/- as compensation.
61. The Respondent is directed to issue the Claimant with a certificate of service for the period worked by dint of Section 51 of the *Employment Act*, 2007.
62. The Claimant is awarded costs of this suit and interest from the date of this judgment until settlement in full.
63. In summary, the judgment is entered in favour of the Claimant against the Respondent in the following terms:
- i. One month's salary in lieu of notice Kshs.9,100.00
 - ii. Leave pay for 8 years Kshs.72,800.00
 - iii. 8 months' compensation for unfair termination Kshs.72,800.00
- Total Award Kshs.154,700.00
- iv. The Respondent to issue the Claimant with a certificate of service
 - v. The Respondent shall pay Claimant's costs for the suit.
 - vi. Interest shall accrue from date of judgment.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 22 ND DAY OF SEPTEMBER 2022

MAUREEN ONYANGO

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 15th March 2020 and subsequent directions of 21st 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.

MAUREEN ONYANGO

JUDGE

