



**Anduku v Real Careers Limited (Cause 1063 of 2016)  
[2022] KEELRC 13044 (KLR) (31 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13044 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1063 OF 2016  
JK GAKERI, J  
OCTOBER 31, 2022**

**BETWEEN**

**FERDINAND ANGAIYA ANDUKU ..... CLAIMANT**

**AND**

**REAL CAREERS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant initiated this claim by a Memorandum of Claim dated May 25, 2016 filed on June 2, 2016 alleging unfair dismissal from employment and non-payment of terminal dues and compensatory damages.
2. The claimant avers that he was employed by the respondent on February 9, 2013 as an Assistant Machine Operator and subsequently promoted to the position of Machine Operator (printing) until September 14, 2015 when his services were terminated on the ground that the respondent was downsizing its operations.
3. The claimant further avers that his employment was terminated unfairly.
4. It is the claimant's case that he did not take leave for 3 years and the respondent neither remitted NHIF nor NSSF contributions.
5. That his position was taken up by another person and had served the respondent for 3 years without blemish.
6. The claimant prays for;
  - i. A declaration that the claimant's dismissal from employment was wrong, unfair and unlawful.
  - ii. A declaration that the claimant is entitled to payment of terminal dues and compensatory damages.



- iii. Payment of Kshs 282,200/= as terminal dues and compensatory damages.
- iv. Interest on (iii) above from the date of filing the suit till payment.
- v. Costs of this suit.

### **Respondent's case**

7. In its response to the claim filed on November 30, 2016, the respondent avers that it made all NHIF and NSSF contributions and did not downsize its operations at any point and did not terminate the claimant's services as alleged.
8. It is the respondent's case that it operated as an employment placement agency and had no machinery to place persons to work on and the claimant worked at Twiga Stationers and Printers Ltd.
9. The respondent further avers that it was Twiga Stationers and Printers Ltd that was downsizing its operations and the claimant lost employment on account of the short notice given by Twiga Stationers and Printers Ltd.
10. It denies having replaced the claimant with another person and paid all the claimant's leave dues as provided by the law.
11. The respondent further avers that the claimant was involved in a fraudulent transaction involving Equity Bank which cast the respondent in bad light and which led to his dismissal from employment.
12. That the claimant forged the respondent's documents to enable him perpetuate the fraud which warranted summary dismissal.
13. That the claimant admitted receipt of his dues and termination of employment was fair.
14. The respondent prays for dismissal of the claimant's case with costs.

### **Claimant's evidence**

15. The claimant's written statement which he adopted as evidence in chief rehashes the contents of the Memorandum of Claim.
16. The claimant added that RWI was her supervisor and is the one who suspended him. That he was declared redundant alone.
17. It was his testimony that he applied for sick off as he had been injured and travelled home but was called back to the office on November 6, 2015 for a commitment letter.
18. The witness testified that Equity Bank had called his employer about his loan repayment and he agreed on how to repay the loan at Kshs 8,000/= per month.
19. On cross-examination, the claimant confirmed that he was an employee of Real Careers Ltd and RWI was his supervisor. He could not recall the name of the Manager.
20. He further confirmed that he borrowed monies from Equity Bank using payslips and a form given by the supervisor but could not remember when he did so.
21. The claimant however had no document on the loan. He testified that his salary was paid through Equity Bank. The witness had no evidence of the alleged injury.
22. On re-examination, the claimant testified that Twiga Stationers and Printers Ltd was not downsizing.



### **Respondent's evidence**

23. RWI, Elizabeth Amulabu testified that she had worked for the respondent from April 2012 and knew the claimant.
24. It was RWI's testimony that the respondent learnt of the claimant's loan with Equity Bank when Barclays Bank of Kenya staff visited the respondent to open accounts for staff for a facility. That the respondent had not approved the loan by Equity Bank and the documents relied upon by the claimant were forgeries.
25. The witness testified that there was a disciplinary meeting and it was decided that the claimant's employment be terminated.
26. On cross-examination, the witness confirmed that it was Twiga Stationers and Printers Ltd that was downsizing and communicated with the respondent orally.
27. It was her testimony that the claimant's employment was terminated because of fraud. The forged documents were three payslips and a letter from the employer. That the documents were not filed in court and the matter was not reported to the police.
28. In addition, the witness confirmed that she had no record of the disciplinary proceedings or show cause letter or invitation to the hearing.
29. The witness testified that by November 10, 2015, the claimant was still an employee of the respondent.
30. Finally, it was her testimony that the claimant's fraud case was not closed but had no results of the investigation.

### **Claimant's submissions**

31. The claimant's submissions identify no specific issues for determination but addresses the issues of evidence on record in relation to duration of employment, salary and termination of employment.
32. As regards the salary, it is submitted that the respondent did not contradict the claimant's evidence on the salary of Kshs 17,000/= and that it was being paid in cash. The court is urged to find that the claimant's salary was Kshs 17,000/=.
33. As regards the duration of employment, the court is urged to find that the claimant was an employee of the respondent from February 9, 2013 to September 14, 2015.
34. On termination of employment, it is submitted that although the parties had agreed that the claimant resumes duty on 1<sup>st</sup> November, 2015, the respondent did not honour its part of the bargain alleging that the claimant had a fraud case with Equity Bank involving a loan of Kshs 40,000/=.
35. It is the claimant's submission that the respondent did not issue a notice of termination of employment.
36. The claimant urges that the respondent tendered no evidence of the alleged downsizing at Twiga Stationers and Printers Ltd.
37. That the allegation that the claimant had a fraud case was untrue. It is submitted that the bank would have been negligent to advance a loan to the claimant without conducting due diligence.
38. That the commitment letter dated November 6, 2015 would have mentioned the fraud if that was the case.



39. It is urged that the final settlement dated 10<sup>th</sup> November, 2015 related to settlement of salary only and was not a discharge voucher.
40. It is the claimant's submission that the respondent did not comply with the provisions of section 41 of the [Employment Act, 2007](#) in the termination of employment.
41. Reliance is made on the decisions in [Walter Ogal Anuro v Teachers Service Commission](#) (2013) eKLR and [Rebecca Ann Maina & 2 others v Jomo Kenyatta university](#) (2014) eKLR to urge that an employee must be guaranteed fairness in a termination of employment as dictated by section 41 and 45(2) of the [Employment Act, 2007](#).
42. That the claimant's employment was terminated without due process and was thus unfair.
43. On the reliefs sought, the claimant submits that he was entitled to one month salary in lieu of notice as no notice was issued, compensatory damages and leave pay. That he was not granted leave.
44. Finally, reliance is made on the provisions of 74 (5) and 28 of the [Employment Act](#) to embellish the submissions on records and leave days.

### **Respondent's submissions**

45. The respondent identifies two issues for determination;
  - i. Whether the respondent terminated the claimant's employment.
  - ii. Whether the claimant is entitled to the reliefs sought.
46. As regards termination, the respondent submitted that Twiga Stationers and Printers Ltd which was downsizing gave the respondent a very short notice for the respondent to secure the claimant alternative employment and coupled with the fact that the claimant was involved in a fraudulent activity to obtain a loan with Equity Bank, the parties agreed to separate amicably and the claimant did not contest the letter dated November 10, 2015.
47. The respondent further submits that the claimant was not truthful on when his employment was terminated.
48. That he had not disclosed that he had fraudulently obtained a loan from Equity Bank using forged documents from the respondent.
49. Reliance was made on the decision in [Esther Nungari Gachomo v Equity Bank Ltd](#) (2019) eKLR.
50. As regards the reliefs claimed, the respondent submitted that the claimant could only claim leave for 1 year, 7 months as it was his duty to prove when he did not take leave.
51. On severance pay, it is submitted that the claimant had not demonstrated that the respondent did not make NSSF contributions and did not prove his salary.
52. The court is urged to dismiss the suit with costs.

### **Determination**

53. The issues for determination are;
  - i. Whether termination of the claimant's employment by the respondent was unfair.
  - ii. Whether the claimant is entitled to the reliefs sought.



54. As to whether termination of the claimant's employment by the respondent was unfair, it is essential to highlight the relevant provisions and propositions of law on termination of employment.
55. The provisions of sections 35, 40, 41, 43, 44, 45 and 47 (5) of the *Employment Act, 2007* provide the anchorage for a fair termination or dismissal of an employee from employment.
56. These provisions are specific on the requirements of notice, redundancy situations, procedure to be complied with, reason(s) for termination of employment and the burden of proof.
57. In *Pius Machafu Isindu v Lavington Security Guards Ltd* (2017) eKLR, the Court of Appeal stated as follows;

“There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47(5)), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination . . .”
58. The court is guided by these sentiments.
59. In the instant case, whereas the claimant alleges that his employment was unfairly terminated on September 14, 2015 on account of redundancy, the respondent's evidence lacks clarity and consistency on what actually happened and when. It is averred that there was a redundancy at Twiga Stationers & Printers Ltd where the claimant worked as well as that his employment was terminated on account of fraud or there was a mutual separation.

### **Reasons for termination**

60. In his evidence in chief, the claimant testified that he was declared redundant.
61. The claimant further testified that by the time he executed a commitment letter on November 6, 2015 to repay the Equity Bank loan he had taken, he had already been dismissed from employment. Strangely, he could not remember when he took the Equity Bank loan of Kshs 40,000/=.
62. On cross-examination, the claimant admitted that he used three payslips of the respondent and a form completed by the supervisor other than RWI who was his supervisor.
63. Puzzlingly, neither party produced a copy of the claimant's payslip or evidence of his salary.
64. The claimant confirmed that salary was paid through the bank.
65. Finally, the claimant confirmed that the supervisor had notified him that Twiga Stationers and Printers Limited was downsizing.
66. On re-examination, the claimant told the court that Twiga Stationers and Printers Ltd was not downsizing.
67. RWI on the other hand testified that the claimant's employment was terminated on account of fraud in relation to the Equity Bank loan the claimant had taken. It was her testimony that the respondent was unaware of the alleged loan until the bank enquired about the repayment, a fact the claimant confirmed in evidence.



68. In her evidence in chief, the witness testified that there was a disciplinary meeting where the decision was made by the Director and Human Resource and the claimant was summarily dismissed. In cross-examination, the witness testified that there were no disciplinary proceedings or show cause letter.
69. The witness confirmed that by 10<sup>th</sup> November, 2015 when the final settlement of salary letter of even date was executed by the claimant and the respondent, the claimant was still in employment.
70. Finally, although the witness confirmed that she had no evidence of the results of the investigation into the alleged fraudulent activities of the claimant, it was her testimony that the respondent had a basis to terminate the claimant's employment.
71. Documentary evidence availed by the respondent show that the claimant could have been in employment on November 6, 2015. His commitment letter to repay the Equity Bank loan dated November 6, 2015 provide an unsubstantiated reason for non-payment of the loan and makes a promise to pay Kshs 8,000/= per month effective November 2015.
72. The last paragraph of the letter states as follows;
- “I kindly request Real Careers Ltd to pay my monthly salary through Barclays Bank. I will be grateful if my request will be considered.
- Thanks in advance.
- Yours faithfully.
- Ferdinand A Anduku
- Signed.
- Phone No 0728xxxxxx
- 0713xxxxxx”
73. For unexplained reasons, the date of the letter is altered from the original October 6, 2015 to November 6, 2015. In the courts view, the change of date was intended to ensure consistency with a complaint made to the Labour Office on October 6, 2015 as evidenced by a letter dated December 4, 2015 from the Ministry of Labour, Social Security and Services to the respondent.
74. The letter makes reference to a meeting on October 23, 2015 which resolved that the claimant resumes duty and be paid his salaries.
75. The respondent's response dated December 8, 2015 explained that the claimant had a fraud case with Equity Bank and investigations were still ongoing.
76. From the evidence on record, it is clear to the court that the respondent terminated the claimant's employment for the alleged fraud involving Equity Bank, the absence of a letter of termination notwithstanding.
77. Section 43(2) of the [Employment Act](#) provide that;
- The reason or reasons for termination of a contract are the matters that the employer at the material time of termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee.
78. From the evidence on record, it is common ground that the claimant took a loan from Equity Bank – OTC Branch without the knowledge of the employer and had used payslips of the respondent as well



as a form signed by an unnamed supervisor. Unfortunately, the claimant defaulted and his employer had to be notified.

79. Relatedly, the respondent had a facility with Barclays Bank of Kenya Ltd for its employees.
80. For the foregoing reasons, the court is satisfied and finds that the respondent had a valid and fair reason to terminate the claimant's employment.

### Procedure

81. As explained in *Pius Machafu Isindu v Lavington Security Guards Ltd* (Supra), section 41 of the *Employment Act* provides a mandatory and elaborate process which an employer must comply with before dismissing or terminating an employee from employment.
82. The specific procedural steps to be complied with have been articulated by the Court of Appeal and this court in innumerable decisions including *Postal Corporation of Kenya v Andrew K Tanui* (2019) eKLR and *Loice Atieno v Kenya Commercial Bank Ltd*.
83. In the instant case, it is evident that the claimant was not taken through any disciplinary process. RWI confirmed on cross-examination that the respondent neither issued a notice to show cause nor conduct any disciplinary proceedings.
84. For these reasons, it is the finding of the court that the respondent has on a balance of probability failed to demonstrate that termination of the claimant's employment was procedurally fair.

### Reliefs

85. The claimant prays for various reliefs which the court will address individually.

#### **a. A declaration that the claimant's dismissal from employment was wrong, unfair and unlawful.**

86. Having found that termination of the claimant's employment was unfair for want of procedural propriety, a declaration to that effect is hereby issued.

#### **b. A declaration that the claimant is entitled to payment of his terminal dues and compensatory damages as pleaded Kshs 282,200/=.**

87. The claimant is entitled to compensatory damages for the unfair termination of employment.

Salary in lieu of notice Kshs 17,000/=

88. Since the claimant alleges to have been terminated from employment on September 14, 2015, and reported the dispute to the Ministry of Labour on October 6, 2015, and was invited by the respondent on November 6, 2015 to write the commitment letter and executed the final settlement of salary on 10<sup>th</sup> November, 2015, it is evident that he did not render services during the month of October 2015 and was paid a total of Kshs 30,824/= as final salary settlement. Relatedly, the claimant neither pleaded nor proved entitlement to pay in lieu of notice. The claim for notice pay is unsustainable and is declined.

Payment *in lieu of* untaken/unpaid annual leave for three years Kshs 35,700/=

89. The claimant was an employee of the respondent for about 2 years 6 months. Neither the claimant's written statement nor the oral evidence adduced in court make reference to any pending leave days and how many they were. Intriguingly, the submissions state that the claimant served for 3 years and 7 months.



90. The prayer for payment for leave for 3 years yet the claimant served for less than 3 years is not believable as it is not supported by any evidence and is declined.

Payment in lieu of severance pay for 3 years Kshs 25,500/=

91. As regards this prayer, the court is guided by the sentiments of Onyango J in *Hassanath Wanjiku v Vanela House of Coffees* (2018) eKLR as follows;

“On the severance pay, the claimant appears to confuse the term with service pay. In the submissions filed on behalf of the claimant, reference is made to section 35(5) and (6) which provides for service pay, while severance is provided for under section 40(1) (g) as a benefit for an employee who has been declared redundant.”

92. These sentiments apply to the facts of this case on all fours.

93. In his submissions, the claimant submitted that he had shown that termination of his employment had nothing to do with redundancy/downsizing. That it was an unfair termination of employment and the claim for severance pay had been withdrawn.

The prayer is unsustainable and declined.

Compensation for unfair termination Kshs 204,000/=

94. Having found that termination of the claimant’s employment was unfair, the claimant is entitled to the discretionary remedy provided by section 49(1)(c) of the *Employment Act*.

95. As enjoined by section 49(4) of the *Act*, the court has taken the following into consideration.

- i. The claimant was an employee of the respondent for about 2 years and 6 months contrary to the submissions.
- ii. The claimant had no previous warning letter of disciplinary issues.
- iii. The claimant was not forthright on the circumstances in which he obtained the loan from Equity Bank and why he defaulted. In addition, he could not remember when he took it or the supervisor who signed his application form. Similarly, the alleged injury was not established nor could it occasion a default if the claimant was still in employment.  
  
In sum, the claimant substantially contributed to his dismissal from employment.
- iv. The claimant did not appeal the respondent’s decision to terminate his employment. Being an employment placement company, the respondent could, if the claimant had intimated to it, retained him in its waiting list for other placements.

96. In the circumstances, the court is satisfied that the equivalent of 2 month’s salary is fair, Kshs 34,000/=.

97. In conclusion, judgement is entered for the claimant against the respondent in the following terms;

- a. Declaration that termination of the claimant’s employment was unfair.
- b. Declaration that the claimant is entitled to compensation for unfair termination of employment by the respondent.
- c. Equivalent of 2 month’s gross salary.
- d. Costs of this suit.
- e. Interest at court rates from the date hereof till payment in full.



98. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 31<sup>ST</sup> DAY OF OCTOBER 2022**

**DR. JACOB GAKERI**

**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 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 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.

**DR. JACOB GAKERI**

**JUDGE**

