



**Masiolo v Jumbo North East Africa Limited (Cause 970 of 2018)  
[2022] KEELRC 3893 (KLR) (16 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3893 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 970 OF 2018  
SC RUTTO, J  
SEPTEMBER 16, 2022**

**BETWEEN**

**ATSANGA LABAN MASILO ..... CLAIMANT**

**AND**

**JUMBO NORTH EAST AFRICA LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant avers that on or about April 1, 2014, he was employed by the respondent as a driver. He avers that he exerted his efforts and skills to the best of his ability. He claims that on or about November 1, 2017, the respondent terminated his services without notice or justifiable cause. As a result, the claimant prays for several reliefs including compensatory damages for wrongful termination, one month's salary *in lieu* of notice, unpaid house allowance, service pay, salary underpayment and unpaid leave days.
2. The respondent entered appearance and filed a response to the memorandum of claim. The respondent denies terminating the claimant's employment and avers that it is him who left its employment on his own volition. Consequently, the respondent prays that the suit be dismissed with costs.
3. The matter was scheduled for hearing on May 26, 2022 and when it was called out, the respondent and his Advocate were absent from court. The claimant's Advocate informed the court that the respondent's Advocate had requested to join the court virtually, within 30 minutes. Subsequently, the file was placed aside and a time allocation of 10:30 am was given.
4. At 10:30 am, the matter was called out again, but neither the respondent nor his Advocate were present in court.
5. That being the case, the claimant through his Advocate produced an affidavit of service sworn on May 20, 2022 by a Mr Christopher Mulinya, wherein he depones that he effected service of the days hearing notice upon the respondent's Advocate. The court being satisfied with the proof of service and



pursuant to the provisions of rule 22 of the *Employment and Labour Relations Court Rules* (2016), proceeded to hear the matter notwithstanding the respondent's absence.

6. At the outset, the claimant sought to rely on his witness statement which he asked the court to adopt as part of his evidence in chief.
7. The claimant told the court that throughout his employment, he did his work honestly and diligently as had been agreed. It was his further testimony that he was neither given accommodation nor paid house allowance throughout his employment with the respondent. That on November 1, 2017 he worked until evening when he was called and given a letter terminating his employment on account that he had attained retirement. That the termination came as a surprise as he was not issued with any notice. He further stated that for the years, he worked for the respondent, he was not granted leave. Subsequently, he has asked the court to allow his claim as prayed.

### **Submissions**

8. The claimant filed written submissions through which he submitted that the respondent had not placed before court any evidence to support the allegation that he deserted duty. The claimant further submitted that his termination was not substantially fair and just. He placed reliance on the cases of *David Gichana Omuya vs Mombasa Maize Millers Limited* (2014) eKLR and *Anthony Mkala Chitavi vs Malindi Water & Sewerage Co Limited* (2013) eKLR.
9. In further submission, the claimant stated that the respondent did not discharge its burden under section 47(5) of the *Employment Act*.

### **Analysis and Determination**

10. From the pleadings on record as well as the evidentiary material placed before me, this court is being called to determine the following twin issues;
  - a. Was the claimant's termination unfair and unlawful?
  - b. Is the claimant entitled to the reliefs sought?

### **Unfair and Unlawful Termination?**

11. Pursuant to section 43(1) of the *Employment Act* (Act), an employer is required to prove the reasons for which it terminated an employee, failure to which such termination is deemed to be unfair. Further, section 45 (2) of the *Act*, provides that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and relates to the employee's conduct, capacity or compatibility; or based on its operational requirements.
12. That is not all. Under section 45 (2) (c) of the *Act*, an employer is required to prove that it complied with the requirements of fair process in terminating the services of an employee. Section 41(1) of the *Act* elaborates what entails fair procedure. In this regard, it requires an employer to notify an employee of the intended termination. Accordingly, the employee is to be notified of the reasons thereof in a language he or she understands and in the presence of another employee or a shop floor union representative.
13. Therefore, for termination to meet the legal threshold, an employer must justify that there was a valid reason to terminate the services of an employee and that such termination was in line with fair procedure. As stated above, such procedure entails giving the employee an opportunity to defend himself or rather, explain his side of the story.



14. In the instant case, the claimant's termination was effected through a letter dated November 1, 2017, which is couched as follows;

“Dear Mr. Laban,

RE: Termination of Your Services

Your employment with Jumbo North (EA) Ltd is terminated and in lieu of this we give you one month notice from this date of 1<sup>st</sup> November, 2017. In this regard you will receive all your dues on completion of this notice period.

By management.”

15. As is evident from the reproduced letter of termination that the respondent did not proffer any reasons for which it terminated the claimant's employment.
16. It therefore follows that the respondent did not satisfy the requirements of the first limb, which relates to proof of reasons. In the circumstances, it is not possible to determine whether the reasons for the claimant's termination were valid or fair in the first place, as none were tendered at all.
17. Indeed, this discounts the respondent's defence through which it stated that the claimant left employment on his own volition. How could he have absconded duty when clearly, he was served with a letter terminating his employment? Therefore, the respondent's assertions do not hold any water and lack substance.
18. Further, it is notable that the respondent did not prove that it notified the claimant of any reasons that may have led to his termination. Similarly, there was no evidence to suggest that the respondent gave the claimant an opportunity to tender his defence against the allegations if any, prior to his termination. In any event, the letter of termination did not refer to any process that was undertaken prior to the letter of termination being issued.
19. Coupled with the foregoing, the respondent did not participate in the hearing hence it did not tender oral evidence to refute the assertions by the claimant. Therefore, this leads me to the inescapable conclusion that there were no reasons to justify the claimant's termination and no disciplinary hearing or such related process as contemplated under section 41 of the Act, was undertaken.
20. In as much as the respondent appeared to have paid the claimant one month's salary *in lieu* of notice, the termination was still irregular as no reasons were tendered at all and due process was not followed.
21. My position is fortified by the determination in the case of Kenfreight (EA) Limited vs Benson [2016] eKLR, in which the Court of Appeal held as follows: -

“Apart from issuing proper notice according to the contract (or payment *in lieu* of notice as provided), an employer is duty-bound to explain to an employee in the presence of another employee or a 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”.

22. It was therefore not sufficient for the respondent to issue the claimant with a letter of termination. It was required to go a step further and explain to him the reasons for the termination, in the presence of another employee or a union official in a language that he understands. As I have stated herein, there



was no evidence that the respondent subjected the claimant to the process contemplated under section 41 of the Employment Act hence it is at fault.

23. The total sum of the foregoing is that the claimant's termination has one resultant effect, which is, the same was unfair and unlawful as it fell below the legal parameters stipulated under sections 43(1) and 45(2) of the Act.
24. Having found as such, I now turn to consider the reliefs available to the claimant.

### **Reliefs**

25. Having found that the claimant's termination was unfair and unlawful, I will award him compensatory damages equivalent to six (6) months of his salary. This award is informed by several factors; first is the length of the employment relationship, second is the fact that the respondent did not advance any reasons whatsoever for the claimant's termination and third, it did not comply with the requirements of fair procedure in terminating the claimant's employment.
26. With regard to the claim for notice and severance pay, it is evident from the documents exhibited by the claimant, that upon his termination, he was paid one month's salary *in lieu* of notice as well as severance pay for 3.6 years he worked of the respondent. To that end, the claim in that regard is declined.
27. With respect to the claim for leave, I will decline to make any award as no evidence was produced to justify the entitlement.
28. Similarly, the claim for salary underpayment is declined as it is evident that the claimant was not paid below the salary stipulated in the relevant minimum wage order.
29. 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**

30. In the end, I enter judgment in favour of the claimant against the respondent and he is awarded compensatory damages in the sum of KShs 111,000.00 which sum is equivalent to six (6) months of his salary. The amount shall be subject to interest at court rates from the date of judgement until payment in full.
31. Costs follow the event hence the claimant shall have the costs of the suit.

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

.....

**STELLA RUTTO**

**JUDGE**

**Appearance:**

For the Claimant Mr. Khalwale

For the Respondent No appearance

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**

