



**Njeri v Powerstar Supermarket Limited (Cause 752 of 2018)
[2022] KEELRC 13201 (KLR) (11 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13201 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 752 OF 2018
SC RUTTO, J
NOVEMBER 11, 2022**

BETWEEN

PETER MBUTHIA NJERI CLAIMANT

AND

POWERSTAR SUPERMARKET LIMITED RESPONDENT

JUDGMENT

1. The claimant avers that he was employed by the respondent on May 28, 2014 as a line attendant and deployed to its Kangari supermarket. That at the time he was being employed, he was not issued with a contract of employment. That his starting salary was Kshs 12,000.00 net of deductions. He avers that he was later transferred to the respondent's supermarket at Zimmerman and promoted to the position of Manager. That subsequently, his salary rose to Kshs 43,000.00. That he worked well for the respondent and had no record of indiscipline.
2. Things took a turn following a series of events, as the claimant avers that the respondent's general manager informed him on March 27, 2018, that he had been dismissed from employment at the behest of the respondent's director, with effect from March 15, 2018. That he was not informed of the reason for his dismissal and was not given an opportunity to be heard prior to the said dismissal. It is for this reason that the claimant perceives his termination as unlawful, wrongful and unfair.
3. The claimant further avers that following his dismissal, he was only paid salary for days worked in the month of March, 2018. Consequently, he seeks against the respondent several reliefs including pay in lieu of notice, pay in lieu of leave, house allowance, overtime, compensatory damages as well as a certificate of service.
4. The respondent entered appearance through the firm of CK Chege & Co Advocates but did not file a response in answer to the claim. This is despite being granted leave on January 31, 2019, to put in a response. As it came to be, that was the last appearance the respondent made in court.



5. The matter was scheduled for trial on July 5, 2022 and when it was called out, the respondent and his advocate were absent from court. The claimant's advocate referred the court to an affidavit of service sworn on June 6, 2022, wherein he depones that he effected service of the day's hearing notice upon the respondent, by way of registered post. The court being satisfied with the proof of service and pursuant to the provisions of rule 22 of the [Employment and Labour Relations Court Rules \(2016\)](#), proceeded to hear the matter, notwithstanding the respondent's absence.
6. At the outset, the claimant sought to rely on his witness statement and bundle of documents filed together with his claim to constitute his evidence in chief. He further produced the said documents as his exhibits before court.

Claimant's case

7. It was the claimant's testimony that on March 15, 2018, while at work, the respondent's director by the name Mr Kamau, enquired from him why the stocks for the supermarket had not been adjusted. That he explained to the said director that the stocks manager and the accountant had largely adjusted the stocks, save for the bread and milk stocks which were usually balanced at the end of each day. That he further informed the director that he had authorized the stocks manager and the accountant to adjust the stocks as it was their duty to do so. That subsequently, the director ordered him to proceed on suspension. That despite finding the directive absurd, he complied and proceeded on suspension.
8. He stated in further testimony that when he called the director regarding his suspension on March 16, 2018, he notified him that he had engaged another manager for the supermarket and that he would observe the new manager's performance against his, before determining the fate of his employment.
9. That on March 19, 2018, he once again sought out the director and politely enquired about his suspension and whether he was still an employee of the respondent. That the director informed him that he was still investigating him and comparing his performance to the new manager's. He stated in further testimony that he was not aware of the offence for which he was being investigated.
10. That on March 26, 2018, the general manager of the respondent removed his cell phone from a WhatsApp platform of managers of the various branches of the respondent supermarket. That when he called the said general manager on March 27, 2018, enquiring the reasons for his removal from the WhatsApp platform, he informed him that he had acted at the behest of the director. That the general manager further informed him that he had been dismissed from employment with effect from March 15, 2018.
11. The claimant further stated that he was neither informed of any wrongdoing on his part, nor was he given an opportunity to be heard prior to his termination. Concluding his testimony, the claimant asked the court to allow his claim as prayed.

Submissions

12. Citing the cases of [Josephine M Akinyi v Farbiyo Mohamed](#) (2016) eKLR and [Wycliffe Makboha Ouma v Security Guards Services Limited](#) (2014) eKLR, the claimant urged the court to find that he was employed on May 28, 2014. He further submitted there was no reason for his dismissal and that he did not commit any fault to warrant dismissal. He further submitted that the respondent did not comply with sections 41(1), 43(1)45(1) and 45(2) of the [Employment Act](#), in effecting his termination.
13. It was the claimant's further submission that failure by the respondent to comply with procedural fairness is sufficient ground to find his dismissal unlawful. In support of the claimant's submissions, the cases of [Samuel Muchiri Gikonyo v Henkel Chemicals \(EA\) Ltd](#) (2014) eKLR, [Peter Apolo Ochieng v](#)



Amedo Center Kenya Limited (2016) eKLR and *Peter Onyango Nyabongo v Citadelle Security Limited* (2015) eKLR were cited in support.

Analysis and determination

14. From the pleadings on record as well as the evidentiary material placed before me, it is evident that this court is being called to primarily determine whether there was any employment relationship between the claimant and the respondent, and if so, whether the claimant's termination was unfair and unlawful and whether he is entitled to the reliefs sought.

Existence of employment relationship?

15. At the outset, it is important to determine the existence of an employment relationship, seeing that the claim was undefended. It was the claimant's testimony that he was not issued with a contract of employment. In support of his assertion that he was an employee of the respondent, the claimant exhibited his bank statements in respect of the account through which he was receiving his salary.
16. From the said bank statements, it is evident that the respondent was remitting money to the claimant's account, at regular intervals.
17. The claimant further exhibited his statements from the National Social Security Fund (NSSF) which indicate regular remittance of his dues. The said statement further identifies the respondent as the claimant's employer.
18. In light of the foregoing, I am satisfied that the claimant has proved on a balance of probability that he was employed by the respondent.

Unfair and unlawful termination?

19. In accordance with section 43(1) of the *Employment Act* (Act), an employer is required to prove the reasons for which it terminated an employee, failure to which such termination is deemed to be unfair. Additionally, section 45 (2) (a) and (b) of the Act, provides that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and relates to the employee's conduct, capacity or compatibility; or based on its operational requirements.
20. That is not all. Under section 45 (2) (c) of the Act, an employer is required to prove that it complied with the requirements of a fair process in terminating the services of an employee. Section 41(1) of the Act elaborates what entails a fair process. In this regard, it requires an employer to notify an employee of the intended termination. Such notification is in respect of the reasons for which the employer is considering termination and ought to be communicated in a language the employee understands and in the presence of another employee or a shop floor union representative.
21. The above legal threshold was aptly expressed as follows in the case of *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR:

“13. 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.”



22. It is therefore apparent that for termination to pass muster, an employer must justify that there was a valid reason to terminate the employment of an employee and that such termination was in line with fair procedure. Fair procedure basically entails giving the employee an opportunity to explain himself and answer to the allegations which he or she is being accused of.
23. In the instant case, the claimant was not issued with a letter of termination hence the manner in which he left employment is largely circumstantial. He avers that he was asked by the respondent's director to proceed on suspension and thereafter his termination was communicated verbally through the respondent's general manager.
24. As stated herein, the respondent did not file a response and did not participate in the hearing. Therefore, the claimant's averments remained uncontroverted. In this regard, no reasons were advanced by the respondent to justify the claimant's dismissal.
25. It therefore follows that the respondent did not satisfy the first requirement, which relates to proof of reasons. In the circumstances, it is not possible to determine whether the reasons for the claimant's termination were valid or fair in the first place, as none were tendered at all. Indeed, it may be well said that the reasons for the claimant's termination remained largely unknown.
26. Similarly, there is no evidence that the respondent complied with the requirement of procedural fairness in terminating the claimant from employment. Matters were made worse by the sheer fact that the claim was undefended hence there was no suggestion or indication by the respondent to that effect.
27. In the circumstances, I cannot help but conclude that the respondent had no reasons to justify the claimant's termination and in so doing, failed to comply with the requirements of a fair process.
28. In total sum, I find that the claimant's termination was unfair and unlawful as it fell below the legal parameters stipulated under sections 43 and 45(2) of the Act.

Reliefs

29. Having found that the claimant's termination was unfair and unlawful, I will award him compensatory damages equivalent to five (5) months of his gross salary. This award is informed by several considerations; the first being the length of the employment relationship, the second being the fact that the respondent did not advance any reasons whatsoever for the claimant's termination and third is that the respondent did not comply with the requirements of fair process in terminating the claimant from employment.
30. The claimant is further awarded one month's salary in lieu of notice as it is evident from the bank statements exhibited, that he was being paid salary at monthly intervals.
31. The claim for house allowance is declined as the claimant was categorical that he was not issued with a contract of employment and pay slips. If indeed true, then the court wonders how the claimant was able to determine that the salary was exclusive of house allowance.
32. Similarly, the claim for untaken leave days and public holidays, is denied for want of proof. Besides, the claim has been made in a global manner and is not particularized. Therefore, it is not clear which period the claimant alleges to have been denied leave and when he was required to work during public holidays.



33. On this issue, I will follow the determination by the Court of Appeal in *Patrick Lumumba Kimuyu v Prime Fuels (K) Limited* [2018] eKLR, where the learned Judges cited with approval the case of *Rogoli Ole Manadiegi v General Cargo Services Limited* (2016) eKLR, as follows:

“ Addressing a similar issue this Court in its decision in *Rogoli Ole Manadiegi v General Cargo Services Limited* (2016) eKLR expressed as follows;

“It is true the employer is the custodian of employment records. The employee, in claiming overtime pay however, is not deemed to establish the claim for overtime pay by default of the employer bringing to court such employment records. The burden of establishing hours or days served in excess of the legal maximum, rests with the employee. The claimant did not show in the trial court when he put in excess hours, when he served on public holidays or even rest days... he did not justify the global figure claimed in overtime, showing specifically how it was arrived at...”

The court disallowed that claim. This case is on all fours with the above case and we reiterate the above finding. The finding by the trial court that the appellant had failed to prove his claim with regard to compensation for public holidays and Sundays worked is without fault. That ground of appeal must therefore fail.”

34. The claim for overtime is also denied as the claimant did not prove the same despite being specific in nature. It is trite law that a claim that is specific in nature must be pleaded and proved for an award to issue. Having not been proved, there is no basis for an award in that regard.

35. As the court has found that the claimant has proved on a balance of probability that he was employed by the respondent, he is entitled to a certificate of service in accordance with the provisions of section 51 of the *Employment Act*.

Orders

36. In the end, I enter judgment in favour of the claimant against the respondent and make the following award:

- a. Compensatory damages in the sum of Kshs 215,000.00 which sum is equivalent to 5 months of his gross salary.
- b. One month’s salary in lieu of notice being the sum of Kshs 43,000.00.
- c. The total award is Kshs 258,000.00.
- d. Interest on the amount in (c) at court rates from the date of judgement until payment in full.

37. Costs follow the event hence the claimant shall have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF NOVEMBER, 2022.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Muli

For the Respondent No appearance



Court Assistant Abdimalik Hussein

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.

STELLA RUTTO

JUDGE

