



REPUBLIC OF KENYA



**Barasa v Ashoke & another (Cause 535 of 2018)
[2022] KEELRC 12991 (KLR) (26 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12991 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 535 OF 2018
JK GAKERI, J
OCTOBER 26, 2022**

BETWEEN

AURALIA IMELA BARASA CLAIMANT

AND

SINGH MADHURU ASHOKE 1ST RESPONDENT

LANGATA HOSPITAL 2ND RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Memorandum of Claim filed on April 13, 2018 alleging unlawful termination of employment by the Respondent.
2. The Claimant avers that she entered into an oral contract of employment with the Respondent on April 2, 2016 to work as a house help, domestic worker specifically at the 1st Respondent's residence at a consolidated salary of Kshs.13,000/= per month and a net of Kshs.12,300 and was housed at the 1st Respondent's servant's quarter.
3. That she used to work on public holidays and did not proceed on leave and NHIF and NSSF contributions were being deducted.
4. The Claimant further avers that her duties included house cleaning, ironing and washing utensils. That she served diligently until she was dismissed from employment on December 1, 2017 on account of redundancy, without notice, certificate of service or terminal benefits.
5. The Claimant prays for;
 - (a) A declaration that terminal and/or dismissal by the respondent was unlawful.
 - (b) An order compelling the Respondent to pay Kshs.726,514.55 as terminal dues and compensation comprising;



- i. One month's salary in lieu of notice Kshs.13,000
 - ii. 15 days severance dues Kshs.6,500
 - iii. Leave allowance outstanding Kshs.74,246.55
 - iv. Public holidays 16 days Kshs.20,933
 - v. Overtime Kshs.455,235.00
 - vi. Refund of NHIF and NSSF Kshs.2,600.00
 - vii. 12 months salary compensation Kshs.156,000.00
6. It is the Claimant's case that the dismissal from employment was in blatant contravention of the [Employment Act, 2007](#) and the rules of natural justice as well as wrongful and/or unfair.

Respondent's case

7. In response, the respondents admit having employed the claimant on January 1, 2017.
8. That the Claimant used to proceed on leave and was paid whenever she worked on public holidays and all statutory deductions were made.
9. The Respondents aver that NSSF contributions not remitted were refunded as part of the following months' salary and contributions continued for a further 2 months after termination of employment.
10. The Respondent states that the Claimant's duties were light involving washing utensils by dish washer, washing clothes using a washing machine and general house cleaning which did not require her to work overtime.
11. The Respondent denies that the Claimant was diligent or that she was declared redundant. That she had been warned many times and her employment was terminated and was paid one month's salary and lawful benefits.

Claimant's evidence

12. The Claimant's statement rehashes the contents of the Memorandum of Claim other than the employer's name.
13. The Claimant states that her employer was Dorcan Keusi Madhuri of Cell phone No. 0722277XXX.
14. By letter dated June 29, 2017, the 2nd Respondent introduced the Claimant to the NSSF for purposes of registration as a member and the NSSF and the statement on record shows that contributions begun in August 2017 and stopped in January 2018.
15. The Respondent attaches documents on the salary payments to the Claimant from January 2017 to December 2017.
16. Records reveal that the 2nd Respondent terminated the Claimant's employment by letter dated 2 November 5, 2017 allegedly for consistent non-performance of duties assigned to her and lack of diligence.
17. The letter promised payment of one month's salary in addition to the November salary.
18. A certificate of service dated November 30, 2017 is also attached. The certificate states that the Claimant was an employee of the Respondents from January 7, 2017 to November 30, 2017.



19. The Respondent has also attached photographs of a dishwasher, washing machine and dryer in addition to utensils in the kitchen.

Claimant's submissions

20. The Claimant identifies four salient issues for determination namely;
- i. Whether the Claimant was employed on April 2, 2016 orally or January 7, 2017.
 - ii. Whether termination of the Claimant's employment was unfair.
 - iii. Whether the Claimant is entitled to the reliefs sought.
 - iv. Costs of the suit.
21. As to whether the Claimant was employed in April, 2016 or January 2017, the Claimant relies on sections 7, 8, 9(1)(a) and (b) and 10(7) of the *Employment Act*, 2007 to urge that the Respondent was duty bound reduce the employment agreement into writing but did not and urges that the Claimant's versions takes precedence as ordained by the provisions of section 10(7) of the *Employment Act*.
22. As regards termination of the Claimant's employment, the Claimant submits that the reason for termination was poor performance of her duties as evidenced by the termination letter.
23. It is urged that the termination of the Claimant's employment was unfair for want of notice and compliance with the provisions of sections 41, 43 and 45 of the *Employment Act*.
24. Reliance is made on the decisions in *National Bank of Kenya V Samuel Nguru Mutonya* (2019) eKLR, *Janet Nyandiko V Kenya Commercial Bank Ltd* (2017) eKLR, *Jane Samba Mukala V Ol Tukai Lodge Ltd* and *Nancy Jemutai Kirui V Unilever Tea Kenya Ltd* (2020) eKLR to urge that when poor performance is detected, the employee ought to be given an opportunity to improve and should be called upon to inter alia explain the performance and be evaluated to assess performance improvement over time.
25. As regards termination of employment, reliance is made on the decision in *Banking Insurance and Finance Union V National Bank of Kenya Ltd* (2020) eKLR.
26. Reliance is also made on the provisions of Sections 41, 44 and 45 of the *Employment Act* to urge that the Claimant should have been given an opportunity to explain her performance. The Claimant submits that termination of the Claimant's employment was substantively and procedurally unfair.
27. As regards the reliefs sought, the Claimant's advocate submitted that the Claimant is entitled to pay in lieu of notice as no notice was given.
28. The prayer for severance pay was abandoned on the premise that the Claimant's employment was terminated on account of poor performance as opposed to redundancy.
29. On leave, it is urged that there were no leave application forms signed by the Claimant and leave is a right under section 28 of the *Employment Act*.
30. As regards public holidays, the Claimant seeks payment for 16 days at Kshs.1,000/= per day.
31. It is further urged that the Claimant is entitled to NHIF and NSSF refunds of Kshs.3,600/= yet the claim is for Kshs.2,600/=. That she worked 5 extra hours every day and claims Kshs.455,235.
32. Finally, the Claimant prays for 12 months compensation.



Respondent's submissions

33. The Respondent raises three issues for determination, namely;
 - i. Whether the Claimant has a cause of action against the 1st Respondent.
 - ii. Whether the Claimant has a cause of action against the 2nd Respondent.
 - iii. Whether the Claimant's prayers are merited.
34. On the first issue, the respondent's counsel submits that by virtue of the provisions of section 3(1) of the *Employment Act*, the NHIF records, certificate of service on record, letter to the NSSF and the termination letter, the Claimant was not an employee of the 1st Respondent.
35. As regards the second issue, reliance is made on the Court of Appeal decision in *Coastal Bottlers Ltd V Kimathi Mitbika* (2018) eKLR to urge that the Claimant executed a discharge voucher thereby discharging the employer from further claims.
36. Counsel relies on an undated document entitled "Muster Roll" which tabulates the Claimant's salary payments from January 2017 to December 2017.
37. It is submitted that the Claimant was paid Kshs.23,040/= and signed on the face of the payroll. Further reliance is made on the decision in *National Bank of Kenya Ltd V Pipeplastic Samkolit (K) Ltd & another* (2001) eKLR to urge that parties are bound by the terms of their contract and the claimant did not plead any vitiating factors in her claim.
38. The court is urged to find that the discharge and acknowledgment executed by the Claimant discharged the Respondents from all further claims.
39. As regards the reliefs sought, the Respondent urges that the Claimant is not entitled to any in that;
 - i. The Respondent paid her one month's salary in lieu of notice.
 - ii. Severance pay is only payable in a redundancy and the claimant's employment was not terminated on account of redundancy.
 - iii. Leave allowance, public holidays and overtime were encashed and paid to the Claimant at Kshs.433.30 per day.
 - iv. NHIF and NSSF contributions were paid to the claimant in cash if not remitted.
 - v. The Claimant signed a discharge voucher that all dues had been paid.
40. The court is urged to dismiss the suit.

Determination

41. The issues for determination are;
 - i. Whether the Claimant was employed by the Respondent on April 2, 2016 or January 7, 2017.
 - ii. Whether termination of the Claimant's employment was unfair.
 - iii. Whether the Claimant is entitled to the reliefs sought.



42. As to the date of employment, while the Claimant alleges that she was employed on April 2, 2016, the Respondents allege that they employed the Claimant as a househelp on January 1, 2017. Neither of the parties provided documentary evidence to buttress their allegation.
43. In determining this issue, the starting point are the relevant provisions of the *Employment Act*, 2007. Section 7 of the Act provides that employment under a contract of service must be in accordance with the provisions of the Act whether it is written or oral (Section 8).
44. Section 9 of the Act dictates the categories of contracts of service which must be in writing, including a contract for a period or number of working days amounting in the aggregate to the equivalent of three months or more as was the case in the instant suit.
45. Relatedly, section 9(2) of the Act imposes a duty on the employer to cause the drawing up of the contract setting out the particulars of employment for execution by the employee.
46. Evidently, the Respondents did not comply with the provisions of section 9 of the *Employment Act*. Such non-compliance is cured by the provisions of section 10(7) of the Act which provides that;
- If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1), the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.
47. The court is in agreement with the submissions of the Claimant’s counsel that in such a scenario, the employee’s version of the date of employment remains uncontroverted and thus prevails.
48. As to whether the Claimant has a cause of action against the Respondents as submitted by their advocate, none of the Respondents pleaded misjoinder or that they had no employment contract with the Claimant. Nothing turns on this issue.
49. As to whether termination of the Claimant’s employment was unfair, the homeport are the provisions of sections 35, 41, 43, 45 and 47(5) of the *Employment Act* and relevant judicial pronouncements.
50. These provisions set out the requirements on notice of termination, reason(s) for termination, procedure and burden of proof of the parties.
51. In *Pius Machafu Isindu V Lavington Security Guards Ltd* (2017) eKLR, the Court of Appeal held 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 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. The Act also provides for most of the procedures to be followed thus obviating reliance on the *Evidence Act* and the *Civil Procedure Act*/Rules . . .”
52. Similar sentiments were expressed in *Janet Nyandiko V Kenya Commercial Bank Ltd* (2017) eKLR.
53. The foregoing provisions of the *Employment Act*, 2007 and judicial pronouncements are unanimous that for a termination of employment to pass muster, it must have been substantively justifiable and procedurally fair as explained in *Naima Khamis V Oxford University Press (EA) Ltd* (2017) eKLR,



CMC Aviation Ltd V Mohammed Noor (2015) eKLR and *Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR.

54. I will now proceed to apply the foregoing provisions and propositions of law to the facts of the instant case.

Reasons for termination

55. Under section 45(2) of the *Employment Act*, the employer is required to establish that the reason or reasons for termination of employment is not only valid but fair.

56. Puzzlingly, although the Memorandum of Claim states that the Claimant's employment was terminated on account of redundancy, the statement makes no reference to a redundancy and no other evidence suggests that she was declared redundant. The averment remains unproven. The termination letter dated November 25, 2017 is more credible and reliable.

57. According to the termination letter dated November 25, 2017, the Claimant's employment was terminated for lack of diligence and consistent, non-performance of duties assigned to her. The effective date of termination was November 30, 2017.

58. The Claimant's submissions are grounded on the premise that her employment was terminated for non-performance and various authorities are relied upon to urge that since that respondents did not demonstrate that they had a system of measuring performance or evaluated the claimant, heard the claimant on her performance and accorded her time to improve, the ground of termination had not been established and was therefore not valid within the meaning of section 45(2) of the *Employment Act*, 2007.

59. In *Jane Samba Mukala v Ol Tukai Lodge Ltd* (2013) eKLR, the court held as follows;

“Where poor performance is shown to be the reason for termination; . . . The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance. It is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further, what measures were in place to enable them assess the performance of each employee.”

60. In *Kenya Science Research International Technical and Allied Workers Union (KSRITAWU) V Stanley Kinyanjui & Magnate Ventures Ltd* Cause No. 273 of 2010, the court stated as follows;

“The proper procedure once poor performance of an employee is noted is to point out the shortcomings to the employee and give the employee an opportunity to improve over a reasonable length of time. In our view 2 – 3 months would be reasonable.”

61. It is not in dispute that the Respondents did not demonstrate that they had put in place a performance assessment policy or system or had subjected the claimant to a performance appraisal or performance improvement plan. The Respondents tendered no evidence of how they ascertained that the Claimant's performance was poor. Was it quantitative or qualitative and did it relate to the washing or house cleaning?

62. For the foregoing reasons, the court is satisfied that the respondent has failed to prove on a balance of probability that the reason for terminating the Claimant's employment was valid and fair.



63. Consequently, it is the finding of the court that termination of the Claimant's employment was substantively unfair.

Procedure

64. Needless to emphasize, section 41 of the *Employment Act*, 2007 prescribes the procedural precepts to be complied with before terminating the employment of an employee or summary dismissal and as underscored in *Pius Machafu Isindu v Lavington Security Guards Ltd (supra)*, the procedure is mandatory.

65. In *Postal Corporation of Kenya v Andrew K. Tanui* (2019) eKLR, the Court of Appeal explained the requirements of section 41 of the Act as follows;

“Four elements must 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 are made;
- iv. hearing and considering any representations made by the employee and the person chosen by the employee.”

66. Applying these principles to the facts of the instance case, it is clear that the Respondent did not comply with the provisions of section 41 of the *Employment Act*.

67. Other than the termination letter dated November 25, 2017, there is no scintilla of evidence to demonstrate that the Claimant was accorded an opportunity to rebut the allegations made against her or was heard in the presence of another employee of her choice and any representations made were considered by the Respondents.

68. The fact that the letter of termination makes reference to several verbal warnings does not ameliorate the Respondent's case as no evidence was availed to buttress the allegation.

69. In a nutshell, the Claimant's employment was terminated without compliance with the requirements of section 41 of the *Employment Act*, and was thus procedurally unfair and the court so finds.

Reliefs

70. Having found that termination of the Claimant's employment was unfair, I will now proceed to examine the appropriate reliefs due to her.

- i. A declaration that termination of the Claimant's employment was unlawful is hereby issued.
- ii. One month's salary in lieu of notice

71. Contrary to the Claimant's counsel's submissions that the Claimant is entitled to pay in lieu of notice, records show that the claimant was paid the salary for November 2017 and an additional one month salary as pay in lieu of notice; a total of Kshs.23,040/=.

The prayer is declined.



(iii) 15 days severance dues

72. The Claimant provided no evidence to demonstrate that she was declared redundant. Her allegation that on December 1, 2017, the employer told her that she had gotten another cook and her services were no longer needed is inconsistent with paragraph 4 of the witness statement which identifies her duties as house cleaning, ironing and washing utensils, a fact confirmed by the Respondents. In addition, the Claimant did not allege that she was a cook as well.
73. In the absence of evidence that the Claimant was declared redundant, the prayer for severance pay is unsustainable and is dismissed.

(iv) Leave allowance outstanding for 2 years

74. Instructively, the Claimant served the Respondent for a duration of 1 years and 7 months as opposed to 2 years.
75. Her statement makes no allegation as to why she did not proceed on leave which is a statutory right and has not alleged the requests to proceed on leave were rejected. On the contrary, records show that she proceeded on off days on request in 2017. However, in the absence of evidence that the Claimant proceeded on leave, an obligation cast upon the Respondents by law, the Claimant's prayer for leave pay is sustainable but only to a limited extent.
76. The court is not persuaded that the Claimant did not proceed on leave for a single day for the duration she worked for the Respondent. A blanket claim for untaken leave days for the entire duration sounds more improbable than probable to the court.
77. Consequently, the Claimant is awarded leave allowance for the actual outstanding leave, if any, and not for 2 years as claimed which is obviously not sustainable.

(v) Public holidays

78. Neither the Statement of Claim nor the witness statement provide the relevant particulars of the public holidays involved and from when. An attempt to do through the submissions could not salvage the prayer.
79. But more significantly, the Respondents' response explains that the claimant only worked during public holidays on her own volition and the days were encashed and payment made.
- The prayer is declined.

(vi) Overtime

80. The Claimant alleged that she worked from 7 a.m to 10.00 pm on weekdays and upto 4.00 pm on Saturdays. The Respondents on the other hand stated that the Claimant worked from 7 a.m to 4 pm and had one hour for lunch and dishes used for dinner were cleaned the following morning. The Claimant did not allege that she was the cook or took care of young children.
81. Weighing the Claimant's evidence against the Respondents, the court is persuaded that the Respondents allegations appear more probable than the blanket prayer made by the Claimant for 20 months.
- The prayer for overtime is unproven and is declined.



(vii) Refund of NHIF and NSSF

82. The Claimant led no evidence that statutory deductions were made but not remitted to the relevant statutory bodies.
83. On the other hand, the Respondent admitted that during the period the Claimant was not a member of the NSSF, the same was paid as part of her salary. This evidence is uncontroverted.
84. With regard to NHIF contributions, documents filed by the Respondents show that the claimant joined on April 15, 2016 and had been making contributions until August 2017 when the Respondents commenced payments.
85. In the absence of evidence to show that deductions were actually made but not remitted, the prayer is unsustainable and is declined.

(viii) 12 months salary compensation

86. Having found that termination of the claimant's employment by the respondent was unfair, the Claimant is entitled to compensation pursuant to the provisions of section 49(1)(c) of the Employment Act subject to the guidelines set out in section 49(4) of the Act which require the court to take certain factors into consideration in determining the quantum of compensation.
87. In this case, the court has taken into consideration the fact that;
- i. The Claimant was an employee of the Respondent for a duration of about 1 year, 7 months and wished to continue in employment.
 - ii. The termination letter dated November 25, 2017 makes reference to several verbal warnings and accuses the Claimant of non-performance and lack of diligence. On the face of it, the Claimant contributed to the termination of her employment.
 - iii. The Claimant did not appeal the decision made by the Respondents.
88. In the circumstances, the court is satisfied that the equivalent of four (4) month's salary is fair, Kshs.52,000/=.
89. In the final analysis, judgement is entered for the Claimant against the Respondent in the following terms;
- a. Leave allowance for outstanding leave days, if any.
 - b. Equivalent of 4 month's salary.
 - c. Costs of this suit.
 - d. Interest at court rates from the date hereof till payment in full.
90. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 26TH 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 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 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

