



Ndiyone v Carslake Nominees Limites t/a Diani Sea Resort & another (Cause E024 of 2021) [2022] KEELRC 12968 (KLR) (27 October 2022) (Judgment)

Neutral citation: [2022] KEELRC 12968 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E024 OF 2021
AK NZEI, J
OCTOBER 27, 2022**

BETWEEN

IBRAHIM MOHAMMED NDIYONE CLAIMANT

AND

**CARSLAKE NOMINEES LIMITES T/A DIANI SEA RESORT ... 1ST
RESPONDENT**

DIANI PROPERTIES LIMITED T/A DIANI SEA LODGE 2ND RESPONDENT

JUDGMENT

1. The Claimant sued the Respondents vide a Memorandum of Claim dated March 1, 2021 and filed in this Court on March 2, 2021 and pleaded that he was employed by the Respondents on November 28, 1991 as a Storeman and left as Purchasing Manager on February 7, 2020 when his services were summarily terminated unfairly and unlawfully by the Respondents.
2. The Claimant further pleaded that the summary dismissal was unfair and unlawful as there were no justifiable grounds for the same and that the Claimant was not confronted with any specific allegations against himself to which he could not defend himself against.
3. It was the Claimant's further pleading that the procedure used by the Respondents was not fair as it failed to comply with the *Employment Act, 2007*; and the Claimant was not given specific reasons or justifiable and/or lawful cause for his termination.
4. The Claimant further pleaded that he was earning a basic salary of ksh. 126,950 per month and set out the following claim against the Respondents:-
 - a. Two months' salary in lieu of noticekshs. 253,900
 - b. Leave days for 2019 not taken.....kshs. 126,950



- c. Leave travelling allowance for 2019.....ksh. 30,000
 - d. Pro-rata leave days for 2020.....kshs. 21,158
 - e. Pro-rata leave travelling allowanceksh. 5,000
 - f. Service pay (gratuity) for 29 years
(125,500x29/2).....ksh. 1,840,775
 - g. Compensation for unlawful/unfair
Termination (12 months)ksh. 1,523,400
 - h. Exemplary and punitive damagesksh. 2,000,000
 - i. A declaration that termination of the Claimant’s employment was unfair and unlawful.
 - j. Costs and interest.
5. The Claimant also filed his written witness statement dated March 1, 2021 and a list of documents dated the same date, listing some twelve documents. The listed documents included a certificate of service dated February 18, 2020, the Claimant’s payslip for January 2020, a promotion letter dated September 22, 1999, suspension letter dated January 27, 2020, response to suspension letter dated February 1, 2020, summary dismissal letter dated February 7, 2020 and a demand letter dated March 12, 2020, among others. These documents accompanied the memorandum of claim.
 6. The Respondents entered appearance on May 17, 2021 and on June 10, 2021 filed a response to the Claimant’s claim. The Respondents admitted having employed the Claimant as pleaded by him, but denied having terminated him unfairly and unlawfully.
 7. The Respondents pleaded that prior to his termination, the Claimant was confronted with specific allegations of misconduct and negligence of duties to which he did not respond satisfactorily.
 8. The Respondents admitted that the Claimant was earning a gross salary of ksh. 126,950 per month, which was subject to statutory deductions, and further pleaded that the Respondents made monthly contributions on behalf of the Claimant to the Claimant’s pension scheme with Jubilee Insurance.
 9. It was the Respondents’ further pleading that the Claimant was in the management level staff and thus he did not qualify to be a member of a worker’s union. The Respondents admitted that a demand had been made, but denied having refused to pay the Claimant’s dues which they pleaded they had calculated as best known to them and availed the same to the Claimant, save for the leave days.
 10. The Respondents filed a written witness statement by their Human Resource Manager, Angela Mwendarani, dated November 15, 2021. The Respondents also filed a list of documents dated the same date (November 15, 2021), listing five documents. The listed documents included a warning letter dated January 21, 2020, minutes of a disciplinary hearing for the Claimant held at Diani Sea Resort on February 4, 2020, a report on theft of white and red wine and juice dated January 15, 2021, a report on undelivered food items, fish and coupons, in the 1st Respondent and Jubilee Insurance Pension withdrawal form and remittances advice.
 11. The Respondents also filed a further list of documents dated May 25, 2022 listing a copy of cheque No. 011836 and details thereof and cheque No. 0120XXX and details thereof.



12. When the trial opened, the Claimant testified and adopted his filed witness statement as his testimony. He further produced in evidence the documents referred to at paragraph 5 of this judgment. The Claimant further testified:-
 - a. that he started contributing to a pension scheme in April 2011 after working for the Respondents for almost twenty years, and that when he started contributing to the pension scheme, he was not paid any service.
 - b. that prior to attending the disciplinary hearing on February 4, 2020, the Claimant was not issued with any documents, and that he did not see the documents referred to in the disciplinary minutes, and that he was not given an opportunity to appeal. That the person he could have appealed to was the company director and he was part of the disciplinary committee panel.
 - c. that he was the Respondent's purchasing officer and out of the LPO's filed by the Respondent, he (the Claimant) had signed only one. That the rest had been written and signed while he was on leave.
 - d. that the Claimant did not take leave in 2019 and in 2020, and was not paid in lieu thereof.
13. The Respondent called one witness, Angela Mwendarani (RW-1), who adopted her filed witness statement dated November 15, 2021 as her testimony and produced in evidence the five documents listed on the Respondent's list of documents dated the same date (November 15, 2021).
14. Cross-examined, the Respondents' witness (RW-1), who was the Respondents' HR Manager, testified:-
 - a. that a show cause letter is a letter that calls upon an employee to show cause why disciplinary action should not be taken against him, and combining it with suspension and an invitation for a disciplinary hearing is not a fair procedure.
 - b. that the combined letter dated January 27, 2020 accused the Claimant of fraudulent activities in the supply chain and flouting purchase procedures, which were general accusations with no particulars stated.
 - c. that the summary dismissal letter dated February 7, 2020 did not give any reason for termination.
 - d. that the Respondent's exhibit no. 3 (a report on theft of white and red wine) was dated January 15, 2021, and was made a year after the Claimant's termination; and did not list the Claimant as having been one of those culpable.
 - e. that the Respondents' exhibit no. 4 (a report on undelivered food items) was not dated, and the author was not shown/was unknown.
 - f. that the witness (RW-1) was not conversant with the Claimant's signature and would not know whether he signed any of the documents (filed by the Respondents).
 - g. that other than the documents filed by the Respondents, the witness (RW-1) did not have any other evidence to show that the Claimant collected commissions from suppliers, among other allegations against him.
 - h. that no audit reports or stock takes had been filed to show that there were any losses that may have been occasioned by the Claimant's misdeeds as alleged.



- i. that from the documents filed by the Respondents, the Claimant was not advised on the right of appeal.
15. Upon considering the pleadings filed by both parties and evidence presented, the following two issues emerge for determination:-
 - a. whether termination of the Claimant's employment was unfair.
 - b. whether the Claimant is entitled to the reliefs sought.
16. On the first issue, the events leading to termination of the Claimant's employment are shown to have been commenced by the Respondents *vide* a suspension letter dated January 27, 2020, which reads in part:-

“Re: suspension letter and invitation for a disciplinary meeting

“the organization is currently conducting a review on various areas of operations which so far has revealed a number of fraudulent activities related to purchases. You have been highly implicated by other members of staff who are also involved.

Through an ongoing review of purchasing documents, we have found out that you have occasionally, intentionally and deliberately failed to give the company value for money in various purchases. The allegations are related to fraudulent activities in the supply chain, flouting of purchasing procedures among others. As the purchasing Manager with satisfactory expertise, knowledge and experience in your role, it is your duty to ensure sufficient supply at the best prices following best practices.

We, therefore, have no option than to send you on suspension to pave way for further investigations. This is effective from Monday January 27, 2020. You are also required to show cause why disciplinary action should not be taken against you in regards to the above highlighted allegations. This is in accordance with the Employment Law and the company policies. Your written explanation should reach the HR Manager on or by Saturday February 1, 2020 at 10am.

Kindly note you shall be expected to report back on Tuesday February 4, 2020 at 14.30 pm for a disciplinary hearing. This shall be in presence of your own representative who should be an employee of the Hotel. The venue shall be Diani Sea Resort conference room.”
17. It is clear from the foregoing suspension letter that in it the Respondents combined suspension, notice to show cause and invitation to attend a disciplinary hearing in one. The Respondents' witness (RW-1) confirmed under cross-examination that this was an unfair procedure.
18. If the purpose of the suspension was to pave way for investigations as stated in the suspension letter dated January 27, 2020, then the investigations ought to have been completed before the Claimant could be called upon to show cause on specific allegations.
19. The allegations contained in the letter were general allegations as confirmed by RW-1 under cross-examination. On what, then, was the Claimant supposed to show cause without specific allegations of misdeeds and/or misconduct? Sending the Claimant on suspension to pave the way for investigations and in the same breath calling upon him to show cause on general allegations supposed to be subjected



to investigations and inviting him for a disciplinary hearing on such general allegations was an unfair procedure. This contravened Section 41 of the *Employment Act* which provides:-

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

20. The foregoing provision sets out the mandatory procedure that must be followed by any employer who wishes to terminate the employment of an employee. The sequence of what must be undertaken by the employer is set out in that Section of the Act; which envisages or contemplates a situation where the employer already has a specific reason or reasons for which he considers termination of the employee’s employment. It is after the employee receives the specific reasons, explained to him in a language that he understands, that the employee and his fellow employee of his choice or union official, where this is applicable, are to make their representations.
21. It is unfair for an employer to ask an employee to show cause and to attend a disciplinary hearing as the employer, in the meantime, fishes for more facts and/or allegations for presentations at the disciplinary hearing. The outcome of any investigation by an employer relating to an employee regarding any particular allegation against the employee must always be made available to the employee before the employee is called upon to attend a disciplinary hearing regarding that particular matter.
22. It is clear from the Respondents’ exhibit no. 2 (minutes of a disciplinary hearing held on February 4, 2020) that specific documents (LPOs) which are not mentioned or referred to in the suspension letter cum notice to show cause cum invitation for a disciplinary hearing dated January 27, 2020 were discussed, and were indeed the subject of the disciplinary hearing. The Claimant testified that the said documents were not furnished to him before the disciplinary hearing, and that he did not see them during the hearing. How could the Claimant defend himself at the disciplinary hearing over matters that had not been disclosed to him earlier before the disciplinary hearing?
23. It was held as follows in the case of *Walter Ogal Anuro-vs- Teachers Service Commission* [2013] eKLR:-

“...for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification was to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”
24. It is worth noting here that matters stated in the Respondent’s witness statement (the witness statement of Angela Mwendarani) dated November 15, 2021 regarding the Respondents’ Hotels’ LPOs and the Claimant’s alleged collusion with suppliers and numerous alleged fraudulent dealings between the Claimant and the suppliers were neither pleaded nor particularized in the Respondent’s pleadings. Parties cannot purport to testify on matters that have not been pleaded and are therefore



- not before the Court. Nevertheless, no effort was made by the Respondents to establish the validity of the allegations made against the Claimant, and on the basis of which his employment was terminated.
25. Section 45(2) (a) of the [Employment Act](#) provides that termination of employment by an employer shall be unfair if the employer fails to prove that the reason for the termination is valid. Section 47(5) of the Act on the other hand provides that the burden of justifying the grounds for the termination of employment shall rest on the employer. In the present case, the Respondents failed to prove the validity of the reasons for termination of the Claimant's employment, and did not justify the same.
 26. In the case of [Kenfright \[E.A\] Limited -vs- Benson K. Nguti](#) [2016] eKLR, the Court of Appeal noted that termination is considered unfair if the employer fails to demonstrate that the reasons for termination were valid and fair and that termination was in accordance with fair procedure. The Court specifically noted that Section 43 of the [Employment Act](#) places the burden of proof that the termination was fair on the employer, while the burden on the employee is limited to asserting that unfair termination has occurred.
 27. It is my finding that termination of the Claimant's employment by the Respondent was procedurally and substantively unfair, and I so declare.
 28. For record purposes, it is to be noted that the warning letter exhibited by the Respondents as their exhibit no. 1 was unrelated to the unproved allegations that led to termination of the Claimant's employment.
 29. On the second issue, and having made a finding that termination of the Claimant's employment was unfair, I award the Claimant the equivalent of six months' salary in compensation for unfair termination of employment, which is ksh. 126,950X6 = 761,700.
 30. On the claim for unpaid leave days, the Claimant testified that he did not take leave in 2019 and in 2020. The Respondent pleaded at paragraph 12 of their response to the Claimant's claim that their calculation of the Claimant's dues, as known to them, did not include leave days. They (the Respondents) did not object to the Claimant's claim for leave days and, being the custodians of the Claimant's employment records under Section 74(f) of the [Employment Act](#), did not present any evidence to show that the Claimant took leave in 2019 and 2020. I allow the claim for ksh. 126,950 being unpaid leave days for 2019 and ksh. 21,158 being payment for *pro-rata* leave days for 2020. The claims for leave travelling allowance for 2019 and prorata leave travelling allowance were not proved, and are declined.
 31. The claim for two months' salary in lieu of notice is declined, and I award the Claimant one month salary in lieu of notice pursuant to Section 35 (c) of the [Employment Act](#). I award the Claimant ksh. 126,900 as prayed. The Claimant exhibited his payslip for January 2020, and his gross salary is indicated as having been ksh. 126,950, a fact that the Respondents admitted in their pleadings.
 32. The claim for gratuity is declined. The Claimant pleaded and testified that he was a member of a pension scheme into which he and his employer contributed monthly, and that he joined the pension scheme in 2011, after working for the Respondents for almost 20 years, and that he was not paid any service at the time of joining the pension scheme. Section 35(6) (c) & (d) excludes from payment of service pay any employee who is a member of any pension scheme established and operated by the employer or are members of National Social Security Fund.
 33. The Claimant cannot claim gratuity for the period between 1991 and 2011 as such a claim is statute barred pursuant to Section 90 of the [Employment Act](#). The claim for punitive and exemplary damages is not available to the Claimant under Section 49(1) of the [Employment Act](#), and is declined.



34. Finally, and having considered submissions filed by Counsel for both parties, judgment is hereby entered for the Claimant against the 1st and 2nd Respondent's, jointly and severally, for:-
- a. the equivalent of six months' salary in compensation for unfair termination of employmentksh.761,700
 - b. unpaid leave days for 2019ksh. 126,950
 - c. prorata leave days for 2020.....ksh.21,158
 - d. one month salary in lieu of notice.....ksh.126,900
- Total ksh.1,036,708
35. The awarded sum shall be subject to statutory deductions pursuant to Section 49 (2)
36. The Claimant is awarded costs of the suit and interest at Court rates. Interest shall be calculated from the date of this judgment.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 27TH DAY OF OCTOBER 2022

AGNES KITIKU NZEI

JUDGE

Order

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....for Claimant

.....for Respondent

