



**Oloo v Straight Security Services Limited (Cause 1800 of 2017)
[2022] KEELRC 12775 (KLR) (6 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12775 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1800 OF 2017
K OCHARO, J
OCTOBER 6, 2022**

BETWEEN

DAVID ODOUR OLOO CLAIMANT

AND

STRAIGHT SECURITY SERVICES LIMITED RESPONDENT

JUDGMENT

1. At all material times the claimant was employed by the claimant as a guard. According to the claimant the employee-employer relationship came into being on or about the month of December 16, 2010. However, to the claimant it did employ him on the January 23, 2013. Further, no common cause was taken by the parties regarding how they. Holding that his employment was brought to an end by the claimant, and that the termination was wrongful and unfair, the claimant instituted a claim against the claimant, through a memorandum of claim filed herein seeking for various reliefs and orders against the latter.
2. Upon being served with the summons to enter appearance the claimant did enter appearance and file a memorandum of response. The claimant denied the claimant's claim and entitlement to the reliefs sought, in toto.
3. At the close of the pleadings there was a joinder of issues, and consequently the matter took the path of getting to be heard on merit.

The claimant's case

4. In his statement of claim herein above mentioned, the claimant sought for the following reliefs.
 - a. A declaration that the termination of the claimant from employment was unlawful and unfair hence the claimant is entitled to payment of his terminal dues and compensatory damages.



- b. An order for the claimant to pay the claimant his due terminal benefits and compensatory damages.
 - c. Costs of suit plus interest thereon.
5. When this matter came up for hearing, the claimant urged Court to adopt the contents of his witness statement dated August 30, 2017 as his evidence in chief, further that the documents filed under his list of documents of the even date namely, bank statement from National Bank of Kenya, National Social Security Fund, statement, job identity card, Sacco membership application form and a demand letter dated December 22, 2017.
 6. The claimant orally testified in court, briefly clarifying matters on his pleadings and witness statement that he held were necessary to. He was then cross examined by counsel for the claimant before a re-examination by his counsel.
 7. The claimant stated that he was employed by the claimant on December 16, 2010. The employment was without a letter of appointment. His monthly salary was KShs 7000, up to the time of termination of the employment.
 8. The claimant stated that on the August 3, 2014, he reported to work as usual only to find another employee had replaced him. The supervisor did not give him any reason for the turn of events. He only instructed him to return the uniform and go home as there was no more work for him.
 9. The claimant stated that during the entire period of his service, the claimant underpaid him. Throughout, he earned amounts less than what the relevant minimum wage orders provided.
 10. It was further stated that the termination was unlawful, and unfair. It was contrary to the provisions of the Constitution, the Employment Act, and the principles on natural justice. The termination was without cause, and due process wasn't followed in the summary dismissal.
 11. The claimant to pay him his terminal benefits compensatory damages namely;
 - I. Payment in *lieu* of notice, Kshs 9,780
 - II. Payment in lieu of untaken leave for the entire period of service,
 - III. House allowance for the entire duration, Kshs 88, 020,
 - IV. Unpaid overtime, Kshs 293, 400
 - V. Unpaid public holidays, 17, 924.
 - VI. Compensation for off days untaken, 93, 888
 - VII. The under paid salary, KShs 99,775.
 12. The claimant denied having signed the agreement, the claimant's exhibit No 1. He contended that the signature obtaining thereon wasn't his. He was not employed under a written agreement.
 13. He further stated that his salary was paid through his account hosted at Equity Bank. He never at any time earned Kshs 10,000 as salary.
 14. The claimant denied the allegation that he resigned from his employment. He denied having authored any resignation letter, denying the signature on the alleged resignation letter that the claimant placed before this court.



15. The claimant further stated that he was a stranger to the allegation that he owed the claimant's welfare association some money. He denied knowledge of the claimant's document No 7, a welfare advance requisition form.
16. He asserted that he used to work from 6:00 am to 6:00 pm daily.
17. In his evidence in re-examination, he testified that the bank statement shows that he started working with the claimant in 2010. His employment was terminated on the September 6, 2015.

The claimant's case

18. The claimant presented Francis Mwenda Munene to present its defence against the claimant's case. The witness just like the claimant did, asked the court to adopt his witness statement as his evidence in chief, and the bundle of documents that had been filed by the claimant as its documentary evidence. It was the claimant's case that contrary to the claimant's assertion, the he came into its employment on the December 16, 2010, he was employed on January 23, 2013, through a contract of employment, which contract he did execute.
19. The witness stated that on the October 6, 2015, the claimant handed in a resignation letter to the claimant's head office. The resignation was contrary to the law as the letter was not preceded by a one month's notice.
20. In response to the resignation letter, the claimant served the claimant with a letter that was captioned "inadequate resignation notice," letter receipt of which he acknowledged by appending his signature thereon. On the same date, the claimant issued him with another letter, titled "Discharge Letter". Too, the claimant acknowledged receipt of the same by signing on it.
21. The witness testified that the claimant never terminated the employment of the claimant. He resigned from his employment voluntarily. His failure to give notice was in breach of the law.
22. The witness stated that the Equity Bank account card was given to the claimant to enable it pick the account into which the claimant's salary could be paid. The card in no way signifies that he came into the claimant's employment in the year 2010.
23. The witness testified that the claimant's monthly salary was Kshs 10,000, gross. Contrary to the testimony claimant, the claimant enjoyed his off days, and would proceed for leave as can be discerned from the application forms tendered as evidence by the claimant.
24. The witness denied that the claimant was ever underpaid. He asserted that at all material times, the claimant was being paid as per the relevant legal requirements. He was stationed at Juja, Kiambu County. The salary he was being paid was consolidated, inclusive of house allowance.
25. The membership application Sacco application form was, the claimant's document, appears that it was never processed. The Sacco was an independent entity from the claimant company.
26. In his evidence under cross-examination, the witness admitted that the claimant did not place forth any record to demonstrate that the claimant wasn't one of those employees who were in the service of the claimant in the year 2010.
27. The witness denied the suggestion that the claimant assisted the claimant to open the account with Equity Bank.



28. The witness admitted that the resignation letter, that was alleged to have to been the basis for the separation was not tendered as evidence, however, the other documents would demonstrate the fact of resignation.
29. The witness testified that the claimant was served with a letter dated October 7, 2015, which letter the latter never responded to. According to him, the letter constituted a disciplinary hearing.
30. The claimant didn't place forth any itemized pay slip, from which it can discerned what he was earning for specific items.
31. The witness testified that the claimant didn't take his off days. Further that his [the witness's] assertion that the claimant used to be paid for overtime worked was without support with any documentary evidence.
32. In re-examination, the witness testified that the claimant used to get his off days, and reiterated that his gross salary was KShs 10,000.

The claimant's Submissions.

33. The claimants' counsel in her written submissions proposed three issues for determination, thus; whether the claimant's employment was terminated or he resigned on his own volition; whether due process was followed prior to terminating the claimant's employment; whether the claimant is entitled to the reliefs sought.
34. It was submitted that despite its allegation that the claimant resigned from his employment through a letter dated the October 6, 2015, the claimant didn't tender the same before this Court for interrogation. It was its duty to prove the existence of the letter and its import, it didn't.
35. On the second proposed issue, that procedural fairness is ingrained in statute. Section 41 of the *Employment Act* which has been held to be a mandatory set forth what an employer who contemplates terminating his or her employee's employment must adhere to. Her or she must notify the employee the reasons for the intended action, allow the employee to make representations on the reasons, and consider the representations before making a decision. Reliance was placed on the decision in *David Gichana Omuya v Mombasa Maize Millers Ltd* [2014] eKLR, to bolster this point.
36. The claimant's evidence that he was not given any show cause letter, and an opportunity to be heard was not challenged. Consequently, the termination of the claimant's employment was not procedurally fair.
37. The claimant didn't place any evidence before court to demonstrate the reasons for the termination, and that the reasons were valid. In absence of the prove, the termination should be held to be substantively unfair.
38. On the reliefs, counsel submitted that the claimant has proved his case, and his entitlement to the reliefs sought

claimant's Submissions.

39. The claimant identified the following issues for determination:
 - i. When was the claimant employed;
 - ii. Whether the claimant was terminated or resigned;
 - iii. Whether the claimant is entitled to the prayers sought.



40. The claimant submitted that contrary to the claimant's claim that he was employed in 2010, he was actually employed on January 23, 2013. The claimant didn't place any evidence to prove his assertion. However, the respondent placed documentary evidence to prove its position. Therefore, the respondent was able to discharge the burden contemplated under section 10 of the *Employment Act*.
41. Contrary to his allegation that he was dismissed summarily from his employment, the claimant resigned from his employment. The respondent's letter, a reply to his resignation letter, was duly received by him, this denial that he didn't sign on the letter as an acknowledgement of receipt of the same, shouldn't be taken to be true. The claimant in essence is alleging that his signature was forged, he needed to place evidence before the court to establish it.
42. The court should come to a conclusion that the claimant voluntarily resigned from his employment, he was never dismissed.
43. On the claim for unpaid leave for the entire period that the claimant alleged to have worked for the respondent from i.e from the year 2010 to 2015, the respondent's Counsel argued that the claim cannot be considered without taking into account the provisions section 90 of the *Employment Act* which set a limitation of time regarding instituting claims like the instant one. If the court were to find the claim justified, then it can only order compensation for not more than the time recognized by the provision.
44. It was further submitted that the claim for overtime is time barred having been brought more than three years since the cause of action arose and more than twelve months after the termination, contrary to section 90 of the *Employment Act*. In any event, the claimant didn't tender sufficient evidence to establish that he worked overtime.
45. The respondent tendered as evidence off days application forms by the claimant, rebutting the claimant's evidence that he at no time enjoyed his entitled off days. The claimant is not entitled to any compensation under this head.
46. On the claim for underpayments, it was submitted that the same is time barred by dint of the provisions of section 90 of the Act. Further, that if the court were to find that the claim isn't time barred, then considering the relevant wage orders between 2012- 2015, the gross salary of kshs 10,000, and his station of work, it will be easy to find that at all material times, the claimant was being paid as per law required.
47. The claimant's claim for compensation for unpaid public holidays worked, is couched in a general manner, one cannot tell which public holidays, and there was no evidence to demonstrate which public holidays he had in mind.
48. Since the claimant voluntarily resigned from his employment, he cannot be heard to claim for notice pay, and a compensatory award.

Determination

49. From the pleadings herein, the evidence and material placed before this court, the following broad issues commend themselves as the issues for determination by this court, thus;
 - a. How did the separation between the respondent and claimant occur?
 - b. If the separation was as a result of the termination of the claimant's employment, was the termination procedurally and substantively fair?
 - c. What reliefs are available to the claimant, if any?



50. On how the separation between the respondent as the employer and the claimant as its employee, there was no common cause. The claimant contended that his employment was terminated on the September 5, 2015, when he was verbally instructed to return the uniform and go home, he had been replaced by another person.
51. The respondent argued that the claimant's evidence shouldn't be believed for the reason inter alia that he did not mention the name of the supervisor who gave him the instructions. The respondent did not assert that the claimant had more than one supervisor, and during cross examination, no question was posed to him requiring him to specify. I am not persuaded that this could be a sufficient reason to cause this court to ignore the claimant's evidence on that regard.
52. In its statement of response, the respondent contended that the claimant resigned from his employment on the October 6, 2015. According to its witness, the resignation was through his letter dated the same date. The court notes that and the respondent's letter dated October 7, 2015, refers to a resignation letter by the claimant. Keeping in view that the existence of the letter was contested, it is this court's view that the respondent had the legal burden to prove its existence.
53. The letter was not produced by the respondent before this court. The respondent through its witness admitted this much but notably didn't explain why it was not produced as evidence, if indeed it did exist. Considering, the position taken by the respondent as regards the separation, production of the document was crucial. I see no other conclusion that this court can make other than that the letter didn't exist, the claimant did not resign from his employment.
54. Having found as I have hereinabove, it becomes imperative to state that the letters of October 7, 2022 stand on loose ground. They were only crafted for purposes of this matter. They are hereby found to be suspect and not genuine.
55. Consequently, this court finds that claimant's employment was terminated in the manner explained by the claimant, and disagrees with the respondent's assertion that the claimant resigned from employment. I now turn to consider whether the termination was procedurally fair. In the case of *Lydia Moraa Obara v Tusker Mattresses* (2021) eKLR this Court stated;
- “ 31. Section 45 of the *Employment Act* dictates that no employer shall terminate the employment of an employee unfairly. Section 45 (2) (c) provides the foundation for insistence on engagement of a fair procedure, if a termination of employment were to be considered fair.”
56. Section 41 of the *Employment Act* supplies the structure for procedural fairness, it provides:
- “(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 the explanation.
- (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”



57. In *Jane Nyandiko vs Kenya Commercial Bank Limited* (2017) eKLR, the court held, and which was cited with approval by the Court of Appeal in the case of *National Bank of Kenya v Anthony Njue* (2019) eKLR, thus;

“Section 45 of the *Employment Act* makes provision inter alia that no employer shall terminate the employment of an employee unfairly. In terms of the said section, a termination of an employee is deemed to be unfair if the employer fails to prove that the reason for the termination was valid; that the reason for the termination was a fair reason and that the same was related to the employee’s conduct, capacity, compatibility or alternatively that the employer did not act in accordance with justice and equity.

The parameters for determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to dismiss the employee; the communication of that decision to the employee and the handling of any appeal against the decision. Also, not to be overlooked is the conduct and capability of the employee up to the date of termination, the extent to which the employer has complied with the procedural requirements under section 41.....”

58. The mandatory elaborate procedure set up under section 41 of the Act, requires notification, a hearing and consideration of the employee’s representations and his co-worker’s before termination. Therefore, the process has three aspects, and absence of any one of them will definitely obliterate the fairness of the process leading to the decision to terminate an employee’s contract of service or summarily dismissing the employee.
59. The claimant took a position that the dismissal was procedurally unfair. He contended that he was not notified of any disciplinary proceedings, and that he was not heard as he was not given an opportunity to make a representation. The position was buttressed by his counsel’s submissions hereinabove brought forth.
60. Probably, owing to the position taken by respondent it got blurred to see the necessity of placing evidence before this Court to demonstrate that the termination of the claimant’s employment was procedurally fair. Therefore, it cannot be said that respondent did discharged its legal burden under section 45[2] of the *Employment Act*. Consequently, this Court finds that the termination was procedurally unfair.
61. Section 43 of the *Employment Act* places an obligation upon the employer 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.
62. The respondent did not place any material before court, from which the reasons for the termination of the claimant’s employment can be deduced, maintaining that he voluntarily resigned from his employment. As a result, the respondent failed to prove the reason[s] for the dismissal as was required of him under the above stated section of the law. Consequently, the termination is hereby deemed substantively unfair.

Of the Reliefs

63. Before I delve into determining whether the claimant is entitled to the reliefs sought or any of them, it is imperative for this court to first deliver itself on the issue of the claimant’s salary. It was the claimant’s



- case that throughout his service of employment, his monthly salary was Kshs 7000. The respondent on the other hand contended that the claimant's earned a consolidated salary of Kshs 10,000.
64. In support of his claim that his salary was KShs 7000 per month, the claimant testified that the salary was being paid through Equity Bank account. The respondent's witness' evidence regarding the mode of payment agreed with the claimant's, through Equity Bank. The claimant tendered a bank statement from National Bank, a true contradiction of his evidence that his salary was being paid through Equity Bank. The statement doesn't even relate to the period when he was in employment of the respondent.
65. In its response to the statement of claim, the respondent was explicit, asserting that the claimant was deliberately attempting to mislead the court by failing to tender statements of his account from Equity Bank, and by placing forth statements from National Bank relating to a period outside that of his employment with the respondent. I found considerable difficulty in understanding the action of the claimant, including the failure to address the issue of the statement even after the express red flag that was raised by the respondent.
66. Having said this, it is imperative to state that in the dispute, the respondent's duty as an employer to produce an itemized pay slip as required by law was not in any manner diminished. The respondent knew that the manner on how its relationship with the claimant was created, and the extent of his monthly salary were in serious contest. In the circumstance, he was reasonably expected to tender salary payment documents before this including but not limited to an extract of the pay roll and statements of account from its end demonstrating the monthly salary remittances into the claimant's Equity account. The respondent didn't discharge its legal burden under section 10 of the *Employment Act*.
67. In the upshot, the court concludes that the claimant was earning a salary of Kshs 7000 as he claimed.
68. The claimant sought for compensation for wrongful and unfair dismissal pursuant to the provisions of section 49[1][c] of the *Employment Act*. The court is cognizant of the fact that a grant of the compensatory relief contemplated in the provision is discretionary. It is awarded depending on the particular circumstances of each matter. Considering that the claimant did not adhere to the fair procedure terminating the employment of the claimant, and that substantive fairness was absent in the decision, the length of service that was rendered by the claimant, and that the claimant didn't contribute in any manner to the termination, I am persuaded that the claimant is entitled to the relief. I award him 10 [Ten] months gross salary, Kshs 70,000.
69. The claimant further claimed for Kshs Kshs 9,980, salary in lieu of notice. In the circumstances of the matter it is not difficult to find that though the claimant's Employment was one terminable by a 28 days' notice under section 35 of the Act, the notice was not issued. And having found that the claimant did not resign from his employment but was terminated, I am persuaded that he is entitled to notice pay under section 36 of the Act. As at the time of termination of the claimant's employment, the wage order that was applicable was that which came into operation through Legal Notice No. 117 of May 20, 2015. The minimum wage relevant to this matter was Kshs 10,107.10. The claimant is hereby awarded the notice pay of Kshs 9.980, sought.
70. On the claimant's claim for unpaid public holidays, this court finds that it is a claim that has been thrown to court, it is common place that in a year there are more than two constitutional holidays and others come in through gazettelement the relevant cabinet secretaries as and when circumstances demand. Without specificity on the holidays the claimant had in mind, this court can do very little It can only dismiss the claim under the head "unpaid public holidays."



71. Section 27 [2] of the *Employment Act* provides;

“Notwithstanding subsection [1]. An employee shall be entitled to at least one day of in every period of seven days.”

The claimant contended he was never allowed to enjoy this statutory right. He was entitled to be paid in lieu but that never happened. He sought for compensation amounting to Kshs 93,888. The respondent placed before the court off duty forms to counter the claimant’s assertion. The forms are in respect of three days for the year 2014 and 2015. One cannot therefore safely conclude that this was sufficient to prove that the claimant was allowed to enjoy his off days throughout the period he says he was not.

72. However, considering the provisions of section 90 of the *Act*, and the fact that though the termination of the claimant’s employment occurred in September 2015, he filed his case in September 2017, under this head, I can only apply a period of three years not the four suggested by the claimant. I therefore award Kshs 70,416 under this head.

73. Having found that the monthly salary of the claimant was Kshs 7000. and considering the relevant wage orders during the period of his service, I am persuaded that the respondent underpaid the claimant. The extent of underpayment brought out by the claimant has not been challenged, However, considering the stipulations of section 90 of the Act, I award him Kshs 66,742 [May 2013- May 2015], and Kshs 11, 862 [June 2015- August 2015], therefore Kshs 78,604.

74. In the upshot, judgment is hereby entered in favour of the claimant in the following terms:

- a. The termination of the claimant’s employment was procedurally and Substantively unfair.
- b. Compensation pursuant to the provisions of section 49[1][c] of the *Employment Act*, Kshs 70,000.
- c. Salary underpayment, Kshs 78, 604
- d. Compensation for unutilized off days, Kshs 70,416.
- e. Interest on (b) [c] and (d) at court rates from date of filing suit till full payment.
- f. Costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 6TH DAY OF OCTOBER, 2022.

OCHARO KEBIRA

JUDGE

Delivered in presence of;

Mr. Alivioza for the claimant.

No appearance for respondent.

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 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.

A signed copy will be availed to each party upon payment of Court fees.

OCHARO KEBIRA

JUDGE

