



**Odhiambo v Habo Agencies Ltd (Cause 621 of 2017)
[2022] KEELRC 4002 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4002 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 621 OF 2017
AK NZEI, J
SEPTEMBER 22, 2022**

BETWEEN

VINCENT ODHIAMBO CLAIMANT

AND

HABO AGENCIES LTD RESPONDENT

JUDGMENT

1. The claimant sued the respondent *vide* a memorandum of claim dated July 31, 2017 and pleaded:-
 - a. That the claimant was employed by the respondent on September 20, 2009 in the position of IT Hardware Technician, via a letter of employment dated March 19, 2009; and worked for six (6) years upto February 2016.
 - b. That on February 8, 2016, the claimant requested, in writing for an emergency leave to enable him to visit his late mother who was at the time ailing and admitted in hospital, which permission was duly granted.
 - c. That the claimant reported back on February 15, 2016 and was served with a notice to show cause why disciplinary action could not be taken against him for failing to attend duty for the days he was away visiting his sick mother.
 - d. That while the claimant was drafting his response to the notice to show cause, he was served with a summary dismissal letter dated February 12, 2016.
 - e. That on February 18, 2016 the claimant was issued with a tabulation of his dues, and that although he was advised that the tabulated dues would be paid in thirty (30) days, no payment was made.
 - f. That the respondent had prior and malicious intention to dismiss the claimant unfairly and only used the emergency leave as an excuse.



- g. That the respondent's actions were unlawful and in breach of both the claimant's contract of employment and the Employment Act.
- h. That termination of the claimant's employment was wrongful and unfair.
2. The claimant claimed: -
- a. Salary for days worked in February 2016.....Ksh 26,000
 - b. Three months salary in lieu of notice.....Ksh 195,000
 - c. Twelve months' salary compensation.....Ksh 780,000
 - d. Leave days not taken (145.25 days).....Ksh 314,708.33
 - e. Unpaid NSSF remittances (400x9).....Ksh 7,600
 - f. Certificate of Service
3. The claimant further prayed for a declaration that termination of his employment was unfair and unlawful. He also prayed for costs of the suit and interest.
4. Along with the memorandum of claim that was filed in court on August 1, 2017, the claimant also filed his recorded witness statement and a list of evidential documents, both dated August 31, 2016. Documents listed on the said list of documents included an offer of employment letter dated March 19, 2009, the claimant's payslip for the month of December 2015, emergency leave application letter dated February 8, 2016, terminal benefits (tabulation) letter by the respondent dated February 18, 2016, a show cause letter dated February 11, 2016, summary dismissal letter dated February 12, 2016, clearance form dated February 18, 2016, the claimant's NSSF statement of account dated May 24, 2017 and a demand letter dated May 27, 2017.
5. The respondent entered appearance on September 28, 2017 and subsequently filed a memorandum of response on July 6, 2018; denying the claimant's claim.
6. Further, the respondent filed a recorded witness statement by one Kennedy Ngei, dated July 2, 2018, and a supplementary statement by one Anderson Muturi Mugambi dated December 13, 2019.
7. On January 17, 2022, this court allowed an application (dated November 26, 2021) by counsel then on record for the respondent (Bosire & Partners Advocates) seeking leave to cease acting for the respondent. The suit was then fixed for hearing on May 12, 2022 and the claimant was directed to serve the respondent with a hearing notice.
8. When the suit came up for hearing on May 12, 2022, the respondent did not attend court, though shown to have been served with a hearing notice on January 18, 2022 and an affidavit of service duly filed. Hearing proceeded. The claimant adopted his recorded and filed witness statement as his testimony and produced in evidence the documents listed on his list of documents referred to at paragraph 4 of this judgment. The claimant further testified that he was not invited for any disciplinary hearing before termination. He asked the court to enter judgment in his favour as prayed in his memorandum of claim. He closed his case. The respondent's case was also marked as closed without any evidence being called.



9. The claimant's evidence was not controverted and/or rebutted as the respondent did not tender any evidence in rebuttal thereof. It was held in the case of *Trust Bank Limited v Paramount Universal Bank Limited & 2 Others*[2009] eKLR, as follows:

“it is trite where a party fails to call evidence in support of his case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein, the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.”

10. The two issues which emerge for determination are as follows:-

- a. Whether termination of the claimant's employment by the respondent was unfair.
- b. Whether the claimant is entitled to the reliefs sought.

11. On the first issue, the claimant pleaded and testified that termination of his employment was unlawful and unfair as the respondent acted in breach of the claimant's contract and provisions of the *Employment Act*. It was the claimant's evidence that he applied for an emergency leave on February 8, 2016 in order to visit his ailing and hospitalized mother, which leave was granted but on returning back to work on February 15, 2016, he was served with a show cause letter dated February 11, 2016.

12. The show cause letter dated February 11, 2016 and shown to have been received by the claimant on February 15, 2016 was produced in evidence by the claimant. The same required the claimant to show cause within twenty-four hours. The summary dismissal letter, dated February 12, 2016, is shown to have been received by the claimant on February 15, 2016. Both the show cause letter and the summary dismissal letter were served on the claimant on the same date. The claimant testified that he was not invited for a disciplinary hearing before termination of his employment.

13. Section 41 of the *Employment Act* provides in mandatory terms as follows:-

- (1) Subject to section 42(1), 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.
- (2) Notwithstanding any other provision of this part, the employer shall, before terminating the employment of an employee, or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the ground of misconduct or poor performance, and the person, if any chosen by the employee within subsection (1) make.”

14. Failure by the respondent to comply with the foregoing mandatory statutory provisions rendered termination of the claimant's employment procedurally unfair. I so find, declare and hold.

15. The Court of Appeal held as follows in the case of *Kenfright [e.a] Limited v Benson K Nguti*[2016] eKLR:-

“apart from issuing a proper notice according to the contract (or payment in lieu of notice provided), an employer is duty bound to explain to an employee, in the presence of another employee or union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition, an employee is entitled to be heard and his representations, if any, considered by an employer before the



decision to terminate his contract of service is taken....We come to the conclusion and find, in agreement with the trial Judge, that the termination of the respondent's contract of service in the circumstances, was unfair, the payment in lieu of notice notwithstanding..."

16. Before delving into the second issue, I must address the issue of the claimant's salary at the time of termination of the claimant's employment. The claimant produced in evidence his payslip for the month of December 2015. It is indicated on the said payslip that the claimant's gross monthly salary was Ksh 65,000. The claimant's employment was terminated less than two months from the date of the said payslip. The court was not told that any changes to the claimant's salary had been made as at February 20, 2016 when the claimant's employment was terminated.
17. Having already found that termination of the claimant's employment was unfair, I award the claimant the equivalent of nine months' salary being compensation for unfair termination of employment, that is Ksh 65,000x9 =Ksh 585,000. I have taken into account the circumstances in which termination of the claimant's employment took place; which are well captured in this judgment.
18. On salary for the days worked in February 2016, the claimant prayed for Ksh 26,000. This amount accords with the respondent's calculations on that particular item as demonstrated in the respondent's tabulation of the claimant's dues dated February 18, 2016, which the claimant produced in evidence. I award the claimant the said sum of Ksh 26,000.
19. The claimant prayed for three months' salary in lieu of notice. His contract of employment, however, provides for one month's salary in lieu of notice. This contractual term basically accords with section 35 (c) of the Employment Act, 2007 . I award the claimant one month salary being payment in lieu of notice, which is Ksh 65,000.
20. Further, the claimant claimed Ksh 314,708.33 being payment for 145.25 untaken (accrued) leave days. This number of accrued leave days and claim thereon accords with the number of earned leave days and payment due thereon as stated in the respondent's tabulation of the claimant's dues dated February 18, 2016; which the claimant produced in evidence as already stated in this judgment. I award the claimant the said sum of Ksh 314,708.33
21. The claim for unpaid/unremitted NSSF dues is declined. Once deducted from an employee's earnings, statutory deductions cease to be an employee's property and/or entitlement. They become property and entitlement of the statutory body to which such deductions are supposed to be remitted. Such statutory bodies, including the NSSF, have statutory prosecutorial powers and are capable of pursuing employers for recovery of any deducted but unremitted amounts of money.
22. In sum, judgment is hereby entered for the claimant against the respondent for:-
 - a. nine months' salary being compensation for unfair termination of employmentKsh585,000
 - b. salary for days worked in February 2016.....Ksh 26,000
 - c. One month salary in lieu of notice.....Ksh 65,000
 - d. Payment for 145.25 untaken/accrued leave days.....Ksh 314,708.33Total Ksh 990,708.33
23. The awarded sum shall be subject to statutory deductions pursuant to section 49(2) of the Employment Act.



24. The respondent shall within thirty days issue a certificate of service to the claimant pursuant to section 51 of the [Employment Act, 2007](#) .

25. The claimant is awarded costs of the suit and interest at court rates.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 22ND DAY OF SEPTEMBER 2022

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

..... for Claimant

..... for Respondent

