



REPUBLIC OF KENYA



**KENYA LAW**

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**Mahamud & another v Fayaz Bakers Limited & another (Cause 106 of 2018)  
[2022] KEELRC 13341 (KLR) (24 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13341 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 106 OF 2018  
AK NZEI, J  
NOVEMBER 24, 2022**

**BETWEEN**

**ABDI MOHAMED ABDI ..... 1<sup>ST</sup> CLAIMANT**

**MUSA KHALIF MAHAMUD ..... 2<sup>ND</sup> CLAIMANT**

**AND**

**FAYAZ BAKERS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**S.D.K. SECURITY SERVICES ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The suit herein was instituted vide a statement of claim dated February 28, 2018 and filed in this Court on March 1, 2018. The 1<sup>st</sup> Respondent entered appearance on March 15, 2018 and filed Response to the Claim on April 18, 2018. An amended statement of claim dated May 28, 2018 was filed on June 8, 2018. The 1<sup>st</sup> Claimant's case against the Respondents was withdrawn, with no order as to costs, on June 29, 2022.
2. The 2<sup>nd</sup> Claimant pleaded that he was, at all material times, employed by the Respondents and that in the alternative, the 1<sup>st</sup> Respondent had sourced the employment service of the 2<sup>nd</sup> Claimant from the 2<sup>nd</sup> Respondent as a security guard since January 2, 2010 at a monthly salary of Kshs 9,500.
3. The 2<sup>nd</sup> Claimant further pleaded:-
  - a. that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were jointly and severally liable for the 2<sup>nd</sup> Claimant's employment and payments.
  - b. that in August 2017 the Respondents, through their duly authorized officers, verbally, illegally and unlawfully terminated the 2<sup>nd</sup> Claimant's employment without any reason or due process or payment of his dues.



- c. that termination of the 2<sup>nd</sup> Claimant's employment was illegal and was in contravention of the Employment Act 2007 and the Constitution because the 2<sup>nd</sup> Claimant was not given any notice or reasons for the termination, and was not given an opportunity to be heard.
4. The 2<sup>nd</sup> Claimant set out his claim against the Respondents as follows:-
- a. One month salary in lieu of notice.....Kshs 9,500
  - b. House allowance (3,200x96 months).....Kshs 307,200
  - c. Gratuity pay (15 days x 8 years x316).....Kshs 37,920
  - d. Leave for 8 years worked .....Kshs 53,088
  - e. Leave travelling allowance (8 years).....Kshs 17,696
  - f. Public holidays & Sundays allowance worked (512 days x Kshs 316 per day .....Kshs 161,792
  - g. Overtime worked (4 hours per day x 2,880 days x 40.00 per hours) .....Kshs 460,800
  - h. Unfair termination (12 months x Kshs 9,500) ....Kshs 114,000
  - i. A declaration that the 2<sup>nd</sup> Claimant's dismissal was unfair.
  - j. Certificate of service.
  - k. Costs and interest.
5. The 2<sup>nd</sup> Claimant filed his written witness statement dated February 28, 2018 and an evenly dated list of documents, listing two documents. The listed documents were the 2<sup>nd</sup> Claimant's ID card and a demand letter dated February 1, 2018.
6. The 1<sup>st</sup> Respondent did not amend its Response to the claim after an amended statement of claim was filed on June 8, 2018. It is pleaded in the 1<sup>st</sup> Respondent's Response to the Statement of Claim dated April 18, 2018:-
- a. that the 1<sup>st</sup> Respondent denied having employed the 2<sup>nd</sup> Claimant or having sourced his employment services from the 2<sup>nd</sup> Respondent as pleaded.
  - b. that if the 1<sup>st</sup> Respondent sourced the 2<sup>nd</sup> Claimant's employment services from the 2<sup>nd</sup> Respondent, which the 1<sup>st</sup> Respondent denied, then it was a contract between the 1<sup>st</sup> and 2<sup>nd</sup> Respondents for the provision of security services on the 1<sup>st</sup> Respondent's premises; and that there was no contract of employment between the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Claimant.
  - c. that the 1<sup>st</sup> Respondent was a stranger to the 2<sup>nd</sup> Claimant's particulars of terminal dues, and that it could not issue a Certificate of Service to a stranger.
7. When the trial opened on June 29, 2022, the 2<sup>nd</sup> Claimant adopted his filed witness statement as his testimony and produced in evidence the documents listed on his list of documents referred to in paragraph 5 of this judgment. The Claimant further testified:-
- a. that he started working on January 2, 2010 and was being paid Kshs 9,500 per month.
  - b. that he (the 2<sup>nd</sup> Claimant) was taken to the 1<sup>st</sup> Respondent by the 2<sup>nd</sup> Respondent, and that the 1<sup>st</sup> Respondent employed him.



- c. that the 2<sup>nd</sup> Claimant was guarding the 1<sup>st</sup> Respondent's yard opposite Coast General Hospital, and was being paid by the 1<sup>st</sup> Respondent through their clerk, one Abdulahi, and was being paid in the 1<sup>st</sup> Respondent's office.
  - d. that he 2<sup>nd</sup> Claimant was signing in a book for his salary, and was not being issued with any voucher or payslip.
  - e. that the 2<sup>nd</sup> Claimant's employment was verbally terminated in August 2017 by the 1<sup>st</sup> Respondent's director, Mohammed Fayaz, whom the 2<sup>nd</sup> Claimant knew personally.
  - f. that the 2<sup>nd</sup> Claimant knew other employees of the 1<sup>st</sup> Respondent, including one Ahmed Salim (RW1).
  - g. that the (2<sup>nd</sup> Claimant) was the 1<sup>st</sup> Respondent's employee, but the 1<sup>st</sup> Respondent never gave him any written contract of employment.
8. Cross-examined, the 2<sup>nd</sup> Claimant testified that the 2<sup>nd</sup> Respondent was an employee of the 1<sup>st</sup> Respondent, and worked there even as at the time of trial herein, and that he had sued the two jointly because they were one and the same thing.
  9. The 1<sup>st</sup> Respondent called one witness (RW1), who adopted his filed witness statement dated May 18, 2018 as his testimony. The witness, Ahmed Salim, also produced in evidence the documents listed on the 1<sup>st</sup> Respondent's list of documents dated January 11, 2019. The witness further testified that he knew the 2<sup>nd</sup> Claimant by seeing him guarding the 1<sup>st</sup> Respondent's yard, and that the 2<sup>nd</sup> Claimant was a security guard employed by the 2<sup>nd</sup> Respondent, from whom the 1<sup>st</sup> Respondent hired security guards. That there existed a contract between the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in that regard.
  10. Cross-examined, the 1<sup>st</sup> Respondent's witness (RW1) testified:-
    - a. that he (RW1) had nothing to show that the 2<sup>nd</sup> Claimant was employed by the 2<sup>nd</sup> Respondent, and that the agreements produced in evidence by the witness had not been signed by the 2<sup>nd</sup> Respondent; and that he had not exhibited any agreement between the 1<sup>st</sup> and 2<sup>nd</sup> Respondents for the year 2010.
    - b. that the witness (RW1) had no list of the 2<sup>nd</sup> Respondent's employees working for the 1<sup>st</sup> Respondent, and had no break-down/list of guards paid the amounts invoiced by the 2<sup>nd</sup> Respondent.
  11. The 2<sup>nd</sup> Respondent did not enter appearance and did not file any pleadings. The 2<sup>nd</sup> Respondent did not, therefore, participate in the trial.
  12. Having considered the pleadings filed and the evidence presented by the 2<sup>nd</sup> Claimant and the 1<sup>st</sup> Respondent, issues that emerge for determination, in my view, are as follows:-
    - a. whether the 2<sup>nd</sup> Claimant was an employee of the 1<sup>st</sup> Respondent.
    - b. whether the 1<sup>st</sup> Respondent terminated the 2<sup>nd</sup> Claimant's employment, and if so whether the termination was unlawful and unfair.
    - c. whether the 2<sup>nd</sup> Claimant is entitled to the reliefs sought.
  13. On the first issue, the 1<sup>st</sup> Respondent (RW1) testified that the 2<sup>nd</sup> Claimant worked for the 1<sup>st</sup> Respondent as a security guard, and did not deny that the 2<sup>nd</sup> Claimant worked for it as such from January 2, 2010 upto August 8, 2017. The 1<sup>st</sup> Respondent did not in any way rebut the 2<sup>nd</sup> Claimant's



- evidence that his salary was, through out the period of employment, paid by the 1<sup>st</sup> Respondent and that it was the 1<sup>st</sup> Respondent's director who verbally terminated his employment.
14. The 1<sup>st</sup> Respondent did not adduce any evidence to prove its allegation that the 2<sup>nd</sup> Claimant was an employee of the 2<sup>nd</sup> Respondent. The 1<sup>st</sup> Respondent did not also demonstrate that there existed any agreement and/or valid agreement between 1<sup>st</sup> and 2<sup>nd</sup> Respondents in the year 2010 for provision of security guards to the 1<sup>st</sup> Respondent by the 2<sup>nd</sup> Respondent. It is my finding that the 2<sup>nd</sup> Claimant was an employee of the 1<sup>st</sup> Respondent.
15. Tied to the first issue is the second issue on whether the 2<sup>nd</sup> Claimant's employment was terminated by the 1<sup>st</sup> Respondent and whether the termination was unlawful and unfair. The 2<sup>nd</sup> Claimant pleaded, and subsequently testified that his employment was on 8<sup>th</sup> August 2017 verbally terminated by the 1<sup>st</sup> Respondent's director, Mohammed Fayaz, whom the 2<sup>nd</sup> Claimant knew personally. This evidence was not rebutted and/or controverted by the 1<sup>st</sup> Respondent, and its said director did not testify in Court in rebuttal. Indeed, the 1<sup>st</sup> Respondent did not even attempt to tell the Court how the 2<sup>nd</sup> Claimant stopped working on its property / yard. I find and hold that the 2<sup>nd</sup> Claimant's employment was terminated by the 1<sup>st</sup> Respondent.
16. As to whether the termination was unlawful and therefore unfair, Section 41 of the [Employment Act](#) is called in aid. Section 41 provides as follows in mandatory terms:-
- “(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.
- (2) Notwithstanding any other provision of this part, the 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 ground of misconduct or poor performance, and the person, if any chosen by the employee within subsection (1) make.”
17. The 1<sup>st</sup> Respondent was not shown to have complied with the foregoing mandatory procedural requirements as outlined in the foregoing statute. The Court of Appeal held as follows in the case of [CMC Aviation Limited v Mohammed Noor \[2015\] eKLR](#):-
- “In view of the foregoing, we find that the appellant's act of summarily dismissing the Respondent without giving him an opportunity to be heard amounted to unfair termination as defined under Section 45 of the [Employment Act](#). In [Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Ssacco Limited \[2013\] eKLR](#), the Industrial Court held that whatever reason or reasons that arise to cause an employer to terminate the services of an employee, the employee must be taken through the mandatory process as outlined under Section 41 of the [Employment Act](#). That applies in a case of termination as well as in a case that warrants summary dismissal. See also [Mary Chemweno Kiptui v Kenya Pipeline Company Limited \[2014\] eKLR](#)”



18. The Court of Appeal also held as follows in the case of [Kenfright \[EA\] LTD v Benson K Nguti \[2016\] eKLR](#):-

“apart from issuing a proper notice according to the contract (or payment in lieu of notice provided), an employer is duty bound to explain to an employee, in the presence of another employee or union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition, an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service is taken....We come to the conclusion and find, in agreement with the trial Judge, that the termination of the Respondent’s contract of service in the circumstances, was unfair, the payment in lieu of notice notwithstanding...”

19. It is my finding that termination of the 2<sup>nd</sup> Claimant’s employment by the 1<sup>st</sup> Respondent contravened the law, and was therefore unlawful and unfair. I so declare.

20. On the third issue, and having found that termination of the 2<sup>nd</sup> Claimant’s employment was unfair, I award the 2<sup>nd</sup> Claimant the equivalent of nine months’ salary as compensation for unfair termination of employment, that is Kshs 9,500x 9 = Kshs 85,500. I have taken into account the circumstances in which the 2<sup>nd</sup> Claimant’s employment was terminated. The Claimant pleaded that his monthly salary was Kshs 9,500 at the time of termination of employment. This was not disputed by the 1<sup>st</sup> Respondent.

21. The claim for Kshs 9,500 being one month salary in lieu of notice is allowed.

22. On the claim for house allowance, the 1<sup>st</sup> Respondent did not adduce any evidence to demonstrate that the 2<sup>nd</sup> Claimant’s monthly salary included house allowance or was consolidated. I allow the claim pursuant to Section 31 of the Employment Act and award the Claimant 15% of his salary multiplied by the number of months worked as prayed. That is Kshs 1,425X96 months = Kshs 136,800.

23. The claim for service gratuity is allowed as prayed, and I award the 2<sup>nd</sup> Claimant Kshs 37,920 as prayed. The claim for unpaid leave days was not disputed, and is allowed as prayed at Kshs 53,088. The claims for leave travelling allowance, allowance for public holidays and Sundays worked, and payment for overtime worked, were neither pleaded nor proved, and are declined.

24. Finally, and having considered written submissions filed by Counsel for both parties, judgment is hereby entered for the 2<sup>nd</sup> Claimant against the 1<sup>st</sup> Respondent for:-

- a. The equivalent of nine months’ salary being compensation for unfair termination of employment .....Kshs 85,500
- b. One month salary in lieu of notice .....Kshs 9500
- c. Unpaid house allowance.....Kshs 136,800
- d. Service gratuity.....Kshs 37,920
- e. Unpaid leave days for 8 years.....Kshs 53,088 **Total Kshs 322,308**

25. The warded sum shall be subject to statutory deductions under Section 49(2) of the [Employment Act](#).

26. The Claimant is awarded costs of the suit and interest.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 24<sup>TH</sup> DAY OF NOVEMBER 2022**

**AGNES KITIKU NZEI**



JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Miss Memia for Claimant

Mr. Mathare for Respondent

