



**Wepo v Multiple Hauliers (EA) Limited (Cause 1729 of 2017)  
[2022] KEELRC 3892 (KLR) (16 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3892 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1729 OF 2017  
SC RUTTO, J  
SEPTEMBER 16, 2022**

**BETWEEN**

**ERIC WANYAMA WEPO ..... CLAIMANT**

**AND**

**MULTIPLE HAULIERS (EA) LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant brought the instant suit *vide* a memorandum of claim dated August 30, 2017 through which he avers that he was employed by the respondent at its tyre retreads section. That although he started off as a casual employee, he was promoted to be in charge of the respondent's tyre department due to his diligence at work, with his salary rising to Kshs 57,000.00, as at June 2017. Seemingly, the claimant's good fortune changed as he avers that on July 19, 2017, the respondent's managing director by the name Rajinder Singh told him "*kazi yako imeisha, enda HR for your cheque*". He avers that that marked the end of his employment with the respondent.
2. The claimant further states that he was not given any reason for his termination and neither was he notified of the respondent's intention to terminate his employment. He contends that his termination by the respondent was therefore malicious hence has asked the court to declare the same as unwarranted and unlawful. To this end, he has sought from the court an award of compensatory damages, general damages for loss of opportunity, certificate of service, costs of the suit as well as interests.
3. The claim was opposed with the respondent terming the claimant's averments as mere allegations based on falsehoods and *innuendos*. The respondent further denied terminating the claimant's employment. Consequently, the respondent has asked the court to dismiss the claim with costs.



### **Claimant's case**

4. At the hearing which proceeded on May 5, 2022, the claimant testified in support of his case. At the outset, he sought to rely on his witness statement, which he asked the court to adopt as his evidence in chief.
5. In testimony, the claimant told the court that throughout his employment with the respondent, he never made any mistake. That he was terminated by the respondent's managing director by the name Mr Rajinder Sign who told him in Swahili "kazi yako imeisha, enda HR (human resource division) for your cheque". That the said Rajinder Singh then called the security officers to escort him to the human resource office and outside the respondent's premises. He further testified that he was not notified of the intention to terminate his employment and was not given any reason for the termination.
6. It was the claimant's further testimony that he served the respondent with utmost dedication and in senior positions thus adding much value and profitability to the company. That due to his advanced age, it might be difficult for him to get another job in the industry as most available jobs are at the entry level. He further stated that upon his termination, his terminal dues were calculated at Kshs 300,000.00 and that he signed for the money but the same was not paid into his account.

### **Respondent's case**

7. The respondent opted not to present oral evidence hence its case was as per its defence through which it denied terminating the claimant's employment. Nonetheless, it did not provide further particulars.

### **Submissions**

8. It was submitted on behalf of the claimant that he was not a casual employee as he worked for the respondent for a period of 17 years. On this score, he sought to rely on the decision of *Reef Hotel Limited vs Josephine Chivatsi* (2021) eKLR. It was further submitted by the claimant that the respondent failed to discharge its burden under section 47(5) of the *Employment Act*, by providing evidence that its reasons for dismissing him were justifiable. To buttress this position, reliance was placed on several authorities including *Silas Owiti Oluoch & another vs Fidelity Commercial Bank Limited* (2017) eKLR, *Nicholas Otiny Muruka vs Equity Bank Limited*, Nairobi ELRC, Cause No 25 of 2013 and *James Muiruri Njenga vs Nakumatt Holdings* (2015) eKLR.
9. The respondent opted not to file any submissions and instead, elected to rely on its pleadings on record.

### **Analysis and determination**

10. I have considered the issues raised in the pleadings, the evidence presented as well as the submissions on record and to my mind, the court is being called to resolve the following questions: -
  - a. Whether the claimant was unfairly and unlawfully terminated from employment
  - b. Is the claimant entitled to the reliefs sought?

### **Unfair And Unlawful Termination?**

11. Before I delve into the fairness of the claimant's termination, I wish to make a mention regarding the nature of the employment relationship that subsisted between the parties. In this regard, the claimant submitted on the issue whilst the respondent's advocate brought up the same during the claimant's cross examination.



12. Be that as it may, I will not address the issue extensively as it was not pleaded by the respondent hence I take it that the same is immaterial and a non-issue. Over and above, the claimant exhibited a copy of his pay slip for the month of June, 2017, which indicates that he worked for and was paid for 31 days. I therefore doubt that the issue is contentious at all.
13. That said, I now proceed to consider whether the claimant's termination was unfair and unlawful, as has been alleged.
14. The claimant has termed his termination as unfair and unlawful. The key provisions in determining this issue, lies in the provisions of sections 43, 45 and 41 of the *Employment Act* (act). The gist of the aforementioned statutory provisions, is that an employer is required to prove that there was substantive justification to warrant an employee's termination and that such an employee was accorded procedural fairness. Essentially, this is the standard for determining whether an employee's termination was fair or not.
15. Breaking it down, section 43(1) of the act, provides for substantive justification. It entails proof of reasons which resulted in an employee's termination. Further, failure on the part of an employer to prove reasons for termination, renders such termination as unfair. In this regard, section 45 (2) (a) and (b) of the act goes ahead to provide that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and is related to the employee's conduct, capacity or compatibility; or based on its operational requirements.
16. In addition to proving the reasons for an employee's termination, an employer is required to adhered to the requirements of procedural fairness. In line with this requirement, Section 45(2) (c) of the act provides that for termination to be fair, it ought to be in accordance with fair procedure. Section 41(1) of the act sets out the specific requirements of a fair hearing. This procedure entails notifying the employee of the allegations he or she is required to respond to and thereafter granting him or her the opportunity to make representations in response to the said allegations.
17. Back to the case herein. I will first start with the requirement for substantive justification. In the instant case, the respondent did not proffer the reasons for the claimant's termination. In this regard, there is no letter of termination on record hence it is not possible to discern the reasons for the claimant's termination and ascertain the fairness and validity of the same.
18. Coupled with the foregoing, the respondent elected not to tender any oral evidence hence the reasons for the claimant's termination remained largely unknown. It can thus be said that at the end of the day, the claimant could only guess the reason for his termination. This leads me to the inescapable conclusion that the claimant's termination was unfair in light of the provisions of sections 43(1) and 45(2) (a) and (b) of the act.
19. With regard to the limb of procedural fairness, the respondent did not lead any evidence, leave alone suggest that the claimant was subjected to a fair process prior to being terminated. As it appears, the respondent appeared to have let go of the claimant without giving him any explanation.
20. I find it necessary at this juncture to emphasize that the respondent was bound to subject the claimant to the process contemplated under section 41 of the act. There being no evidence that the respondent complied with the said statutory provision, I can only conclude that none was undertaken and the respondent is at fault.
21. In light of the foregoing, it is my finding that the claimant's termination was unlawful for want of procedure.



22. The totality of the foregoing is that it is my finding that the respondent's termination was unfair and unlawful in terms of sections 41, 43 and 45 of the [Employment Act](#).
23. There is no better way to sum up my findings than by reiterating the legal threshold for termination of employment, as established by the Court of Appeal in the case of [Janet Nyandiko vs Kenya Commercial Bank Limited](#) [2017] eKLR, thus: -

“Section 45 of the act makes provision *inter alia* that no employer shall terminate the employment of an employee unfairly. In terms of the said section, a termination of an employee is deemed to be unfair if the employer fails to prove that the reason for the termination was valid; that the reason for the termination was a fair reason and that the same was related to the employee's conduct, capacity, compatibility or alternatively that the employer did not act in accordance with justice and equity.

The parameters for determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to dismiss the employee; the communication of that decision to the employee and the handling of any appeal against the decision. Also not to be overlooked is the conduct and capability of the employee up to the date of termination, the extent to which the employer has complied with the procedural requirements under section 41, the previous practice of the employer in dealing with the type of circumstances which led to the termination and the existence of any warning letters issued by the employer to the employee.

Section 41 of the act, enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands the reasons for which the employer is considering to terminate the employee's employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice; and to hear and consider any representations which the employee may advance in response to allegations leveled against him by the employer.”

### **Appropriate Reliefs**

24. Having found that the claimant's termination was unfair and unlawful, the court awards him seven (7) month's gross salary as compensatory damages.
25. As regards the claim for notice pay, unpaid house allowance and unpaid leave days, the same cannot be awarded as the claimant did not plead them in his claim. Submitting on the same was not sufficient and it was too little too late, bearing in mind that it is trite law that parties are bound by their pleadings.
26. As the employment relationship has not been disputed, the claimant is entitled to a certificate of service in accordance with section 51 of the [Employment Act](#).

### **Orders**

27. Against this background, I enter judgment in favour of the claimant against the respondent and he is awarded compensatory damages in the sum of Kshs 234,815.00 which is equivalent to seven (7) months of his gross salary. The amount shall be subject to interest at court rates from the date of judgement until payment in full.



28. The respondent shall bear the costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16<sup>TH</sup> DAY OF SEPTEMBER 2022.**

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**STELLA RUTTO**

**JUDGE**

**Appearance:**

For the Claimant Mr. Njomo

For the Respondent Mr. Kokebe

Court Assistant Abdimalik Hussein

**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 had 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.

**STELLA RUTTO**

**JUDGE**

