



REPUBLIC OF KENYA



KENYA LAW
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**Juma v Kool Company Limited (Employment and Labour Relations Cause
13 of 2017) [2022] KEELRC 12865 (KLR) (6 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12865 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS CAUSE 13 OF 2017**

JW KELI, J

OCTOBER 6, 2022

BETWEEN

ROBERT MUKHWANA JUMA CLAIMANT

AND

KOOL COMPANY LIMITED RESPONDENT

JUDGMENT

1. The claimant filed claim by way of plaint dated July 17, 2017 against the respondent on grounds of wrongful and unlawful dismissal seeking payment of general and special damages and:-
 - a. Three months' salary in lieu of notice
 - b. Leave allowances
 - c. House and medical allowance
 - d. Unpaid overtime allowance for 14 months
 - e. Terminal benefits and severance pay for the period of twenty years
 - f. All unclaimed dues including half pay during the period of suspension
 - g. Legal charge of Kshs. 8000/-.
 - h. costs and interest
2. Together with the plaint the claimant filed verifying affidavit, claimant's witness statement, list of documents of even date together the bundle of documents.
3. The Claim is opposed. The respondent filed a letter dated July 26, 2017 and received in court on August 16, 2017 in response to the plaint addressed to the deputy registrar wherein their response to the claim is stated. The respondent filed receipt of kshs 22,770/- by J S Khakula & Company Advocates. The



respondent later appointed an advocate who filed notice of appointment of advocates dated May 28, 2019 and received in court on even date.

4. The claimant applied same *modus operandi* and filed a letter in response on August 25, 2017 in reply to the response.

Claimant's evidence

5. The matter was heard on June 30, 2022 with the claimant giving sworn testimony as a witness of fact in his case. The claimant told the court he was 43 years old. That he was a professional journalist and not in employment. That he had sued Radio Mambo under Kool communications ltd. That he was employed in 2006 and dismissed from service in 2017 without notice and without payment. He says his rights were violated by employer. He prayed for compensation. The claimant had filed with his claim letter of appointment dated June 16, 2006, certificate of service dated June 20, 2017, and demand letter dated June 20, 2017 by J S Khakula & Company Advocates. The claimant also filed leave application form for 2015.
6. During cross-examination the claimant told the court he was employed in 2006 and relied on his appointment letter. That when employed the respondent was known as Chetabe FM which became Radio Mambo who issued them with letters. The claimant told the court he was not paid terminal benefits on dismissal. The claimant confirmed he engaged J.S- Khakula advocates for demand letter and ended the engagement. The claimant denied payment of kshs 22,770 through J S Khakula Advocates and denied knowledge of money having been deposited with the law firm. The claimant denied having absconded duty close to 2 months prior to dismissal. The claimant denied having switched off his phone. The claimant told the court he was employed as a news anchor. The claimant confirmed his employment letter stated that he was employed as a reporter. The claimant confirmed he was aware that the respondent stated so in their defence.
7. In rejoinder the claimant stated that he had not issued instructions for his lawyers to receive his payment and asked for payment of the 3 months notice as he did not receive the money. The claimant told the court that he received his certificate of service.

Defence case

8. The defence hearing was scheduled for July 12, 2022. On that day Mr Wamalwa advocate for the respondent informed the court that the person who wrote the letter of defence was no longer a shareholder. That there had been significant changes in ownership of the respondent's radio. That the respondent will not call any witness and would rely on the document filed on August 16th August 2017 and the annexure. The defence closed.
9. After the hearing the court directed the parties to file and exchange written submissions in 14 days. Only the respondent filed written submissions dated July 25, 2022.

Determination.

Issues for determination

10. The court taking into consideration the evidence of the claimant and the respondent's pleadings is of the considered opinion the outstanding issues for its determination are as follows:-
 - i. Whether there was unfair termination of employment of the claimant.
 - ii. Whether the claimant is entitled to reliefs sought.



Issue 1

Whether there was unfair termination of employment of the claimant

The relevant law

11. Section 43 of the [Employment Act](#) addresses proof of reasons for termination of employment as follows:-
 - “(a) in any claim arising out of termination of contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
 - (b) The reasons or reasons for termination of contract are the matters that the employer at the time of termination of the contract genuinely believe to exist and which caused the employer to terminate the services of the employee.”
12. Section 44 (4) of the [Employment Act](#) provides for justifiable and lawful grounds for dismissal from employment, *inter alia* to be if:-
 - “a Without leave or other lawful cause, an employee absents himself from the place appointed for the performance of work,
 - c an employee willfully neglects to perform any work which it was his duty to perform or if he carelessly and improperly performs any work which was his duty under his contract to have performed.....”
13. Section 45 (2) of the [Employment Act](#) provides that a termination of employment by an employer is unfair if the employer fails to prove:-

The reason for the termination is a fair reason:-

 - a Related to the employees conduct, capacity or compatibility or
 - b Based on the operational requirements of the employer.
14. Section 46 of the [Employment Act](#) provides for reasons that do not constitute fair reasons for dismissal.
15. Section 47(5) of the [Employment Act](#) provides for burden of proof in claims for wrongful dismissal as follows:-
 - “5 For any complaint of unfair termination of Employment or wrongful dismissal the burden of proving that unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds of the termination of employment or wrongful dismissal shall rest on the employer.”
16. Thus, the obligation of the employee is discharged upon proving wrongful dismissal has occurred and the burden then shifts to justify the grounds of termination.
17. Section 41 of the [Employment Act](#) provides for procedural fairness as follows:- ‘41. (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.”

The claimant’s case

18. The claimant’s case was that on June 4, 2017 he was without justifiable cause fired by his immediate boss via phone text message. That the dismissal was wrongful and unfair.

The respondent’s case

19. The respondent did not produce evidence in court and its case was closed. In their written response dated Junly 26, 2017 which the advocate indicated they rely on , at paragraph one it is written :-‘as per the plaint we confirm that we know the plaintiff Robert Mukwana Juma as our former employee who was earning a net salary of kshs, 7, 590 until his dismissal on June 4, 2017 through a phone message”(emphasis given)

Determination on the issue of unfair termination

20. It is not in dispute that the claimant was an employee of the respondent and was terminated from service via a text message on June 4, 2017. The burden of proof was on the claimant to demonstrate he was unlawfully dismissed from employment and after which the burden shifted to the employer to justify the dismissal consistent with provisions of section 47(5) of the *Employment Act*. The respondent submits that the claimant has a generalized allegation of alleged unfair termination. To buttress its case the respondent relies on the decision of Justice Marete in *Protus Wanjala Mutike v Anglo African Properties t/a Jambo Mutara Lodge Laikipia* (2021)eKLR.
21. The court finds that in Protus Wanjala Mutike decision the court found there was no termination of employment hence the authority is not relevant to the instant case where it was not in dispute the claimant was dismissed from employment vide a text message.
22. The court finds and determines that that the claimant has discharged his burden under section 47(5) of the *Employment Act* to wit:- “(5) For any complaint of unfair termination of Employment or wrongful dismissal the burden of proving that unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds of the termination of employment or wrongful dismissal shall rest on the employer.”
23. The court further finds that the evidence of the claimant was not controverted at cross examination and the respondent did not justify the termination. The claimant case was he was sacked vide text message without justified cause. The respondent admitted that position in paragraph 1 of its defence letter. The burden then shifted to the respondent to justify the dismissal by the text message. The respondent did not discharge its burden by way of evidence and the Claimant’s case of unfair dismissal was thus unchallenged.
24. Further the court finds and determines the dismissal did not meet the requirements of section 41 of the *Employment Act*(*supra*) as the employee was not given a hearing as contemplated by the law before termination of employment. The provisions of section 41 of the *Employment Act* are couched in mandatory terms and must be complied with for the termination of employment process to pass muster.
25. The court finds and determines the dismissal of the claimant from employment was wrongful and unfair.



Issue 2:

Where Whether the claimant is entitled to reliefs sought

Prayer for general damages.

26. The court having found wrongful and unfair termination which was done casually vide text message, the claimant having no fault and having not been heard before the dismissal the court awards maximum compensation of 12 months salary under section 49(1)(c) of the *Employment Act* at the salary of kshs 8, 500/- as stated in the respondent's letter paragraph 3(c).
27. The court awards compensation for wrongful and unfair dismissal from employment to the claimant to the sum of kshs 102,000/-

Prayer for three months notice.

28. The respondent produced evidence of payment of 3 months notice pay to J S Khakula Advocates instructed by the claimant. It was not in dispute that the said payment was done pursuant to instructions to J S Khakula Advocates by claimant to write a demand letter. The court finds on balance of probabilities that the said 3 month notice pay was paid to the said advocates instructed by the claimant. The advocates ought to have remitted the money to the client. The court then finds and determines that the said money having been paid to the claimant's advocates, it would be double punishment to order payment of notice pay. The claim is rejected. The claimant ought to pursue his notice pay with the said law firm.

Claim for leave allowances

29. The claimant's letter of appointment does not provide for leave allowance. The claim is disallowed.

Claim for house and medical allowance,

30. The claimant did not lay basis of the claim in his pleadings. The respondent pleaded he was paid a consolidated salary of kshs 8, 500 hence not entitled to claim for payment of housing allowance. Section 107 of the *Evidence Act* provides: whoever desires any court to give a judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exist. There is no prove of the basis of the claim for housing allowance in the instant case where consolidated salary was paid.
31. Medical allowance is not a legal right unless provided for under contract of employment. The statutory obligation of an employer is to cater for medical provision when an employee is ill as provided for under section 34(1) to wit, 'Subject to subsection (2), an employer shall ensure the provision sufficient and of proper medicine for his employees during illness and if possible, medical attendance during serious illness'.
32. The claims for housing and medical allowances are disallowed.
Claim for unpaid overtime allowances for 14 months, all unclaimed dues including half pay during the period of suspension and claim for legal charges of kshs 8000/-.
33. The court finds the above three claims to be in the nature of special damages thus requiring strict proof. Applying the provisions of section 107 of the *Evidence Act*. I find the claim not proved and the same is disallowed.



Terminal benefits /service pay

34. Section 35(5) of the [Employment Act](#) provides:-‘An employee whose contract of service has been terminated under subsection (1) (c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.’
35. The claimant seeks payment of service pay for the 20 period of 20 years worked. The claimant during cross examination confirmed he was employed on June 16, 2006 and dismissed from employment on June 4, 2017. Mathematically those are 11 years worked as submitted by the respondent. The court did not find evidence of pension scheme or even NSSF deductions. The claimant was left exposed for lack of social security. The court awards service pay as part of terminal benefits for the claimant for 11 years of service at 15 days for every year worked thus $15/30 \times 8500 \times 11$ total award of kshs 46,750/- The claimant is awarded service pay of kshs 46,750/- for the 11 years worked.

Conclusion and disposition

36. The court determines that the termination of the employment service of the claimant by the respondent was wrongful and unfair issues judgment for the claimant against the respondent as follows:-
- a. Award of compensation for wrongful and unlawful at the equivalent of 12 months gross salary of kshs 8500/- thus kshs 102,000/-.
 - b. Award of service pay for 11 years worked at 15 days for every year total sum of kshs 46,750/- (statutory deductions apply to (a) and (b) above).
 - c. Interest awarded at court rates from date of judgment until payment in full.
 - d. Each party to bear own costs.
37. It is so ordered.

DATED, SIGNED & DELIVERED IN OPEN COURT AT BUNGOMA THIS 6TH OCTOBER, 2022.

J W KELI,

JUDGE.

In The Presence Of:-

Court assistant : Brenda Wesonga.

Claimant:- Mr Juma in person.

Respondent: Onyando holding brief for H P Wamalwa Advocate

Stay of 30 days of judgment is granted.

J W KELI,

JUDGE.

