



**Nyagwachi v Mimosa Pharmacy Limited (Cause 1286 of 2013)  
[2022] KEELRC 12925 (KLR) (21 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12925 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1286 OF 2013  
MA ONYANGO, J  
OCTOBER 21, 2022**

**BETWEEN**

**MARK GITENGA NYAGWACHI ..... CLAIMANT**

**AND**

**MIMOSA PHARMACY LIMITED ..... RESPONDENT**

**JUDGMENT**

1. *Vide* his memorandum of claim dated and filed in court on August 13, 2013, the claimant avers that his employment was wrongfully and unlawfully terminated by the respondent, who he further claims failed and/or ignored to pay his terminal benefits.
2. His case is that he was employed by the respondent on or about November 7, 2007 in the capacity of guard earning a monthly salary of Kshs 17,000/-.
3. The claimant averred that he performed his duties diligently and to the respondent's satisfaction and as a result he was enrolled for a driving school course as a rider. That upon successful completion of the course the respondent hired him as a rider on part time basis in addition to his guarding duties. He avers that in the year 2013 he was served with a notice to show cause in which he was accused of insubordination and absenteeism, allegations he vehemently denied.
4. That the respondent proceeded to terminate the claimant's employment on November 5, 2013 *vide* the respondent's letter of the same date in which the respondent cites insubordination and absenteeism as the reasons for termination.
5. The claimant maintained that his termination was unlawful, unfair and un-procedural for failure on the part of the respondent to comply with the provisions of the *Employment Act*, 2007 on termination.
6. In the claim dated August 13, 2013, the claimant seeks the following reliefs:
  - a. The sum of Kshs 1,248,425/- as itemised bellow:-



i. NSSF balance Kshs 3,600

ii. House Allowance

$$\left( \frac{15}{100} \times 17,000 \times \frac{58}{12} \right) \text{Kshs } 12,325$$

iii. Rest days  $(17,000 \times 15 \times \frac{58}{12})$  .....Kshs 1,232,500

Total Kshs 1,248,425

- b. Compensation.
- c. Costs of this suit
- d. Interest on (a) above
- e. Any other relief as the court may deem fit.
7. In response to the claim the respondent filed a memorandum of reply dated September 12, 2013 in which it admits that it engaged the claimant as stated in the memorandum of claim. It however maintained that his employment was effective May 1, 2008 as evidenced by the letter of appointment (DEx. 1).
8. The respondent avers that the claimant was summarily dismissed for gross misconduct being that he persistently absented himself from duty in the years 2012 and 2013 that led to the periodic loss of medical supplies.
9. It avers that it acted in accordance with the provisions of section 44 (1), (3) and (4) of the Employment Act, 2007 as read with the respondent's regulations as elaborately set out in the claimant's letter of appointment dated May 1, 2008.
10. The respondent states that the claimant was paid all his terminal dues at the time of his summary dismissal totalling to Kshs 20,966.66/- being one month's salary in lieu of notice, days worked in February 2013 and accrued leave days. It maintained that the claimant has no claim against it having acknowledged payment and signed a discharge voucher to that effect.
11. The respondent contended that the claimant is not entitled to any compensation as prayed in his memorandum of claim and therefore urged this court to dismiss the same with costs to the respondent.
12. At the hearing of the case the claimant testified on his behalf while the respondent called one witness. The parties thereafter filed and exchanged written submissions.

### Submissions By The Parties

13. The claimant submits that his employment was unfairly and unlawfully terminated for no reason and he was not accorded a fair hearing. He further maintained that no hearing was conducted by the respondent to ascertain any allegations levelled against him contrary to the provisions of the law. To buttress this argument the claimant relied on the decision in the case of Kenfreight (EA) Limited v Benson K Nguti (2016) eKLR on fair termination.
14. The claimant submits that no internal mechanisms were put in place by the respondent to investigate the allegations of insubordination, absenteeism and loss occasioned to the respondent as alleged. The



claimant argues that the reasons given were an afterthought. To fortify this argument the claimant cites the case of *Peter Kamau Mwaura & Another v National Bank of Kenya* (2020) eKLR where the court found that the termination was unfair for want of fair procedure as provided under section 41 of the *Employment Act, 2007*.

15. It is on this basis that the claimant maintained that he is entitled to the reliefs sought in his claim. He sought for maximum compensation for his unlawful and unfair termination relying on the provisions of section 49(1)(c) of the *Employment Act, 2007* as well as costs of the suit and interest.
16. The claimant urged this court to find merit in his claim and allow it as prayed.

### **Respondent's Submissions**

17. The respondent on the other hand submitted that the claimant's termination was fair and was occasioned by a valid reason as required under the provisions of sections 43 and 44 of the *Employment Act, 2007*. To buttress this argument the respondent relied on the Court of Appeal decision in the case of *Judicial Service Commission v Gladys Boss Shollei & Another* (2014 eKLR and *Evans Kamadi Misango v Barclays Bank of Kenya Limited* (2015) eKLR where the courts emphasised the need for the respondent's compliance with the provisions of section 43 of the *Employment Act, 2007*.
18. The respondent further submitted that the claimant's abandoning of his duties was tantamount to gross misconduct contrary to the respondent's rules and regulations and as such his summary dismissal was lawful by dint of the provisions of section 44(3) of the *Employment Act, 2007*. For emphasis the respondent relied on the Court of Appeal decision in the case of *Rodgers Titus Wasike v General Motors East Africa Limited* (2020) eKLR.
19. The respondent submits that it substantively complied with the procedural requirements as stipulated under section 41 of the *Employment Act, 2007* thus the termination was valid and fair. To fortify this argument the respondent relied on the findings in the case of *Kenya Ports Authority v Fadhil Juma Kisuwu* (2017) eKLR on procedural fairness in termination of an employment contract.
20. The respondent further urged this court to be guided by the Court of Appeal decision in the case of *Coastal Bottlers Limited v Kimathi Mitbika* (2018) eKLR and to enforce the discharge voucher signed by the claimant. Further reference was made to the case of *Victor Ochieng Okola v William (K) Limited* (2020) eKLR.
21. The respondent further urged this court to find that there was no basis for the claim herein the claimant having voluntarily signed a discharge voucher confirming that he had no further claim against the respondent. For emphasis the Respondent relied on the cases of *John Karanja Muiruki v Njuca Consolidated Company Limited* (2018) eKLR, *Jane Vuligwa v Good Earth (Group) Limited* (2021) eKLR, *Ephraim Gaitbo Githongori v Timaflor Limited* (2018) eKLR and *Frank Kibegwa Omboga v G4S Kenya Limited* (2020) eKLR on the admissibility of a signed discharge voucher.
22. In conclusion the respondent urged this court to find that the claimant's termination was lawful, fair, just and met the acceptable standards as set out in the *Employment Act, 2007* and as such should dismiss the claim in its entirety with costs to the respondent.

### **Analysis and Determination**

23. Having considered the facts of this cause, evidence, submissions and authorities cited by the parties, the issues for determination are the following:



- i. Whether the termination of the claimant's employment was valid both procedurally and substantively;
- ii. Whether the claimant is entitled to the reliefs sought.

### **Was The Claimant's Employment Unfairly Terminated?**

24. The reason cited for terminating the claimants' employment was long absence from his duty post, which led to loss of products at the respondent's premises as he (the claimant) was expected to keep watch of the premises at all times. The claimant's letter of summary dismissal dated February 5, 2013 reads as follows: -

"February 5, 2013

Mark Gitenga Nyagwachi

Box 1852 - 00621

Nairobi

Dear Mark,

RE: TERMINATION OF EMPLOYMENT

From time to time, we have received complaints about your whereabouts and no one seems to know where you go during working hours. When asked to explain the situation, you were quick to blame other staff for sending you, but admitted that you sometimes leave for errands without informing your branch manager which amounts to insubordination.

We have reviewed your statement and found it to be unacceptable because it does not explain your long absence from the branch. This not only interferes with the pharmacy operations like urgent procurement and delivery of medicines to patients, but also poses a threat to the business where you are not there to monitor the activities of customers in the shop or secure the goods receipt process by suppliers.

The breach of security has resulted in several losses of products in the pharmacy and the recent stock taking exercise shows that Westgate has the highest variance in the company. In order to implement effective systems and controls to safeguard our business, we at Mimosa pharmacy have adopted a zero tolerance on inefficiency and lack of integrity of our staff.

For these reasons therefore, we have no option but to terminate your services with the company and hereby give you one months' notice in accordance with your contract of service. However you will not be expected to serve your notice period but released immediately. All the dues including days worked in February and any accrued leave will be paid to you by the finance manager once your personal account with the company has been sorted out. Please arrange to hand over all personal property under your care to the branch manager by close of business today.

On behalf of Mimosa pharmacy, I thank you for having worked with us and wish you all the best in your future endeavours.

Yours sincerely,

(Signed)

Chris Getonga



Managing Director”

25. In his pleadings and evidence the claimant denied any wrong doing as alleged maintaining that the respondent failed to follow due process. He further maintained that his alleged absence from his duty post was occasioned by the fact that his colleagues kept sending him on errands. He further contended that he was also sent on errands by the respondent.
26. The respondent on the other maintained that it rightfully, lawfully and with just cause terminated the claimant’s employment following receipt of complaints on his whereabouts during working hours. It further maintained that the claimant’s actions were tantamount to insubordination and exposed the respondent to the risk of loss in the business as he was not available to monitor the activities of the respondent’s customers.
27. The letter of termination refers to long absence by the claimant and breach of security that led to losses. The losses are not specified in the letter of termination nor was the same specified during the hearing.
28. There was no explanation how the claimant’s absence from the premises led to loss of stock as he was not dealing with stock. The claimant explained that he was sent to buy snacks for other staff and milk for the office. None of the people whom the claimant named were called as witness either by the respondent before terminating the claimant’s employment or to testify in court.
29. I therefore find that there was no valid reason for termination of the claimant’s employment.

#### **Procedure Followed**

30. The procedure to be followed before termination of employment is provided under section 41 of the *Employment Act*, 2007. Before an employee is terminated on grounds of gross misconduct or poor performance, he ought to be given an opportunity to present his case.
31. No evidence was availed to this court to prove that the claimant had been accorded a hearing prior to the termination of his employment. The claimant testified that he was called and issued with the letter of termination. Although the respondent’s witness stated the claimant was called and given reasons for termination, no evidence was adduced of a disciplinary hearing as required under section 41 of the Act. In the circumstances, I find that the respondent has failed to prove that a fair procedure was followed before termination of the claimant’s employment on account of gross misconduct contrary to the mandatory provisions of section 41 of the *Employment Act*, 2007.
32. For these reasons, I find the termination of the claimant’s employment was both substantively and procedurally flawed unfair in terms of section 45(2) of the *Employment Act*, 2007.

#### **What Reliefs Is The Claimant Entitled To**

33. The claimant prays for payment of his terminal dues arising out of his employment contract with the respondent. The respondent however contends that the claimant signed a settlement agreement in the form of a discharge voucher and as such he is not entitled to any further relief.
34. The Court of Appeal in its decision in the case of *Thomas De La Rue (K) Ltd v David Opondo Omutelema* (2013) eKLR held that:

“We would agree with the trial court that a discharge voucher per se does not absolve an employer from statutory obligation and that it cannot preclude the industrial court from enquiring into the fairness of a termination. That is however, as far as we are prepared to go. The court has in each and every case to make a determination, if the issue is raised, whether



the discharge voucher was freely and willingly executed when the employee was seized of all the relevant information and knowledge”.

35. Again in the Court of Appeal decision in *Coastal Bottlers Limited v Kimathi Mithika* (supra) the court held that:-

“Whether or not a settlement agreement or discharge voucher bars a party thereto from making further claim depends on the circumstances of each case. A court faced with such an issue, in our view, should address its mind firstly upon the import of such a discharge/ agreement; and secondly whether the same was voluntarily executed by the concerned parties”

36. In the instant case the claimant was only asked during cross examination if was paid terminal dues. The issue whether or not the termination was unfair was not the subject of the alleged discharge. The respondent did not put any questions to the claimant on the circumstances under which he signed the discharge. Further, the claimant testified that he was under the impression that he was signing for his salary. I find that the discharge signed by the claimant only related to terminal dues itemized therein and not anything outside the list.

37. Having found the termination unfair, the claimant is entitled to compensation. In view of the claimant’s length of service of about six years, the manner in which his employment was terminated and taking into account all relevant factors under section 49(4) of the *Employment Act*, I award the claimant compensation equivalent to six months’ salary in the sum of Kshs 102,000/-.

38. The claimant is not entitled to NSSF as he did not prove the prayer. In any event he would not be entitled to receive the same. The claimant is advised to report any gaps in his NSSF contributions to the fund to follow up with the respondent in accordance with the provisions of the *NSSF Act*.

39. On the prayer for house allowance, the claimant’s letter of appointment states that the salary is a monthly gross rate, meaning that it includes allowances. The claimant did not demonstrate that the salary is lower than the gazetted minimum rates of pay plus 15% house allowance. The prayer has therefore not been proved and is dismissed.

40. On the prayer for rest days, the claimant did not prove that he is owed any by the respondent. Evidence on record shows that the claimant was given one rest day every week.

### **Conclusion**

41. In conclusion, I award the claimant the sum of Kshs 102,000/- as compensation.

42. The claimant will have costs of the suit and interest shall accrue at court rates from date of judgment.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 21<sup>ST</sup> DAY OF OCTOBER 2022**

**MAUREEN ONYANGO**

**JUDGE**

