



**Kusimba v Navisat Telematics Limited (Cause E016 of 2021)
[2022] KEELRC 13215 (KLR) (10 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13215 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E016 OF 2021
AK NZEI, J
NOVEMBER 10, 2022**

BETWEEN

CELESTINE KUSIMBA CLAIMANT

AND

NAVISAT TELEMATICS LIMITED RESPONDENT

JUDGMENT

1. The claimant sued the respondent vide a statement of claim dated February 16, 2021 and set out the following claim:-
 - a. One month salary in lieu of notice.....ksh 100,668
 - b. Compensation for unfair termination
of employment (100,668X12).....Ksh 1,208,016
 - c. Severance pay (100,668 -15/30)X4.....Ksh 201,336
 - d. Housing allowance (19,753X10 months).....Ksh 197,530
 - e. Certificate of service
 - f. Costs of the suit.
2. The Claimant pleaded that she was on December 28, 2013 appointed by the respondent to the position of Business Account Executive, which appointment too effect on January 6, 2014 at a salary of ksh 45,000 per month. The claimant further pleaded that she was subsequently promoted to the position of Operations Manager at the respondent company, earning Ksh 100,668 per month.



3. It was the claimant's pleading that she signed a contract of employment on January 6, 2014 and that when the period of that contract ended in 2017, the respondent allowed her to continue working in the same position earning the same salary.
4. The claimant further pleaded:-
 - a. that on January 8, 2018, she proceeded on a 21 days annual leave that was to end on January 29, 2018, and that when the leave ended, the respondent send her on a two weeks forced leave and was thereafter not allowed back to work by the respondent, and was turned back unceremoniously on February 20, 2018.
 - b. that the respondent refused to pay the claimant's salary for four months; which the respondent paid upon demand.
 - c. that the claimant's employment was terminated without her knowledge and without any reason, and that the termination was unfair, unlawful, abrupt, without notice and contravened the rules of natural justice, the Constitution of Kenya, labour laws and the International Law Conventions and Declarations.
 - d. that the claimant was not accorded an opportunity to be heard before termination; and was terminated without notice.
5. Along with the statement of claim, the claimant also filed her written witness statement which replicated the statement of claim, and a list of documents dated February 16, 2021, listing some seven documents. The listed documents included the claimant's payslip for March 2018.
6. The filed payslip indicates that the claimant's gross salary as at March 2018 was Ksh 135,949, inclusive of house allowance, and that the claimant's monthly net pay was ksh 100,668. The claimant's claim therefore appears to be based on the net pay rather than the gross pay. The claimant's claim will thus be determined based on her net pay, as parties are bound by their pleadings.
7. The respondent entered appearance on March 3, 2021 and filed a response to the claim on March 23, 2021, denying the claimant's claim. Further, the respondent filed a witness statement of one Walter Mbindyo on November 12, 2021 and a list of documents dated October 27, 2021, listing eleven documents, which included the claimant's contract of employment and copies of cheques, among other documents.
8. When trial opened on January 31, 2022, the claimant adopted her written and filed witness statement as her testimony and produced in evidence the documents referred to in paragraph 5 of this judgment. The claimant further testified:-
 - a. That the claimant did not receive from the respondent any communication on any accusation against her (the clamant).
 - b. That the claimant was not taken through any disciplinary process, and was not issued with any notice of termination.
9. The claimant further testified that after she sought legal intervention after being terminated, and upon demand being issued, the respondent issued her with cheques for a total sum of Ksh 402,672, being the claimant's salary for the months of April, May and June 2018, and that one the cheques, for Ksh 67,112, bounced. The claimant further testified that the credit notes alleged by the respondent were not true, and were never in her knowledge, and that the claimant was never made aware of them while she worked for the respondent. That the issue of credit notes was only raised in response to the claimant's



- demand letter, *vide* a response to the demand dated September 17, 2018. The claimant denied ever issuing the alleged credit notes totaling Ksh 5,573,809, and stated that she had no capacity to issue such notes.
10. Cross-examined, the claimant admitted that her pleaded salary was inclusive of house allowance, and that the money paid to her by the respondent upon demand was inclusive of house allowance; and that it was not true that her house allowance was not paid for ten months.
 11. Re-examined, the claimant testified that the last month that the respondent paid her salary was July 2018, and that from that month the respondent did not pay her.
 12. The respondent called one witness, Walter Mbidyo (RW-1), who adopted his filed witness statement dated October 27, 2021 as his testimony and produced in evidence the documents referred to in paragraph 7 of this judgment. The witness, who told the court that he was the respondent's CEO (Chief Executive Officer), testified further:-
 - a. That the claimant did not do proper top-up on motor vehicles/fleet trucking system, resulting in the loss of Ksh. 5,573,890.
 - b. That upon receipt of the claimant's advocates' demand letter, the Respondent paid the claimant ksh. 402,672, and that one of the cheques which initially bounced was rebanked on RW-1's instructions to the claimant's counsel.
 - c. That the respondent did not terminate the claimant, either unfairly or at all.
 - d. That the respondent had send the claimant on forced leave as there were ongoing investigations.
 - e. That the claimant was being paid house allowance as stated in the payslip for March 2018.
 - f. That the claimant was not declared redundant, and that the claim for severance pay could not be allowed.
 13. Cross-examined, the respondent's witness (RW-1) testified:-
 - a. That the claimant had not been given job description in her employment.
 - b. That the claimant was not subjected to any disciplinary proceedings.
 - c. That the respondent did not terminate the claimant, but had nothing to show that the respondent paid the claimant's salary before she came to court.
 - d. That the respondent did not issue any notice to the claimant.
 - e. That the respondent paid the claimant's salary upto August 2018.
 14. Upon considering the pleadings field and evidence adduced by both parties, issues that present for determination are:-
 - a. Whether the claimant's employment was terminated by the respondent, and if so, whether the termination was unfair.
 - b. Whether the claimant is entitled to the reliefs sought.
 15. On the first issue, the claimant testified that the respondent send her on forced leave upon completing her annual leave in January 2018, and that upon returning to work on February 20, 2018 after the two weeks' forced leave, the Respondent turned her away unceremoniously. While admitting to having



send the claimant on force leave, RW-1 did not deny having denied the claimant access to her place of work, and did not deny having stopped payment of the claimant's salary in August 2018.

16. Further, the respondent did not tell the court what disciplinary action it took against the claimant if at all she stayed away from duty without her employment having been terminated as pleaded and testified by the claimant. It is my finding that the claimant's employment was terminated by the respondent.
17. On whether or not termination of the claimant's employment was unfair, section 41 of the [Employment Act](#) is called in aid. The said section provides:-

“(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.”

18. The respondent did not demonstrate that it complied with the foregoing mandatory procedural requirements, and did not demonstrate that it had any valid reason to terminate the claimant's employment. It was held in the case of [Walter Ogalo Anuro v Teachers Service Commission](#) [2013] eKLR as follows:-

“...for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”

19. The Court of Appeal held as follows in the case of [Kenfright \[e.a.\] Limited 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...”

20. It is my finding that termination of the claimant's employment by the respondent was procedurally and substantively unfair.
21. On the second issue, I award the claimant the equivalent of eight months salary as compensation for unfair termination of employment; that is Ksh 100,688 X 8 = 805,504. I also award the claimant ksh 100,688 being one month salary in lieu of notice. I have taken into account the circumstances in which the claimant's employment was terminated.



- 22. The claim for severance pay is declined as termination of the claimant’s employment was not on account of redundancy. The claim for house allowance is also declined as the claimant demonstrated, by exhibiting a copy of her payslip for March 2018, that her monthly salary was inclusive of house allowance. Both the claimant and the respondent’s witness (RW-1) testified as much. The prayer for issuance of a certificate of service is merited and I allow the same.
- 23. Finally, judgment is hereby entered for the claimant against the respondent for:-
 - a. The equivalent of eight months’ salary
being compensation for unfair termination
of employmentKsh 805,504
 - b. One month salary in lieu of notice.....ksh 100,688

Total Ksh906,192
- 24. The sum awarded shall be subject to statutory deductions pursuant to section 49(2) of the Employment Act.
- 25. The respondent shall issue the claimant with a certificate of service within thirty days of this Judgment pursuant to section 51(1) of the Employment Act.
- 26. The claimant is awarded costs of the suit and interest at court rates. Interest shall be calculated from the date of this judgment.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 10TH 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:

..... for Claimant

..... for Respondent

