



**Mumo v Elite Earth Movers Limited (Cause 1749 of 2017)
[2022] KEELRC 13200 (KLR) (11 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13200 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1749 OF 2017
SC RUTTO, J
NOVEMBER 11, 2022**

BETWEEN

KENNEDY LUVENI MUMO CLAIMANT

AND

ELITE EARTH MOVERS LIMITED RESPONDENT

JUDGMENT

1. The claimant avers through the instant suit that he was employed by the respondent as a turn boy. That he performed his duties continuously with due diligence to the respondent's satisfaction until his dismissal on August 2, 2016. He avers that he was not given any reasons for his termination and was not given notice or payment in lieu thereof. The claimant has termed his termination as unfair and as such, claim against the respondent the sum of Kshs 278,227.00 being notice pay, compensatory damages, untaken leave days, unutilized public holidays, untaken off days and service pay.
2. The claim was opposed with the respondent denying the claimant's averments. The respondent termed the claimant as a casual labourer who undertook his duties as assigned by his supervisor on each day. The respondent further stated that on the material day, the claimant was assigned duties of a mechanic assistant, which he declined to do and deserted duty. Consequently, the respondent has asked the Court to dismiss the claim with costs.
3. When the matter came up for hearing on March 23, 2022, the respondent's Advocate indicated his intention to file an Application to cease acting, hence sought the appropriate leave. The matter was scheduled for further mention on March 30, 2022 to confirm filing of the said application and for purposes of taking further directions on the hearing.
4. On March 30, 2022, the respondent's Advocate was absent from Court and there was no application from his end to cease acting. Subsequently, the Court scheduled the matter for hearing on June 23,



2022. On the said hearing date, the respondent's Advocate had filed an application to cease acting. However, he was not in Court to prosecute the same.
5. The claimant notified Court through his Advocate, that service of the day's hearing had been effected upon the respondent. To this end, the Court was referred to an Affidavit of Service sworn by Ms. Owuor Reen on June 15, 2022.
 6. Being satisfied with the proof of service, the Court directed the matter to proceed for hearing, the respondent's absence notwithstanding.

Claimant's case

7. At the start of the hearing, the claimant sought to rely on his witness statement together with the documents filed with the claim, to constitute his evidence in chief. He also produced the said documents as his exhibits before Court.
8. It was the claimant's testimony that he was employed by the respondent on April 2, 2014. That he was engaged as a casual employee and was earning the sum of Kshs 440/= per day, which was paid on a weekly basis. That the salary payments would be made through MPesa by Ms. Pravin Vasanti and/or Mr. Mayani Kalyan. That throughout his employment with the respondent, he worked continuously.
9. That he reported to work on August 2, 2016 and was informed by the respondent's manager by the name, Mr. Raju, that he had been dismissed from employment. That he was not given the reason for his termination and neither was he issued with a notice prior to the said termination. That further, he was not subjected to a disciplinary hearing. That following his dismissal, he made efforts to enquire from the respondent's Chief Executive Officer, by the name Mr. Pravin Patel as to the reasons for his termination but he ignored him and ordered him to leave the respondent's premises and take the necessary action against the company.
10. In further testimony, the claimant denied deserting duty. He further stated that following his termination, he was not paid his terminal dues. He concluded his testimony by asking the Court to allow his claim as prayed.

Respondent's case

11. As stated herein, the respondent did not present oral evidence hence its case is as per its defence through which it has denied the claimant's averments.

Submissions

12. The claimant submitted that the respondent failed to substantiate the reasons for his termination from employment, in accordance with section 43 of the *Employment Act*. That despite the respondent accusing him of insubordination and absconding duty, it failed to subject him to a fair disciplinary hearing. To support the claimant's submission, the authorities of *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR and *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR were cited.

Analysis and determination

13. I have considered the issues raised in the pleadings, the evidence, as well as the submissions on record and I have singled out the following questions for resolution:
 - a) Was the claimant's termination from employment unfair and unlawful?



- b) Is the claimants entitled to the reliefs sought?

Was the claimant's termination from employment unfair and unlawful?

14. At the outset, I need to address a question regarding the nature of the employment relationship between the parties. The claimant has stated that he was engaged as a casual employee but worked continuously. It is noteworthy that despite the respondent asserting that it employed the claimant as a casual employee, it failed to lead evidence to prove as much.
15. It is important to point out that pursuant to Section 10 (7) of the *Employment Act*, the respondent being the employer, was under an obligation to prove the fact that the claimant was a casual employee. The said statutory provision is couched as follows: -
- “if in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1), the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.”
16. This position was reiterated by the Court of Appeal in *Jackson Muiruri Wathigo t/a Murtown Supermarket v Lilian Mutune* [2021] eKLR where it was held that: -
- “[15]. In any event, as per the respondent, the burden lay with the appellant by virtue of Section 10(7) of the *Employment Act* to establish the terms of her employment. His failure to render any employment record meant that the appellant had not established his allegations that she was a casual employee. Besides, the respondent submitted that having worked for the appellant from August, 2010 until November, 2013, the appellant was estopped by Section 37 of the *Employment Act* from claiming that she was a casual employee.”
17. In light of foregoing, it was not sufficient for the respondent to submit that the claimant was a casual employee, then fail to prove as much by way of evidence. The respondent's assertions to that effect remain unsubstantiated.
18. That said, I now move to determine whether the claimant's termination was unfair and unlawful.
19. The claimant has alleged that he was unfairly and unlawfully terminated from employment. The relevant statutory provisions in determining this issue are sections 43, 45 and 41 of the *Employment Act*.
20. Under sections 43 and 45(2) (a) and (b) of the Act, an employer is required to prove that there was substantive justification to warrant an employee's termination. Specifically, section 43(1) of the *Employment Act*, requires an employer to prove the reason or reasons for the termination, and where it fails to do so, such termination shall be deemed to have been unfair within the meaning of section 45.
21. Section 45 (2) (a) and (b) of the *Employment Act* goes ahead to provide that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and is related to the employee's conduct, capacity or compatibility; or based on its operational requirements.
22. As regards procedural fairness, sections 45(2) (c) and 41 of the *Employment Act* require that an employee be accorded to a fair hearing prior to being terminated from employment. The specific requirements in fulfilment of a fair hearing are to be found under section 41. The procedure entails notifying the employee of the allegations he or she is required to respond to and thereafter granting him or her the opportunity to make representations in response to the said allegations.



23. What I have stipulated above, constitute the legal parameters for determining the fairness of an employee's termination.
24. The above legal threshold was aptly summarized by the Court of Appeal in the case of *Janet Nyandiko v Kenya Commercial Bank Limited* [2017] eKLR, thus: -

“Section 45 of the 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, the previous practice of the employer in dealing with the type of circumstances which led to the termination and the existence of any warning letters issued by the employer to the employee.

Section 41 of the Act, enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands the reasons for which the employer is considering to terminate the employee's employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice; and to hear and consider any representations which the employee may advance in response to allegations leveled against him by the employer.”

25. Turning to the case herein, the respondent has stated in its defence, that the claimant declined to undertake the duties assigned and deserted duty. Essentially, it accused the claimant of insubordination and desertion.
26. Despite the respondent's assertions, there was no evidence to back up its assertion for instance, a muster roll or attendance register.
27. As per the legal threshold established in the *Employment Act*, the respondent was bound to prove that it had valid and fair reasons to disengage with the claimant. In default of such proof, the claimants' termination can only be termed as unfair in terms of sections 43(1) and 45(2) (a) and (b) of the *Employment Act*.
28. Similarly, the respondent failed to lead evidence to prove that it applied a fair process prior to terminating the claimant's employment. In light of the provisions of section 45(2) (c) as read together with section 41 of the *Employment Act*, the respondent was bound to subject the claimant to a fair process prior to termination. There being no evidence let alone, an indication that the claimant was subjected to a fair process prior to being terminated, I am led to conclude that such a process was not undertaken in the first place.



29. In light of the foregoing, I arrive at the inescapable conclusion that the claimant's termination was not only unfair but unlawful.

Appropriate Reliefs

30. Having found that the claimant's termination was unfair and unlawful, the Court awards him five (5) months of his gross salary as compensatory damages. This award takes into account the length of the employment relationship as well as the respondent's failure to prove that there was a substantive justification for the claimant's termination and that fair process was applied.
31. The claimant is further awarded one (1) month's salary in lieu of notice and service pay for the respective years served.
32. The claimant is further awarded service pay for the period served as there was no evidence that he was not entitled to the same, pursuant to the provisions of section 35(6) of the Employment Act.
33. The claim for untaken leave, public holidays and off days is declined for want of proof.

Orders

34. In the end, I enter Judgment in favour of the claimant against the respondent and the Court makes the following award: -
- (a) Compensatory damages in the sum of Kshs 61,600.00 which sum is equivalent to 5 months of the claimant's gross salary.
 - (b) One month's salary in lieu of notice being the sum of Kshs 12,320.00.
 - (c) Service pay for 2.5 years being the sum of Kshs 15,400.00.
 - (d) The total award is Kshs 89,320.00.
 - (e) Interest on the amount in (d) at court rates from the date of Judgement until payment in full.
35. 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 Ms. Alividsa

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

