



**Ogol v Laboratory & Allied Ltd (Cause 1740 of 2017)  
[2022] KEELRC 12996 (KLR) (28 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12996 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1740 OF 2017  
SC RUTTO, J  
OCTOBER 28, 2022**

**BETWEEN**

**JOHNSON AKELLO OGOL ..... CLAIMANT**

**AND**

**LABORATORY & ALLIED LTD ..... RESPONDENT**

**JUDGMENT**

1. The claimant avers vide his memorandum of claim filed on August 21, 2017 that he was employed by the respondent as a medical representative with effect from May 6, 1996. That the respondent's director terminated his services through a letter dated November 6, 2015. The claimant has termed his termination as unlawful and in breach of his contract of employment as he was not given an opportunity to be heard. It is for this reason that the claimant has prayed for a declaration that his termination was unlawful and unfair, compensatory damages for unfair termination, service charge (sic) for 15 years of service, general damages, exemplary damages, certificate of service as well as costs of the suit.
2. Opposing the claim, the respondent avers that the claimant's termination was procedural and as per his contract of employment. The respondent further contends that the claimant was given one month's notice of termination.
3. The matter proceeded for hearing on June 15, 2022 and both sides presented oral evidence.

**Claimant's Case**

4. The claimant testified in support of his claim and at the start of the hearing, sought to adopt his witness statement to constitute his evidence in chief. He further produced the list and bundle of documents which were filed together with his claim, as his exhibits before court.



5. The claimant testified that he started working for the respondent since 1996 upto 2015 and was terminated through a letter dated November 6, 2015. That although the termination appeared like a normal termination, it contained words like “loss of confidence and trust”, which reason, he did not agree with. He further testified that the procedure for termination was not followed as he was not given a hearing prior to being terminated. That further, he was not issued with a notice nor paid salary in lieu of notice. That therefore, his termination was unlawful.

### **Respondent’s Case**

6. The respondent presented oral evidence through Mr Golukish Kartikiy Darjy who testified as RW1. He told the court that he is a finance officer at the respondent company. Similarly, he sought to adopt his witness statement to constitute his evidence in chief. He further produced the documents filed by the respondent as exhibits before court.
7. It was RW1’s testimony that the claimant’s termination was as per his contract of employment and that he was paid all his terminal dues.

### **Submissions**

8. It was submitted on behalf of the claimant that his termination was unfair as the reason given for his termination was not valid. In support of the claimant’s submissions, reliance was placed on the cases of [\*John Ngatia Ndung’u v Kenya Commercial Bank Limited\*](#) (2014) eKLR and [\*Enos Olungo Mang’ong’o v Kenya Commercial Bank\*](#) (2015) eKLR.
9. That further, the respondent’s action of terminating the claimant’s employment was in total disregard of the procedure under section 41 of the [\*Employment Act\*](#) as he was not informed of the allegations against him and there was no elaboration of the grounds of termination of employment. To support this argument the claimant cited the case of [\*Janet Nyandiko v Kenya commercial bank Limited\*](#) (2017) eKLR.
10. On its part, the respondent relied on the provisions of sections 35 and 36 of the [\*Employment Act\*](#), urging that just like an employee, an employer can terminate the employment upon issuance of one months’ notice. That in this regard, the respondent exercised its contractual right as donated by the employment contract. It was the respondent’s further submissions that it is not for the court to rewrite the contract of the parties. On this score, the respondent invited the court to consider the determination in the case of [\*Kenya Revenue Authority v Menginya Salim Murgani\*](#) (2010) eKLR.
11. In further submission, the respondent stated that the claimant had not proved any particulars of unfairness or unlawfulness as pleaded and had not discharged its burden of proof under section 47(5) of the [\*Employment Act\*](#). The decisions of [\*Manuel Aanidos v Kinangop Wind Park Limited \(in receivership\)\*](#) (2019) eKLR was cited in support of this argument. That further, section 43(a) (sic) and 47(5) of the [\*Employment Act\*](#) are inapplicable where termination is validly effected pursuant to contractually agreed terms.

### **Analysis And Determination**

12. From the pleadings on record as well as the evidence placed before court, the issues for determination can be distilled as follows:
  - a. Was the claimant’s termination unfair and unlawful?
  - b. Is the claimant entitled to the reliefs sought?



## Unfair And Unlawful Termination?

13. Whereas the claimant has alleged that his termination was unfair and unlawful, the respondent contends that the said termination was as per the terms of his contract. What does the law say?
14. Under section 43(1) of the [Employment Act](#) (Act), an employer bears the burden of proving the reasons for termination and failure to do so, such termination is deemed to be unfair. Further, section 45 (2) (a) and (b) 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. This essentially substantive justification or proof reasons.
15. The legal position espoused above was aptly captured by the Court of Appeal in the case of [Chairman Board of Directors \(National Water Conservation and Pipeline Corporation\) v Meshack M Saboke & 2 others](#), Nairobi Civil Appeal No 241 of 2015, as follows:

“In light of the above provision, termination of employment will be unfair if the court finds that in all the circumstances of the case, it is based on invalid reasons or if the reason itself or the procedure of termination are themselves not fair. Section 43 of the [Employment Act](#) deals with proof of reasons for termination placing the burden on the employer to prove the reasons for termination failure to which termination is deemed unfair within the meaning of section 45.”

16. The employer is further enjoined under section 45 (2) (c) of the Act, 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 a fair process. In this regard, an employer is required to notify an employee of the intended termination and the reasons thereof in a language he or she understands and in the presence of another employee or a shop floor union representative. This is also known as procedural fairness.
17. What manifests from the statutory provisions stipulated above is that, for termination to meet the legal threshold, an employer must justify that there was reason to terminate the services of an employee and that such termination was in line with fair procedure.
18. Turning to the instant case, the claimant's letter of termination which is dated November 6, 2015 is couched as follows:

“RE: Normal termination of employment/services

This is to inform you that after very careful deliberations and much regret your services with the company are undesirable and hence we terminate your contract under normal termination with effect from December 6, 2015 i.e one month notice from the date of the letter.

We have lost confidence, trust and faith in your ability to carry out duties and responsibilities as per the requirements of the company.

Kindly please hand over all company assets to your superior.

You are required to book an appointment with the accountant for the finalizations of all dues

Thank you....”



19. As can be discerned from the reproduced letter of termination, the reason for the claimant's termination was that the respondent had found his services undesirable hence had lost confidence, trust and faith in his ability to carry out duties and responsibilities as per the requirements of the company.
20. Applying the provisions of sections 43(1) and 45(2) (a) and (b) of the Act, to the case herein, the respondent was required to substantiate the allegations against the claimant and prove that the same were fair and valid and related to his conduct, capacity or compatibility. This was not done. If anything, the reasons advanced by the respondent in the letter of termination were quite vague.
21. To pass the fairness test, the respondent was required to lead evidence to prove and justify the reasons proffered in the claimant's letter of termination.
22. It is also notable that the respondent has maintained that the claimant's termination was normal termination in terms of section 35 of the *Employment Act* and his contract of employment. Despite this assertion, the claimant's letter of termination states otherwise as it is evident that he was being let go due to other reasons. It is those reasons that the respondent was required to justify through evidence. Merely stating the same was not sufficient.
23. Besides, the argument by the respondent that the termination was a normal one, does not have a basis in law as it had to be accompanied by justifiable reasons.
24. As per sections 43(1) and 45(2) (a) and (b) of the Act, any termination is unfair if not accompanied by reasons that are determined to be fair and valid.
25. I must point out that the process of terminating an employee without justifiable reason belongs in the past as that was the position in the repealed *Employment Act*. Under the *Employment Act, 2007*, the employer is duty bound to give reasons which must be determined to be fair and valid. Times have changed and it is not permissible for an employer to wake up and terminate an employee without proffering reasons and justifying the same.
26. As rightly stated by the Court of Appeal in the case of *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR:

“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 employment 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.
27. In light of the foregoing, it is evident that the respondent was bound to prove that the reason that occasioned the claimant's termination from employment was fair and valid. This burden was not discharged hence the claimant's termination was rendered unfair.
28. In regards to the issue of procedural fairness, the respondent did not prove, let alone suggest that it subjected the claimant to a fair process. Indeed, there was no evidence to suggest that the respondent gave the claimant an opportunity to tender his defence against the allegations if any. Further, the letter of termination did not refer to any process undertaken prior to the termination being effected.



29. The Court of Appeal in considering the import of section 41 of the Act had this to say in the case of *Postal Corporation of Kenya v Andrew K Tanui* [2019] eKLR:

“It is our further view that section 41 provides the minimum standards of a fair procedure that an employer ought to comply with. The section provides for

“Notification and hearing before termination on grounds of misconduct” in the following manner: -

- (1) Subject to section 42 (1), an employer shall before terminating the employment of an employee, on the grounds of misconduct; poor to 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, an 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 grounds of misconduct or poor performance, and the person, chosen by the employee within subsection (1) make.”

Section 42 (1) referred to in sub-section (1) relates to employees on probation.

Four elements must thus be discernible for the procedure to pass muster:-

- (i) an explanation of the grounds of termination in a language understood by the employee;
- (ii) the reason for which the employer is considering termination;
- (iii) entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;
- (iv) hearing and considering any representations made by the employee and the person chosen by the employee.”

30. I wholly reiterate and apply the above determination to the case herein. There is therefore no shortcut when it comes to applying fair procedure in effecting an employee’s termination from employment.

31. Therefore, the respondent was enjoined to comply with the process under section 41 and anything short of that invalidated the termination.

32. My position is further fortified by the determination by the Court of Appeal in the case of *Kenfreight (E.A) Limited v Benson K Nguti*, civil appeal No 31 of 2015, where it was held that:

“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”.



33. It was therefore not sufficient to merely issue the claimant with a letter of termination and term it as “normal termination”. The respondent was required to go a step further and explain to the claimant the reasons for the termination in the presence of another employee or a union official in a language that he understands.
34. The respondent having failed to meet the threshold stipulated under section 41 of the Act, its actions can only have one resultant effect and which is, the termination was unlawful.
35. Ultimately, the court is satisfied that the claimant’s termination from employment was devoid of substantive justification and was procedurally unfair as the respondent’s actions went contrary to the provisions of sections 41, 43, and 45 of the Employment Act, 2007. Therefore, the termination was unfair and unlawful.
36. Having found as such, I now turn to consider the reliefs due to the claimant.

### **Reliefs**

37. Having found that the claimant’s termination was unfair and unlawful, I will award him compensatory damages equivalent to eight (8) months of his gross salary. This award is informed by the length of the employment relationship and the fact that the respondent did not justify the reasons for the claimant’s termination and did not comply with the requirements of fair procedure in so doing.
38. The claim in regards to service pay collapses as it is evident from the claimant’s pay slip, that he was contributing to the National Social Security Fund (NSSF), thus he falls within the exclusions under section 35(6) of the Act.
39. The claimant is entitled to a certificate of service as the employment relationship has not been disputed.

### **Orders**

40. Accordingly, I enter judgment in favour of the claimant against the respondent as follows:
- a. A declaration that the claimant’s termination by the respondent was unfair and unlawful.
  - b. The claimant is awarded compensatory damages in the sum of Kshs 360,000/=which is equivalent to 8 months of his gross salary.
  - c. Interest on the amount in (b) at court rates from the date of judgement until payment in full.
  - d. The respondent is directed to issue the claimant with a certificate of service within 30 days from the date of this judgement.
  - e. The claimant shall have the costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF OCTOBER, 2022.**

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**STELLA RUTTO**

**JUDGE**

**Appearance:**

For the Claimant Mr. Ndalila

For the Respondent Mr. George Gilbert



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**

