



REPUBLIC OF KENYA



KENYA LAW
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**Wambongo v Radar Security Ltd (Cause 1142 of 2018)
[2022] KEELRC 13473 (KLR) (17 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13473 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1142 OF 2018
AN MWAURE, J
NOVEMBER 17, 2022**

BETWEEN

BENSON WAMAYA WAMBONGO CLAIMANT

AND

RADAR SECURITY LTD RESPONDENT

JUDGMENT

1. The Claimant is alleging unlawful and unfair termination of his employment services. In the memorandum of claim dated the June 13, 2018 and filed on the July 5, 2018, the Claimant says that he was employed by the Respondent around November 2011 as a credit control rider with a monthly salary of Kshs 31,000/= and was given appointment letter.

Claimant's case

2. The Claimant avers that he served the Respondent with loyalty and diligence until March 14, 2018 when the Respondent wrongfully and unlawfully terminated the Claimant's services without notice and refused to pay him his terminal dues
3. The Claimant says that the terminal dues comprise of
 - a. Pay *in lieu of* notice Kshs 31,000.00
 - b. Leave earned but not taken for 1 year 21,699.93
 - c. Compensation for unfair termination for 12 months (12 x 31,000) 372,000

Total Amount Kshs 424, 699

4. The Claimant says that he was dismissed without due process of the law and therefore he considers that the said termination was manifestly unprocedural and unfair.



5. The Claimant prays that the honourable Court awards the following;
 - a. The sum of Kshs 424, 699.93 inclusive of compensation for wrongful dismissal to a maximum of 12 months wages as particularized above
 - b. Costs of the suit
 - c. Interest in (i) and (ii) above
 - d. Any other relief as the Court may deem just

Respondent's case

6. The Respondent entered a memorandum of appearance on the October 29, 2018 through the firm of Mwamuye, Mzungu and Solomon. It then filed the statement of defence dated the November 20, 2018 on the November 23, 2018.
7. The Respondent avers that the Claimant was dismissed summarily as a result of his involvement with the fraud at the Radar Staff Welfare Association. The Respondent says the Claimant was under investigations by the Cooperative Bank Anti Banking Fraud Unit at the time of his dismissal. He also says that that the Radar Staff Welfare Association instructed the Respondent to withhold the final dues from the Respondent's former employees including the respondent, as they were under investigations. The Claimant further states that as the Claimant was summarily dismissed, he was not entitled to notice or pay in lieu of notice.
8. The Respondent states that the Claimant cleared with it and was issued with his clearance and therefore he has no valid claim against the Respondent whatsoever and urged that the claim be dismissed.
9. The Claimant then filed a reply to the Respondent's defence reiterating what is in the statement of claim and said that the allegations against him are unsubstantiated and that they never in any way warranted the summary dismissal. The Claimant also reiterated the computation in paragraph 5 (a) (b) (c) stating that the Respondent indeed admits withholding his unpaid dues.

Claimant's evidence

10. CW1 Benson Wamaya Wambogo gave sworn testimony and said he does courier deliveries. He adopted the witness statement dated the July 5, 2018 as his evidence in chief. He also adopted the documents contained in list dated the June 13, 2018 as his exhibits 1-6.
11. He testified that he was not given warning letters or any reasons for the termination, was not called to defend or explain himself but was simply given the termination letter. He prayed for the awards as per the memorandum of claim. The Respondent did not testify in the case but applied to adopt his pleadings as per section 21 of *Employment and Labour Relations Court rules*.

The Claimant's submissions

12. The Claimant submits that from the pleadings, the issues for determination borders on the justification and the manner for termination of employment and trickles down to whether the Claimant is entitlement to the available remedies under the law.
13. The Claimant submits that at no point did the Respondent issue any warning letter, suspension notice in respect of the Claimant's employment and neither was he subjected to a disciplinary hearing to answer any allegations. The Claimant says that the letter did not also state any allegations against him and the Respondent unilaterally withheld the claimant's salaries and terminal dues.



14. The Claimant further says that no investigation report or findings or any such evidence demonstrating the purported investigations conducted by the Respondent was presented before Court to corroborate the Respondent's allegations. The Claimant says that to date, he remains unaware of the reasons of his termination and the purported investigations stated in the response. The Claimant states that he was never found guilty of any wrongdoing or culpable of any offence. The Claimant says that the Respondent was determined to terminate him without any justifiable cause.
15. The Claimant further submitted that the Respondent did not have any substantiated reason to terminate him. The Claimant also says that the Respondent did not prosecute his case on the hearing date despite several attempts of service to appear in Court and therefore its evidence as presented in its witness statement is unreliable. The Claimant relied on the case of *Linus Nganga and Others versus Town Council of Kikuyu* 2012 eKLR to the effect that where no witness is called upon on behalf of the defendant, the evidence adduced by the Claimant stands uncontroverted. The claimant submits that the Respondent has not proved its case on justified termination which clearly shows the level of malice from the Respondents in their attempt to terminate the Claimant.
16. The Claimant further argues that section 41 of the *Employment Act* is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing. The Claimant argues that the allegations against the Claimant were without basis and nonetheless, the Respondent proceeded to seemingly try the Claimant and to unilaterally terminate his employment.
17. He further says that he was never notified of the outcome of the purported investigations by the Respondent to date even after making several enquiries. He therefore asks the Court to be guided by the rights of the employee as enshrined in the *Constitution* and the *Employment Act*.

Respondent's Submissions

18. The Respondent submitted that the Claimant's termination was not unlawful or unfair but was a summary dismissal as provided for under the *Employment Act 2007*. That it is in evidence that the Claimant was dismissed as a result of his involvement with fraud at the Radar Staff Welfare Association and the Claimant was also under the investigations by the Cooperative Bank Anti Banking Fraud Unit at the time of his dismissal.
19. The Respondent argues that the *Employment Act 2007* allows for various modes of termination of employment one of the them being summary dismissal provided for under section 44 of the *Employment Act 2007*.
20. The Respondent relied on the case of *Thomas Sila Nzivo v Bamburi Cement Limited* 2014 eKLR where the Court observed that 'the Respondent had reasonable and sufficient grounds to suspect the Claimant having acted to the substantial detriment of the Respondent and its property, and was justified in summarily dismissing the Claimant under section 44 (4) of the *Employment Act, 2007*. The employer was not required to have conclusive proof of the Claimant's involvement, it was only expected to have reasonable and sufficient grounds.
21. The Respondent says that its case in the circumstances overwhelms that of the Claimant and a case of lawful termination ensues from insurmountable evidence of the Respondent against the Claimant. The Respondent says that the Claimant has failed to adduce evidence in support of a case of unlawful termination of employment and has failed to satiate his burden of proof as required under section 47(5) of the *Employment Act*.



Determination

22. The Court has to determine the issue of whether the Respondent terminated the employment of the Claimant unlawfully and secondly whether they followed the right procedure.
23. Section 45 (1) and (2) of the [Employment Act 2007](#) provides that—
- “(1) No employer shall terminate the employment of an employee unfairly.
 - (2) A termination of employment by an employer is unfair if the employer fails to prove—
 - (a) That the reason for the termination is valid;
 - (b) That the reason for the termination is a fair reason—
 - (i) related to the employee’s conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and (c) that the employment was terminated in accordance with fair procedure.”
24. Section 47(1) (5) of the [Employment Act 2007](#) provides that
- “For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.
25. In [Naima Khamis v Oxford University Press \(EA\) Limited](#) [2017] eKLR, the Court of Appeal said that –
- “On the first issue, that is whether the termination was lawful, we wish to take note of the provisions of Section 43(1) of the [Employment Act](#), which provides that in any claim arising out of termination of a contract, the employer is required to justify the reason or reasons for the termination, and where the employer fails to do so, the termination is deemed to have been unfair. Also, Section 45(2)(c) requires a termination be done according to a fair procedure. From the foregoing, termination of employment may be substantively and/or procedurally unfair. A termination is also deemed substantively unfair where the employer fails to give valid reasons to support the termination. On the other hand, procedural unfairness arises where the employer fails to follow the laid down procedure as per contract, or fails to accord the employee an opportunity to be heard as by law required.”
26. Section 41 of [Employment Act 2007](#) provides in mandatory terms the procedure to be employed by the employer prior to terminating the employment of the employee.
27. Similarly the court in [Walter Ogal Anuro versus Teachers Service Commission](#) 2013 eKLR held that:-
- “However, for a termination of employee to pass the fairness test it must be shown there was not only substantive justification but also procedural fairness.



28. The Court of Appeal in CMC Aviation Limited v Mohammed Noor 2013 e KLR' expressed itself as follows;

“We respectfully agree that 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 the statute that still amounts to unfair termination. On the other hand, wrongful dismissal involves breach of the employment contract, like where the employer dismisses the employee without notice or without the right amount of notice.”

29. In the termination letter dated the March 14, 2018, the Respondent does not make any reference whatsoever to the circumstance leading to the termination. There is also no show cause letter with reasons why the Respondent might have contemplated the termination. The Respondent also never called the Claimant for any hearing prior to the termination of the Claimant and the Respondent never tendered any evidence to justify the reasons for termination.

30. In fact in the letter of termination the Respondent merely informed the Claimant “we will no longer require your services”. He went further to provide “we value the service you rendered the company during the course of your employment and we will consider you in future where need arises.” This letter is in total contradiction to the averments in their response to the Claimants claim where they aver they summarily dismissed the Claimant as a result of his involvement with the fraud at the Radar Staff Welfare Association.

31. If at all the Claimant was being indicted for gross misconduct the Respondent should have said so clearly and categorically in their letter of summary dismissal. As it is, it seems these allegations in their defence were just that, allegations with no meat to the same.

32. The upshot of the foregoing is that the Respondent did not profer a valid reason to terminate the employment of the Claimant so abruptly without even any notice. As per the law related to employment and in particular sections 41, 45 and 47 of the Employment Act 2007 the Respondent failed the fairness test as well articulated in numerous authorities among them Walter Ogal Anuru v Teachers Service Commission 2013 eKLR.

In the above authority is where the Court held that in order for termination of employee to pass the fairness test it must be shown there was not only substantive justification but also procedural Fairness.

33. The Court finds the Respondent failed on all the two fronts and therefore holds the Claimant has proved his case on the balance of probability. Judgment is entered in favour of the Claimant.

34. The Court having entered judgment in favour of the Claimant now awards him the following reliefs:-

- a. One month pay *in lieu of* notice Kshs 31,000/-
- b. The Claimant is also awarded compensation for general damages equivalent to 7 months Kshs 31,000x7 = Kshs 217,000/-
- c. Leave for the year 2017 @21 days = Kshs 21,699/93

Total awarded is Kshs 269,699/93

d. Claimant is also awarded costs as well as interest at Court rates from the date of judgment till full payment.

Orders accordingly.



Delivered, dated and signed in Nairobi this 17th November, 2022.

ANNA NGIBUINI MWAURE

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 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 had 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.

ANNA NGIBUINI MWAURE

JUDGE

