



**Yayi v Urysia Limited (Cause 599 of 2015)
[2022] KEELRC 14633 (KLR) (17 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 14633 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 599 OF 2015
NZIOKI WA MAKAU, J
NOVEMBER 17, 2022**

BETWEEN

PETER OUMA YAYI CLAIMANT

AND

URYSIA LIMITED RESPONDENT

JUDGMENT

1. The Claimant instituted this suit against the Respondent in 2015 and later filed an Amended Statement of Claim dated March 15, 2021 alleging unfair termination and Respondent's refusal to pay him his terminal dues. He avers that the Respondent offered him employment on or about May 25, 2010 and issued him with an appointment letter as a driver reporting to the Respondent's Service Manager. That the Respondent then paid him a consolidated gross salary of Kshs 35,000/= per month and confirmed him as a Driver/Runner on March 1, 2013.
2. He further avers that he diligently and faithfully served the Respondent until on or about May 13, 2014 when the Respondent terminated his employment on allegations of gross misconduct. The Claimant avers that the Respondent did not give him notice nor invite him to show cause why he should not be terminated from his employment contrary to the principles of natural justice and the law. The Claimant avers that when he sought payment of his terminal dues, the Respondent through its advocates sent a response alleging that he had absconded from duty and was facing a criminal charge in a court of law. The terminal dues he claims include three months' salary in lieu of notice, 12 months' compensation, individual retirement pension benefits, and a certificate of service. He further prays for award and/or judgment against the Respondent for a declaration that termination from his employment was unfair and for this Honourable Court to issue such orders and directions as it may deem fit to meet the ends of justice. Further, for the Respondents to pay the cost of the claim and for interest at court rates.



3. The Respondent filed an Amended Response to Claim dated September 27, 2021 averring that the Claimant signed his appointment letter on June 18, 2010 and commenced work on June 22, 2010. It is the Respondent's case that on May 5, 2014, the Claimant's supervisor Alfred Marangu had instructed the Claimant to drive the Managing Director to various meetings. That the Claimant was however not present at his station and after his supervisor made several attempts to reach him by mobile phone in vain, he was forced to find alternative means of transport for the MD. That his supervisor was again forced to find alternative means of transport on May 7, 2014 when the Claimant failed to be present at his station. The Respondent avers that following the Claimant's actions on 5th and May 7, 2014, his supervisor called him to a meeting on 13th May 2014 to explain his absence on those days. That the Claimant at that meeting admitted in the presence of his Supervisor and the acting HR Manager, of having taken unauthorized leave on the said days.
4. The Respondent further avers that it was therefore forced to dismiss the Claimant by the way of a letter dated May 13, 2014, effective May 16, 2014. It denies the claim for terminal dues and avers that it paid the Claimant 19 days' salary for the month of May, 2 pending leave days for 2014, pension refunds for between April 2013 and April 2014, and PAYE of Kshs 2,084/- which was also deducted from his pay. That the payment totalling Kshs 33,000.67 was made to the Claimant via Cheque No 101732 for Kshs 21,625.68 and by petty cash voucher No 2255 for Kshs 11,375/-. It denies receiving any demand letters from the Claimant and asserts that it gave the Claimant an opportunity to explain his absence from his post, which the Claimant admitted was unauthorized and without any lawful cause. The Respondent prays that the Claim herein be dismissed with costs or, in the alternative, parties be allowed to negotiate the matter out of Court within a specified period and the mutually agreed settlement be adopted as an order of the Court.
5. The Respondent also filed a witness statement made on October 28, 2021 by its HR Manager, Jacqueline Chele. She stated that as a departmental driver, the Claimant would often be sent to pick and drop customer vehicles and that he also chauffeured the MD to meetings. She noted that from the HR records, the Claimant orally requested for leave from his immediate Supervisor on Monday, May 5, 2014 to Wednesday May 7, 2014 to attend to personal matters but the request was denied due to work requirements and the Claimant informed that he would be required at the office. That the Claimant nevertheless failed to come to work from 5th May to May 7, 2014, forcing his supervisor to find alternative means of transport for the period. She further asserted that the Claimant's disciplinary meeting was held at around mid-morning on May 13, 2014 wherein he admitted of having absconded work to attend to his personal errands and did not apologize for his conduct. That the Claimant was informed in the said meeting that his services were being terminated on the grounds of his gross misconduct.

Claimant's Submissions

6. The Claimant submits that the Respondent did not have a valid reason to terminate his employment. That his testimony before this Court was that he sought an off from his Manager so that he could take his child to school on May 5, 2014 and his manager granted him leave. That it would have been fair if the said Manager came to testify on the veracity of his leave but he did not. It is the Claimant's submission that pursuant to Section 43(1) of the *Employment Act*, the Respondent was required to prove the reasons for the termination of his employment and where it fails to do so, the termination is deemed unfair within the meaning of Section 45. That since the Manager who gave him permission to go on leave did not testify in the case and there having been no communication to him of the Respondent's intention to terminate the Claimant's services, this Court should find that the Respondent lacked any reason to terminate his employment.



7. The Claimant submits that he was also entitled to a fair disciplinary hearing process as envisaged under Section 41 of the [Employment Act, 2007](#) that is, getting an explanation of the reason for which, the employer was considering termination and having another employee or a shop floor union representative of his choice present during this explanation, before termination of employment. That in the instant case, no procedure was followed before termination of his services and the Respondent has not produced in Court any minutes for the alleged meeting. That the Respondent did not also issue him with any warning letter or a notice to show cause why his services could not be terminated in the manner they were. The Claimant relies on the case of [Standard Group Limited v Jenny Luesby](#) [2018] eKLR where the court held that a hearing is important as the law made it mandatory even in the worst-case scenario where an employee grossly misconduct oneself, and that the right to hearing is what amounts to meeting the true tenets of natural justice. The Claimant thus invites this Court to declare the termination as unfair and unlawful and award the terminal dues sought.
8. It is the Claimant's submission that he is entitled to salary in lieu of notice as under Section 35 of the [Employment Act](#) since he was not issued with any notice before his services were terminated and his appointment letter provided at clause 13 for three months' pay in lieu of notice. He further submits that he worked for the Claimant for four years with a clean record and thus seeks the maximum 12 months compensation for the unlawful, unprocedural and unfair termination from employment under Section 49 as read with Section 50 of the [Employment Act, 2007](#). That he is further entitled to issuance of a Certificate of Service as required under Section 51 of [Employment Act](#) and that as it is the Respondent that vehemently refused to pay him his terminal dues, the award of costs and interest at Court rates ought to be in favour of the Claimant.

Respondent's Submissions

9. The Respondent submit that the termination of the Claimant's employment was premised on the ground of his absenteeism from work. That summary dismissal is allowed for a fundamental breach of the employment contract and for gross misconduct as under Section 44(3) and (4) of the [Employment Act](#) respectively. Notably, an employee's absenteeism from work without leave or lawful cause amounts to gross misconduct under Section 44(4)(a) and that the practice of the Respondent company when seeking leave was filling a leave form in advance and presenting it to the head of the department for review. That the Claimant did not abide by this rule and instead sought leave from his supervisor. The Respondent relies on the case of [Moi Teaching and Referral Hospital v James Kipkonga Kendagor](#) [2019] eKLR where the Court stated that being absent from work without leave or lawful cause constitutes a misconduct that can justify the dismissal of an employee. It is the Respondent's submission that considering its averments that the Claimant admitted to having absconded work without permission, his termination was fair and justified as the same is a ground for summary dismissal.
10. As regards the reliefs sought in the Claim, the Respondent submits that Section 18(4) of the [Employment Act](#) provides that where an employee is summarily dismissed for lawful cause, the employee shall be paid all moneys, allowances and benefits due to him up to the date of his dismissal. That it is pursuant to this provision that the Claimant was paid his terminal dues after termination of employment. It avers that the Claimant is not entitled to salary in lieu of notice or compensation as he was summarily dismissed for reasonable cause. Further and in relation to the pension benefits, it made pension refunds to the Claimant for the period from April 2013 to April 2014. That since the Claimant never served the demand letter and intention to sue on the Respondent, he is therefore not entitled to costs.



11. The Claimant was dismissed after he played truant on a few occasions. He asserts that he was entitled to a fair hearing which he states he was not given. The Respondent on the other hand asserts the Claimant was dismissed for cause and that in the dismissal the Respondent followed the law. It was apparent the Claimant prior to dismissal was called and asked to give an explanation. He was in my considered view granted a chance to defend himself and in terms of Section 41 of the *Employment Act* was accorded a hearing. It is not lost on the Court that a hearing under Section 41 of the *Employment Act* is not synonymous as a hearing in a civil or criminal trial. It is the formal opportunity an employee is granted to give explanation for an incident that the employer can well use to terminate employment. The Claimant admitted he was absent on the days in question and his absence, not being one that was sanctioned by the Respondent, was basis for the dismissal. The Claimant was paid his terminal dues as required under Section 18 of the *Employment Act* and he therefore has no valid claim against the Respondent. The suit being devoid of merit is dismissed albeit with no order as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF NOVEMBER 2022

Nzioki wa Makau

JUDGE

