



**Shivogo v Stevenson (Cause 1495 of 2017)
[2022] KEELRC 3882 (KLR) (2 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3882 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1495 OF 2017
SC RUTTO, J
SEPTEMBER 2, 2022**

BETWEEN

SUSAN KEJEDI SHIVOGO CLAIMANT

AND

SARAH STEVENSON RESPONDENT

JUDGMENT

1. The claimant through a memorandum of claim filed on August 1, 2017, avers that she was employed by the respondent as a cleaner with effect from September 1, 2014 on a monthly salary of Kshs 6,500/= . She avers that on or about May 2, 2017, the respondent unfairly terminated her employment. It is for this reason that she claims a sum of Kshs 391,983.95 being one month's salary *in lieu* of notice, leave days for three years and eight months, gratuity, statutory underpayment below minimum wage, unpaid house allowance and compensatory damages.
2. Opposing the claim, the respondent avers that she engaged the claimant on a casual basis. That the claimant was aware that the respondent intended to go outside the country hence the reason she gave her three months' notice. The respondent has asked the court to dismiss the suit.
3. When the matter came up for hearing on May 18, 2022, the respondent was not present in court. The claimant through his advocate produced an affidavit of service sworn by one Mr George Omondi Ogola on February 21, 2022, through which he deponed that he had effected service of the day's hearing notice upon the respondent's advocate. Annexed to the affidavit of service was a copy of a hearing notice dated December 21, 2021, which bore the receiving stamp of the advocate on record for the respondent.
4. The court being satisfied with the return of service and being guided by rule 22 of the *Employment and Labour Relations Court (Procedure) Rules*, 2016, directed that the matter proceeds, the respondent's absence notwithstanding.



Claimant's Case

5. At the start of the hearing, the claimant sought to rely on her witness statement and documents filed together with her claim. She asked the court to adopt the same as part of her evidence in chief. She also produced the documents as her exhibits before court.
6. It was the claimant's testimony that she was a diligent employee and always attended to her assigned duties promptly with diligence and loyalty. She stated that she was unlawfully terminated on May 2, 2017 and that she had done nothing wrong to warrant dismissal. That upon termination, the respondent failed to pay her all her terminal dues causing her to suffer loss. That further, the respondent did not follow the required procedure in terminating her employment. She asked the court to allow her claim as prayed.

Respondent's case

7. As the respondent failed to call oral evidence, her case is as per her defence to the memorandum of claim, her witness statement and the affidavit of Jane Carver, all of which were never admitted as evidence in court. It is the respondent's case as per her defence that she did not have much domestic work hence did not need a full-time domestic worker. That she employed the claimant on July 19, 2014 on a casual basis for only three days a week and for four hours. That she paid the claimant Kshs 500/= for each morning and Kshs 1,000/=, if she worked beyond four hours. That further, the claimant's work was not good at all and showed little improvement even after several corrections. She described the claimant's discipline at work as careless as she would aggressively bang and break stuff in the house. That they parted ways with the claimant on May 2, 2017 after the expiry of a three months' notice she gave her as she intended to leave the country. She denied underpaying the claimant but rather, stated that she overpaid her.

Submissions

8. The claimant submitted that there was no sufficient basis for her termination. It was her further submission that the process followed by the respondent in dismissing her was flawed hence unprocedural. That further, the respondent did not abide by the provisions of the *Employment Act* in terminating her employment. To support her submissions, the claimant placed reliance on the case of *Anthony Mkala Chitavi vs Malindi Water & Sewerage Co Ltd* Court case no 66 of 2012 and *Mary Chemweno Kiptui vs Kenya Pipeline Company Limited* (2014) eKLR.

Analysis and determination

9. Having considered the pleadings on record as well as the evidence placed before court, the following issues stand out for determination: -
 - a. On what terms was the claimant engaged by the respondent?
 - b. Was the claimant's termination fair and lawful?
 - c. Is the claimant entitled to the reliefs sought?

Terms of Engagement Between The Claimant and The Respondent

10. The respondent has contended that she employed the claimant on a casual basis. It is therefore imperative for the court to interrogate the nature of the employment relationship that existed between the parties as it will determine whether or not the claimant was unfairly terminated.



11. Section 2 of the *Employment Act* defines the term “casual employee” to mean:-

“.. an individual the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time”.
12. From the above statutory definition, it is evident that a casual employee is an employee who is engaged for twenty four hours at a time. In terms of section 35(1) (a) of the *Employment Act*, such engagement is terminable by either party at the end of the day, without notice.
13. The respondent annexed to her response, what resembled an attendance register, indicating the dates the claimant attended to duty.
14. Notwithstanding the attendance records presented by the respondent, she elected not to appear in court to tender oral evidence or have the documents admitted as exhibits, hence same could not be tested in cross examination. The resultant effect is that they were of no evidential value to her case. Such was the holding by the Court of Appeal in the case of *Kenneth Nyaga Mwise vs Austin Kiguta & 2 others* [2015] eKLR where it was held that a document “marked for identification”, is of very little, if any, evidential value until it is formally produced.
15. In this case, the said attendance records were neither marked for identification nor formally produced as exhibits before court. As such, it was of no evidential value to the respondent as compared to the claimant’s testimony and evidence. Therefore, they did not aid the respondent in proving that the claimant worked for her intermittently.
16. In the end, the respondent’s assertions remained mere statements hence she failed to prove that the claimant was a casual employee.
17. Having found as such, the next logical question to ask is whether the claimant’s termination was fair and lawful.

Was the claimant’s termination fair and lawful?

18. Pursuant to section 43(1) of the *Employment Act*, an employer bears the burden of proving reasons for termination and failure to do so, such termination is rendered unfair. In addition, section 45 (2) of the *Employment Act*, regards a termination of employment as unfair where 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.
19. In the instant case, the respondent stated in her response, that she gave the claimant three months’ notice as she was leaving the country. As stated herein, the respondent did not attend court hence she did not prove her assertion. In terms of section 43(1) of the *Employment Act*, the respondent bore the evidential burden of proving the reason for the claimant’s termination. This she failed to do, hence the evidential burden was not discharged as by law required.
20. In addition, the respondent was required to comply with the requirements of sections 45 (2) (c) and 41 of the *Employment Act*. With respect to this, she was required to notify the claimant of the intended termination and the reasons thereof in a language he understands and in the presence of another employee or a shop floor union representative.
21. The respondent avers in her response that she gave the claimant three months’ notice as she was leaving the country. Yet again, since she failed to attend court, this assertion was not proved hence it remained as that, a mere assertion, which was not substantiated.



22. Consequently, in absence of proof of compliance with the mandatory provisions of section 41 of the [Employment Act](#), the respondent is at fault.
23. In total sum, the reasons for the claimant's termination have not been proved and there is no evidence that she was subjected to a fair process, hence I cannot help but find that the claimant's termination was unfair and unlawful in terms of sections 43(1) and 45(2) of the [Employment Act](#).

Reliefs

24. Having found that the claimant's termination was unfair and unlawful, I will award her four (4) month's gross salary as compensatory damages. This is noting the length of the employment relationship and failure by the respondent to prove reasons for the claimant's termination and her failure to follow due process.
25. The claimant is further awarded one (1) month's salary *in lieu* of notice as per the provisions of section 35 (1) (c) of the [Employment Act](#).
26. The claimant is also entitled to service pay for the three years she worked for the respondent there being no evidence that she fell under the exclusions under section 35(6) of the [Employment Act](#).
27. The claimant has further averred that her salary was underpaid contrary to the minimum wage order. From the evidence presented, the claimant was stationed within Nairobi, hence pursuant to legal notice Nos 197 of 2013 and 117 of 2015, which prescribed the applicable minimum wage payable to various categories of employees, she was entitled to a monthly basic salary in the sum of Kshs 9,780.95 from September 1, 2014 until May 1, 2015 and Kshs 10,954.70 from May 1, 2015 until May 2, 2017. This therefore confirms her assertion that her salary was underpaid.
28. The claim for house allowance also succeeds, as the prescribed minimum wage order expressly provides that the minimum wage payable is only in respect of basic salary and is exclusive of house allowance. This is also founded on the provisions of section 31 (1) of the [Employment Act](#) which provide as follows:

“(1) An employer shall at all times, at his own expense, provide reasonable housing accommodation to each of his employees either at or near to the place of employment or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.”

29. The Court of Appeal in the case of [Grain Pro Kenya Inc Ltd vs Andrew Waitbaka Kiragu](#) [2019] eKLR determined the rate payable as house allowance as follows; “to us 15% is reasonable percentage that an employee spends from part of a salary to pay house rent.” This rate is also in tandem with the general wages order.

Orders

30. To this end, Judgment is entered in favour of the claimant against the respondent and she is awarded: -
 - a. Compensatory damages in the sum of Kshs 43,818.80 which sum is equivalent to four (4) months of her gross salary.
 - b. One (1) month's salary in lieu of notice being Kshs 10,954.70.
 - c. Service pay for 3 years being Kshs 16,432.05.



- d. Underpaid salary for 8 months (from September 1, 2014 until May 1, 2015) being Kshs 26,247.60.
- e. Underpaid salary for 24 months (from May 1, 2015 until May 2, 2017) being Kshs 106,912.80.
- f. Unpaid house allowance 8 months (from September 1, 2014 until May 1, 2015) being Kshs 11,737.14.
- g. Unpaid house allowance 24 months (from May 1, 2015 until May 2, 2017) being Kshs 39,436.92.
- h. The total award is Kshs 255,540.01.
- i. Interest on the amount in (h) at court rates from the date of judgement until payment in full.
- j. The claimant shall also have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF SEPTEMBER, 2022.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Enonda

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 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 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

