



**Musine v Holt (Cause 2244 of 2016) [2022] KEELRC 4874 (KLR) (3 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4874 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE 2244 OF 2016**  
**JK GAKERI, J**  
**OCTOBER 3, 2022**

**BETWEEN**

**JANE ATSENGA MUSINE ..... CLAIMANT**

**AND**

**LYNDA HOLT ..... RESPONDENT**

**JUDGMENT**

1. The Claimant commenced this suit by a Memorandum of Claim filed on November 2, 2018 alleging wrongful and unfair termination and failure to pay terminal benefits.

**Claimant's case**

2. The claimant avers that she was employed by the respondent on 1<sup>st</sup> June, 2010 as a domestic worker at Kshs.15,000/= per month under a written contract and served diligently until June, 2016 when her services were terminated without notice.
3. The Claimant prays for;
  - i. One month's pay in lieu of notice Kshs. 15,000.00
  - ii. Leave pay for 2015 Kshs. 10,500.00
  - iii. House Allowance Kshs. 81,000.00
  - iv. Service pay Kshs. 45,000.00
  - v. 12 month's salary compensation Kshs.180,000.00  
Total Kshs.331,500.00
  - vi. Costs of this suit
  - vii. Interest.



## **Respondent's case**

4. In her Memorandum of Response and counter-claim, the respondent avers that she employed the claimant on June 1, 2010 at Kshs.10,000/= per month and Kshs.500 as phone allowance and an annual increment of Kshs.1,000/=
5. The respondent avers that in May, 2015, she gave the claimant a one (1) months' notice as she was relocating to a smaller house. That following the death of the respondent's husband, the respondent and the claimant entered into an oral agreement that the claimant would work as a casual labourer twice a week at Kshs.1,000/= per day and the claimant did so from January, 2016 to June, 2016.
6. It is the respondent's case that after transition of the claimant's employment from permanent to casual, the claimant was paid a salary of Kshs.15,000/= in lieu of the daily pay of Kshs.1,000/= for a period of 7 months to cover service pay and thereafter she was paid Kshs.1,000/= per day for the two days she worked per week.
7. That the respondent recommended the claimant as a casual labourer to other persons for other days of the week as follows;
  - i. Respondent's home - Monday and Fridays
  - ii. Respondent's son & girlfriend - ones a week Tuesdays and Thursdays
  - iii. Respondent's Sister Sarah - Wednesday and Saturday.
8. That the respondent advanced a loan to the claimant to pay for her daughter's school fees deductible from the claimant's salary and a balance of Kshs.18,000/= was outstanding.
9. That the claimant took three month's leave which cleared all the outstanding leave days from 2015.
10. The respondent further avers that she gave the claimant a verbal termination notice in early June 2016 in the presence of a witness.
11. That the claimant voluntarily and willingly chose to terminate her engagement.
12. That as at the date of termination, the claimant was a casual labourer.
13. The respondent denies owing the claimant the amount claimed.

## **Counter Claim**

14. The respondent avers that the claimant is yet to repay the sum of Kshs.18,000/= owed to the respondent.
15. The respondent prays for judgement against the claimant for Kshs.18,000/= with costs.
16. In reply to the memorandum of reply and counter-claim, the claimant reiterates the contents of the memorandum of claim on the duration and nature of employment from 1<sup>st</sup> June 2010 to June 30, 2016.
17. That she worked for the respondent's relatives at the respondent's behest.
18. The claimant admits having received a loan of Kshs.50,000/= and had paid Kshs.32,000/= as at the date of termination. Thus admitting that Kshs.18,000/= is still owing.



### **Claimant's evidence**

19. In her written statement, the claimant states that on the day her employment was terminated by the respondent, she had gone to the respondent's sister house where she had been requested to take the respondent's sister's child to the respondent's house and was late in reporting to the respondent's house for work and was told to go away but was paid the month's salary.
20. On cross-examination, the claimant confirmed that she was not a resident employee. She used to report in the morning and leave after work.
21. The witness admitted having been told by the respondent that she would be moving to a smaller house and would continue working for her on all days.
22. That although she did work at Joseph's and Sarah's houses, the respondent paid the salary.
23. The witness stated that from January 2016, she worked at different places but the respondent paid her salary.
24. The witness admitted that the loan advanced to her had not been paid in full by the time she left employment.
25. On re-examination, the witness stated that she was not paid house allowance, was not given housing and did not proceed on leave at all. That neither Joseph nor Sarah paid for the services rendered and was not invited for a hearing.

### **Respondent's evidence**

26. RWI, Lynda Holt, confirmed that she had given a termination notice in May 2015 but had no copy. That she neither paid NSSF nor NHIF contributions on behalf of the claimant. It was her testimony that from October 2015 to March 2016, the claimant's salary was Kshs.15,000/= per month.
27. It was her testimony that she terminated the claimant's employment in May 2015. That the claimant left the respondent's house voluntarily and was paid for the month of May.
28. On re-examination, the witness testified that the claimant was paid up to September 2015, but did not work in July, August and September but was paid as she was on leave at Kshs.15,000/= per month.
29. That from October 2015 to March 2016, the claimant worked for two days a week for the respondent, Joseph and Sarah at Kshs.1,000/= per day.
30. The witness testified that in June 2016, the alleged date of termination, the claimant was to clean the respondent's house at 10.00 am but arrived late at 12 noon and when questioned about it in the presence of RWII, she got annoyed, picked her bag and left.
31. RWII, Joe Holt confirmed on cross-examination that she saw the claimant at the respondent's house on the material day. He testified that the claimant used to work for him as a casual twice a week and paid in cash or Mpesa.
32. The witness testified that in June 2016, he was at the mother's house (respondent) when the claimant stated that she would not work for her anymore and left.



### Claimant's submissions

33. The claimant's counsel identifies several issues for determination including whether the claimant was an employee of the respondent, breach of contract of employment by the respondent, settlement of the outstanding loan, costs and interest.
34. The first issue is uncontested and nothing turns on it.
35. As to whether the respondent breached the contract of employment, counsel relies on section 31 of the *Employment Act* to urge that the claimant was not paid house allowance and was thus entitled to Kshs.81,000/= for 36 months from May 2013 to June 2016.
36. That the claimant had unspent leave in 2015 and was not paid service pay as the respondent did not pay NSSF contributions.
37. The decisions in *Martin Ireri Ndwiga v Olerai Management Company* (2017) eKLR and *Mwende Mbiti v Citrus in Ltd* (2018) eKLR are relied upon to urge that the claimant is entitled to housing allowance, outstanding leave days and service pay.
38. As regards unlawful termination of employment, reliance is made on the provisions of Article 47 of *the Constitution* of Kenya, 2010 and section 4(1), (3)(f) and (g) of the *Fair Administrative Actions Act*.
39. Further reliance is made on the provisions of section 44(4)(c) of the *Employment Act* to urge that summary dismissal of an employee must be in compliance with the law.
40. The decision in *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR is relied upon to submit that termination of employment must be substantively justifiable and procedurally fair.
41. On procedural fairness, reliance is made on the decision in *Alphonse Mghanga Mwachanya v Operation 680 Ltd* (2013) eKLR. It is urged that termination of the claimant's employment was procedurally unfair.
42. As regards the outstanding loan, it is urged that since the claimant admits that the sum of Kshs.18,000/= is owing, the same be set off against the amount awarded by the court.
43. Finally, the provisions of section 26 and 27 of the *Civil Procedure Act* and case law are relied upon to urge that the claimant is entitled to interest and costs of this suit.

### Respondent's submissions

44. The respondent submits that since the letter dated 30<sup>th</sup> July, 2010 does not have the claimant's signature or thumb or finger imprint on it as provided by section 9(3) of the *Employment Act*, the same cannot be regarded as a contract and the two persons had an oral contract of employment. The respondent did not contest this letter or disown it. RWI admitted that the claimant had a written document as evidence of their contract.
45. It is submitted that between July 2010 and May 2015, the claimant's salary was Kshs.10,000/= per month and rose by kshs.1,000/= annually and she took annual leave.
46. As regards housing, it is submitted that the same was offered but the claimant declined and thus accepted a consolidated salary.
47. It is further submitted that the respondent gave a valid reason for terminating the claimant's employment as she was moving to a smaller house and subsequently, the claimant worked as a casual employee, a fact confirmed by Joe Holt, RWII.



48. The respondent, further submits that in June 2016, no termination of employment took place as the claimant left the respondent's house voluntarily and did not return.
49. As to the claimant's entitlement to the reliefs prayed for, the respondent urges that the claimant is not entitled to notice pay as notice was given in May 2015 and she worked in June 2015 and was thereafter a casual employee until she left in June 2016.
50. As regards leave pay, it is submitted that the claimant did not work in July, August and September but was paid to cover for the accrued leave days and is thus not entitled to leave pay.
51. As regards housing allowance, it is urged that the claimant elected not to take up residence when it was offered by the respondent.
52. On service pay, it is submitted that from October 2015 to June 2016, the claimant was working for 2 days in a week but was paid Kshs.15,000/= per month as part of service pay and was thus paid Kshs.42,000/= in 6 months, having been terminated from employment in May 2015.
53. On compensation, it is submitted that the claimant resigned from employment and does not fall within the circumstances contemplated by section 49 of the Employment Act and the remedies provided there under are discretionary.
54. Finally, the respondent submits that the claimant's action is actuated by malice and greed for money with a view unjustly enrich herself. Reliance is made on the decision in Scholar Katuvec Mulei V Maria Zermmlin (2016) eKLR where the court observed that there was need in cases of Domestic Workers who sue their employers for the court to be wary of bounty hunters.

#### **Analysis and determination**

55. After careful consideration of the pleadings by the parties, evidence and submissions on record, the issues for determination are;
  - i. Whether the claimant's employment was permanent from July 2010 to June 2016.
  - ii. Whether termination of the claimant's employment was unfair.
  - iii. Whether the claimant is entitled to the reliefs sought.
56. As regards the contract of employment and its nature, it is common ground that the respondent employed the claimant as a househelp from 1<sup>st</sup> June, 2010 at Kshs.10,000/= per month with annual increments of Kshs.1,000/=:, leave entitlement of 21 days per year and 5<sup>1</sup>/<sub>2</sub> days per week and was not housed by the respondent.
57. From the evidence on record, the relationship remained uneventful until May 2015 when the respondent informed the claimant that she intended to shift to a smaller house.
58. From this point onwards, the evidence of the parties is divergent. While the claimant testifies that nothing changed, the respondent stated that she gave the claimant a termination notice upto June and was paid upto September although she was not working from July to September as the respondent was in Watamu taking care of her husband who later died in December 2015, a fact the claimant admitted in evidence.
59. It is unclear how the claimant was working for the respondent in her absence.



60. RWI's evidence that the two had agreed that the claimant would work as a casual and did so from October 2015 to June 2016 appeared credible to the court as confirmed by RWI compared to the claimant's testimony that she continued working for the respondent on permanent terms.
61. The fact that the claimant denied that she was receiving payment from Joe Holt whenever she worked for him sounded untruthful.
62. To her credit however, the claimant maintained that her salary did not change at any point as did her work stations. Although the respondent testified that the extra pay was intended to cater for service pay, the claimant was never notified of the excess payment and no evidence of such an arrangement was adduced by the respondent.
63. The foregoing notwithstanding, the claimant was aware that things had changed. She was rendering services to other persons who paid her for the days served but still received Kshs.15,000/= per month from the respondent after working for two days a week.
64. From the evidence on record, it is the finding of the court that the claimant served the respondent on permanent terms from June 2010 to September 2015 and subsequently as a casual employee of the respondent.
65. However, since the claimant worked for more than the duration fixed by section 37 of the [Employment Act](#), the claimant's employment transitioned from casual to term contract.
66. As to whether termination of the claimant's employment was unfair, the starting point is the evidence on record. The claimant alleges that her employment was unfairly terminated in June 2016 when she reported to the respondent's house late, having been at the respondent's sisters house to pick a child. That the respondent was very annoyed and chased her away but paid her for the month.
67. RWI, on the other hand testified that it was the claimant who got annoyed and left, an allegation supported by RWII who was present on that day.
68. The respondent appears to be suggesting that the claimant absconded duty. Even if she did, it was the duty of the respondent to demonstrate that she made reasonable attempts to contact her to ascertain why she was not reporting to work. See [Simon Mbithi Mbane v Intersecurity Services Ltd](#) (2018) eKLR, [Joseph Nzioka v Smart Coatings Ltd](#) (2017) eKLR and [Felistas Acheba Ikatwa v Charles Peter Otieno](#) (2018) eKLR on the duty of the employer in such cases.
69. The court is further guided by the sentiments of Onyango J. in [Judith Atieno Owuor v Sameer Agriculture and Livestock](#) (2020) eKLR,
- “Further even if she had absconded, she is by law entitled to a fair disciplinary process as set out in section 41 of the [Employment Act](#). No evidence was availed to the court to support there having been a disciplinary process or notice issued prior to the termination. It is the duty of the respondent to show this court it did accord the claimant a fair hearing prior to her termination . . .”
70. As submitted by the claimant, for a termination of employment to pass muster, it must be substantively justifiable and procedurally fair as stated by Ndolo J. in [Walter Ogal Anuro v Teachers Service Commission](#) (Supra). (See the sentiments of the Court of Appeal in [CMC Aviation Ltd V Mohammed Noor](#) (2015) eKLR, [Naima Khamis v Oxford University Press \(E.A\) Ltd](#) (2017) eKLR).



71. In this case, although the respondent may have had a good reason to terminate the claimant's employment, she did not do so in accordance with the procedure prescribed by the provisions of the Employment Act.
72. The respondent neither issued a notice to show cause nor invite the claimant for a disciplinary hearing.
73. For the above stated reasons, it is the finding of the court that termination of the claimant's employment was not conducted in accordance with fair procedure and was thus procedurally unfair.
74. As to whether the claimant is entitled to the reliefs sought, the court proceeds as follows;

**i. One month's pay in lieu of notice**

75. Although the respondent alleged that the employment relationship between her and the claimant ended in May 2015, she led no evidence to prove the allegation. She tendered no evidence of the alleged notice or actual termination of employment.
76. In the absence of credible evidence of termination of the employment relationship in accordance with the precepts prescribed by law, the claimant is awarded Kshs.15,000/= as one month's notice pay.

**ii. Leave pay**

77. The claimant testified that she had not proceeded on leave at any time, yet her only claim is for 2015, the sum of Kshs.10,500/=.
78. More significantly, the claimant's written statement makes no reference to pending leave days or number. Relatedly, RWI testified that from July 2015 to September 2015, a duration of 3 months, the claimant did not work but was paid her full salary and no leave days were pending.
79. The claimant did not controvert this evidence.  
The prayer for leave pay for 2015 is declined.

**iii. House Allowance**

80. Contrary to the respondent's submissions that the claimant declined to take up residence provided by the respondent, the claimant confirmed on cross-examination that she did not stay at the respondent's house. That she went home every day.
81. Neither RWI nor RWII testified that the claimant was offered residence by the respondent but declined nor was it the claimant's testimony.
82. In 2010, the claimant's salary was Kshs.10,000/= and Kshs.500/= airtime allowance. The minimum wage at the time was Kshs.6,743/= per month exclusive of house allowance.
83. Be that as it may, in 2011, the salary was Kshs.11,000/= while the prescribed minimum wage was Kshs.7,586/=. In 2012 the salary rose to Kshs.12,000/= while the prescribed minimum wage was Kshs.8,579.80.
84. In 2013, the claimant's salary stood at Kshs.13,000/= compared to the minimum wage of Kshs.9,780.95 excluding house allowance.
85. In Grain Pro Kenya Inc. Ltd v Andrew Waitbaka Kiragu (2019) eKLR, the Court of Appeal held that 15% is a reasonable percentage that an employee spends from the salary to pay house rent.



86. It is not in dispute that the respondent paid the claimant a salary far above the minimum wage including the 15% housing allowance as courts have held and additionally gave her a telephone allowance of Kshs.500/= per month.
87. The claimant did not fault the respondent in any way other than for the termination. The respondent must have been a good employer.
88. For these reasons, the prayer for housing allowance is declined.

#### **iv. Service pay**

89. The respondent admitted, on cross-examination that she neither paid NSSF nor NHIF contributions. The claimant was thus not a member of the NSSF and is thus entitled to service pay by virtue of section 35(5) of the *Employment Act*.
90. The respondent's allegation that part of the salary paid between October 2015 and June 2016 was on account of service pay was not supported by evidence. In addition, the respondent led no evidence to demonstrate that the claimant had been made aware of and was party to arrangement.
91. The prayer for service pay of Kshs.45,000/= is allowed.

#### **v. Compensation for unfair**

92. Having found that termination of the claimant's employment was unfair for want of procedural propriety, the claimant is entitled to the discretionary relief provided by section 49 (1) (c) of the *Employment Act*.
93. In arriving at the quantum of compensation, the court has considered the relevant circumstances including;
  - i. The claimant was an employee of the respondent for a duration of 6 years and had no warning letter or disciplinary issues.
  - ii. The claimant made no effort to appeal the termination by the respondent.
  - iii. It is unclear whether the claimant wished to continue.
94. In light of the foregoing, the court is satisfied that the equivalent of 3 month's salary is fair Kshs.45,000/=.

#### **Counter-claim**

95. The claimant admitted that she owed the respondent Kshs.18,000/= as part of a soft loan advanced to her.
96. In conclusion, judgement is entered for the claimant against the respondent in the following terms;
  - a. One months salary in lieu of notice Kshs.15,000/=
  - b. Service pay Kshs.45,000/=
  - c. Equivalent of three months salary a compensation Kshs.45,000/=TOTAL KSHS.105,000/=  
Less Kshs. 18,000/=  
Kshs. 87,000/=



- d. Costs of this suit.
- e. Interest at court rates from date of judgement till payment in full.

97. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 3<sup>RD</sup> 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 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 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**

