



**Kagumbas v Career Directions Ltd (Cause 732 of 2017)
[2022] KEELRC 12879 (KLR) (5 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12879 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 732 OF 2017
JK GAKERI, J
OCTOBER 5, 2022**

BETWEEN

DICKSON KAGUMBAS CLAIMANT

AND

CAREER DIRECTIONS LTD RESPONDENT

JUDGMENT

1. The claimant commenced this suit by a memorandum of claim dated April 18, 2017 and filed on April 19, 2017 alleging unfair and unlawful dismissal from employment and non-payment of compensatory damages.
2. The claimant prays for;
 - a. Declaration that the respondent's constructive dismissal of the claimant from employment was unfair, unlawful, illegal and breach of contract.
 - b. Declaration that the claimant is entitled to payment of his terminal dues and compensatory damages totalling Kshs 450,000/= comprising;
 - i. Remainder of the contract (Kshs 45,000/= x 3) = Kshs 135,000/=
 - ii. Outstanding annual leave Kshs 45,000/=
 - iii. Damages for breach of contract 6 months gross pay (45,000 x 6) = Kshs 270,000/=

Claimant's Case

3. The claimant avers that he was employed by the respondent from March 17, 2016 under a one (1) year contract as a cabin crew seconded to Kenya Airways at Kshs 45,000/= per month and served the respondent diligently.



4. The claimant further avers that on November 23, 2016, he was suspended from employment allegedly for carrying shoe items while on duty contrary to company policies and procedures and standard operating procedures, an allegation he contests as false since the standard operating procedures permitted the number of items carried and the sizes involved.
5. That on December 2, 2016, the claimant attended a disciplinary hearing but did not receive a response and the salary was stopped at the end of December, 2016.
6. It is the claimant's case that the respondent's conduct amounts to constructive dismissal which is unfair and unlawful.

Respondent's case

7. The respondent filed a response to the claim on June 28, 2017 admitting that the claimant was its employee and was suspended from employment on November 23, 2016.
8. The respondent avers that the claimant was notified that his employment had been terminated but he declined to collect the dismissal letter.
9. It is the respondent's case that the claimant violated fundamental standards and policies of employment and was summarily dismissed.
10. The respondent prays for dismissal of the suit with costs.

Claimant's Evidence

11. The claimant testified that his bags were searched and he signed the search form. That his luggage weighed about 20kgs and his limit was 30kgs. It was his testimony that the search form stated that nothing of concern was reported. That he had 8 pairs of shoes and attended a disciplinary hearing on December 2, 2016.
12. On cross-examination, the witness confirmed that he underwent two searches and had two (2) bags, was aware of the company policy and had three (3) different types of shoes.
13. It was further confirmed that the claimant was in a KQ passenger flight from London.

Respondent's Evidence

14. RWI, Mr Rodgers Wafula testified that he participated in the disciplinary hearing of the claimant. The witness testified that the claimant was accused of exceeding the luggage attached to crew members and number of items carried.
15. That a decision to terminate the claimant was made on February 6, 2017 and the claimant was paid his final dues.
16. On cross-examination, the witness stated that he had no evidence of the bag the claimant had. It was his testimony that the Kenya Airways complained to the respondent.
17. That the disciplinary committee found the claimant culpable on the two issues.
18. It was the respondent's testimony that the claimant declined to sign the dismissal letter. The witness admitted that he had filed neither the dismissal letter nor the record of payment of terminal dues and leave days.



Claimant's Submission

19. The claimant identifies two issues for determination, namely; whether the procedure employed by the respondent to terminate the claimant's employment was fair and entitlement to the reliefs sought.
20. On the first issue, reliance is made on the provisions of section 41 and 43 of the *Employment Act* to underscore the burden of proof on the part of the respondent and the need to conduct termination of employment in accordance with a fair procedure.
21. The decision in *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR is relied upon to underline the need for substantive justification and procedural fairness in termination of employment.
22. It is urged that claimant had less than the prescribed luggage weight and the search found nothing to report and the operating procedures were not availed to the claimant at the hearing.
23. It is submitted that the allegations against the claimant were not substantiated.
24. It is the claimant's contention that although he participated in the disciplinary hearing, he did not receive the outcome of the deliberations yet his salary was stopped at the end of December, 2016.
25. That although the respondent's witness testified that the claimant's employment was terminated on February 6, 2017, he tendered no proof or explain the delay.
26. It is the claimant's case that he was not accorded a fair hearing as contemplated by the law.
27. Reliance is made on the decision in *Jacqueline M Mutiso v Kenya Revenue Authority* (2021) eKLR where the respondent had taken unreasonably long to conclude the disciplinary process and the court awarded compensation.

Respondent's Submission

28. The respondent identifies several issues for determination including whether termination was substantively and procedurally fair as well as entitlement to compensation.
29. As to whether termination of the claimant's employment was fair, the respondent's counsel relies on the provisions of sections 41, 44(3), 43, 45 and 47(5) of the *Employment Act*, as well as the decisions in *Eric Gichuru Thiga v Unga Limited* (2021) eKLR and *Moses Banda Daniel v Republic* (2016) eKLR to urge that the respondent complied with the law and the termination was substantively and procedurally fair.
30. It is the respondent's submission that the claimant was afforded an opportunity to be heard.
31. As to whether the claimant is entitled to compensation, it is submitted that the claimant has tendered no evidence to show that his termination from employment was wrongful or unfair.
32. It is further submitted that the claimant adduced no oral or documentary evidence of entitlement to payment for outstanding leave days.

Analysis and Determination

33. The issues for determination are;
 - i. Whether termination of the claimant's employment was fair.
 - ii. Whether the claimant is entitled to the reliefs sought.



34. On the first issue, the starting point is a consideration of the law on termination of employment which is encapsulated in the provisions of the [Employment Act, 2007](#) and as interpreted in various decisions.
35. In [Pius Machafu Isindu v Lavington Security Guards Ltd](#) (2017) eKLR, the Court of Appeal summarised the law 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.”
36. In [CMC Aviation Ltd v Mohammed Noor](#), the court observed that;
- “We respectfully agree. Unfair termination involves breach of statutory law. Where there is a fair reason for terminating an employee’s service but the employer does it in a procedure that does not conform with the provisions of a statute that still amounts to unfair termination . . .”
37. Similar sentiments were expressed in [Naima Khamis v Oxford University Press EA Ltd](#) (2017) eKLR.
38. In a nutshell, the provisions of the [Employment Act, 2007](#) and judicial authority are consistent that for a termination of employment to pass muster, it must be substantively justifiable and procedurally fair (See also [Walter Ogal Anuro V Teachers Service Commission](#) (*supra*).
39. I will now proceed to apply the foregoing provisions and propositions of law to the facts of the instant case.

Substantive Justification

40. While the claimant submits that his luggage was 20kgs below the prescribed maximum of 30kgs for a night shift and the search form stated that there was nothing of concern reported. The respondent submits that the claimant had a cabin luggage of more than the prescribed weight of 10kgs and had 9 pairs of shoes.
41. The claimant admitted that he had 8 pairs of shoes yet the record he produced in court shows that he had 9 pairs of shoes on Flight-KQ 101 on November 20, 2016.
42. It is clear that a search was conducted and the luggage was weighed and the claimant’s bag was 20kgs.
43. From the proceedings of the disciplinary committee, it is evident that the security personnel of KQ had concerns about the claimant’s luggage but do not appear to have taken any action at their level but consulted.
44. RWI testified that it is KQ that complained to them about the claimant’s luggage.
45. During the disciplinary hearing, the claimant requested for the standard operating procedure he had violated but was not given. Documents on record show that the claimant had been provided with the basic information and other sources of information by the airline from as early as July 6, 2015.



46. For the foregoing reasons, it is the finding of the court that the respondent has on a balance of probability established that it had a valid and fair reason to terminate the claimant's employment.

Procedure

47. As regards procedure, section 41 of the *Employment Act* prescribes the procedural precepts to be complied with. In *Postal Corporation of Kenya v Andrew K Tanui* (2019) eKLR, the Court of Appeal summarised the procedural requirement as follows;

“Four elements must thus 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 is made;
- iv. Hearing and considering any representations made by the employee and the person chosen by the employee.”

48. In this case, the evidence on record is explicit the claimant received a notice to show cause, responded and was invited for a disciplinary hearing which he attended and made representations. He also signed the minutes of the meeting on December 24, 2016 while the respondent's witness confirmed on cross-examination that the claimant's employment was terminated on February 6, 2017 and a letter to that effect was written but the claimant refused to sign the same. The witness admitted that he did not file a copy of the dismissal letter.

49. The claimant confirmed on cross-examination that he was not given a dismissal letter, an allegation the respondent did not controvert by evidence.

50. Further, it was the claimant's testimony that his salary was discontinued at the end of December, 2016.

51. The absence of communication by the respondent and withdrawal of salary would appear to suggest that the claimant remained on suspension with no pay until he considered himself constructively dismissed in April, 2017 when he consulted an advocate and filed the suit herein.

52. The concept of constructive dismissal was succinctly explained by Lord Denning in *Western Excavating ECC Ltd v Sharp* [1978] 2 WLR 344 as follows;

“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all, or alternatively he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.”



53. The concept of constructive dismissal was domesticated by the Court of Appeal in *Coca Cola East & Central Africa Ltd V Maria Kagai Ligaga* (2015) eKLR where the court emphasized that the employer's conduct must constitute a repudiatory breach of the contract of employment.
54. In the instant case, the respondent neglected, failed or refused to communicate the outcome of the disciplinary proceedings and discontinued the claimant's salary at the end of December, 2016.
55. Arguably, the respondent's conduct in this case entitled the claimant to treat himself as discharged from further performance of the contract of employment.
56. For these reasons, it is the finding of the court that the claimant was constructively dismissed by the respondent.

Relief

57. As regards the reliefs sought, the court proceeds as follows;
 - i. Having found that the claimant was constructively dismissed by the respondent, a declaration that his termination was unfair and unlawful is hereby issued.
 - ii. Compensation for remainder of the contract, 3 months
58. Since the contract of employment between the claimant and the respondent was terminable by notice of either party, the claim for compensation for the unexpired period of the contract is unsustainable. Relatedly, this is a claim for anticipatory earnings and is disallowed. (See *Elizabeth Wakanyi Kibe v Telkom Kenya Ltd* (2014) eKLR, *Engineer Francis M Gachuri V Energy Regulatory Commission* (2013) eKLR and *DK Njagi Marete v Teachers Service Commission* (2020) eKLR).
 - iii. Outstanding annual leave
59. Applying the mantra that he who alleges must prove, the court is in agreement with the respondent's submissions that the claimant failed to prove this claim. The claimant led no oral or documentary evidence of the number of outstanding leave days. The claim is declined.
 - iv. Having found that termination of the claimant's employment was unfair and the claimant is entitled to compensation as provided by the provisions of section 49(1) of the *Employment Act* under which the maximum compensation is the equivalent of 12 months gross salary for unfair termination or summary dismissal and as ordained by section 49(4) of the *Employment Act*, the court has considered the following;
 - i. The claimant was an employee of the respondent for about 8 months which is a fairly short time.
 - ii. The claimant substantially contributed to his termination from employment.
 - iii. The claimant made no effort to ascertain why it had taken long to receive a response from the employer or demonstrate his wish to continue working.
60. In light of the foregoing, the court is satisfied that the equivalent of two (2) months salary is fair, Kshs 90,000/=
61. In conclusion, judgment is entered for the claimant against the respondent as follows;
 - a. Equivalent of 2 months gross salary.
 - b. Costs of this suit.



c. Interest at court rates from the date hereof till payment in full.

62. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 5TH 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 March 15, 2020 and subsequent directions of April 21, 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

