



**Ombaisi v Slapper Shoes Industries (Cause 633 of 2017)  
[2022] KEELRC 13213 (KLR) (10 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13213 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 633 OF 2017  
AK NZEI, J  
NOVEMBER 10, 2022**

**BETWEEN**

**JOSEPH OKWAYO OMB AISI ..... CLAIMANT**

**AND**

**SLAPPER SHOES INDUSTRIES ..... RESPONDENT**

**JUDGMENT**

1. The claimant sued the respondent vide a memorandum of claim dated August 2, 2017 and pleaded:-
  - a. That the claimant was employed by the respondent on March 1, 2000 as a machine attendant in Changamwe, and was in 2011 deployed as Turn Man with various vehicles used for delivery of the respondent's products in various parts of Kenya, and that the claimant's duties as Turn Man were to offload and to deliver merchandize to the respondent's customers.
  - b. That March 26, 2015, while in the process of performing the aforesaid duties at Industrial Area in Nairobi, the claimant sustained severe injuries as a result of a motor vehicle accident.
  - c. That the respondent continued paying the claimant's salary upto August 2015 when he abruptly stopped paying without notice, and that when the claimant's union made a follow up of the matter, the respondent's Human Resource Manager verbally informed him that the claimant's employment had been terminated.
  - d. That at the time of termination in August 2016, the claimant had travelled upcountry to seek help from his family as he was helpless as a result of the injuries and could not stay alone.
  - e. That the respondent never informed the claimant the reason for the dismissal.
  - f. That the respondent's actions were in breach of the contract and terms of employment and the Employment Act 2007, and the claimant is entitled to damages and compensation for unfair and unlawful termination of employment.



- g. That the claimant was terminated without notice, and was not accorded any fair hearing and was not paid his dues or given a certificate of service.
2. The claimant set out his claim against the respondent as follows:-
- a. Salary from September 2016 to February 2016.....KSh. 112,000
  - b. Three months' salary in lieu of notice .....KSh. 48,000
  - c. Twelve months' salary compensation .....KSh. 192,000
  - d. A declaration that termination of the claimant's employment was unfair and unlawful.
  - e. Certificate of service.
  - f. Costs and interest.
3. The claimant filed his written witness statement and a list of documents dated August 2, 2017, listing six documents. The listed documents include the claimant's payslip for February 2016 and a certificate of service dated September 7, 2016, among other documents. The said documents accompanied the memorandum of claim.
4. The respondent filed a response to the memorandum of claim on May 9, 2018, and pleaded, *inter-alia*:-
- a. That the claimant's employment was on contract basis whereby the claimant would be paid salary in arrears at the end of each calendar month upon rendering services.
  - b. That there occurred a road traffic accident on March 26, 2015 involving the respondent's motor vehicle registration number KAR 642P, in which the claimant suffered severe physical injuries in the cause of his employment as a turn boy.
  - c. That the respondent continued paying the claimant's salary/wages from the said date of the accident until August 2016 in the hope that the claimant would recover from the injuries sustained and resume his duties.
  - d. That prior to stopping the claimant's salary, the respondent called on the claimant, who had relocated to his butere rural home, to avail himself for medical evaluation on his suitability to continue working, but to no avail.
  - e. That sometimes in the month of August 2016 or thereabouts, the claimant asked the respondent on telephone to pay him his terminal dues and to stop disturbing him as he was physically unable to continue working due to the injuries sustained.
  - f. That the respondent computed the claimant's dues as follows:-
    - i. Gratuity at the rate of 18 days for 16  
 competed years ( of service)..... KSh 149,483
    - ii. Pay in lieu of leave for the year 2015  
 (25 days) ..... KSh 12,976
    - iii. Pro-rata pay in lieu of leave 2016 (14 days) ..... KSh 7,267
    - iv. Two months' pay in lieu of notice .....KSh 26,990

Total KSh 196,716



less

i. PAYE..... KSh 25,196

ii. Slapper Saco loan balance.....KSh. 59,700

Total KSh. 111,820

- g. That the respondent deposited the terminal dues into the claimant's bank account vide a cheque dated September 19, 2016.
- h. That the respondent did not act unlawfully or in breach of the claimant's contract of employment; and only stopped paying the claimant's salary after the claimant refused or neglected to comply with the respondent's repeated requests for the claimant to avail himself for medical evaluation on his suitability to continue in employment.
- i. That the claimant had filed suit against the respondent seeking general damages for pain, suffering and loss of amenities sustained in the accident on March 26, 2015 vide Mombasa CMCCC No 1312 of 2017.
5. On August 20, 2018, the respondent filed a witness statement by one Thomas Nyamwaro dated August 15, 2018 and a list of documents dated the same date, listing 9 documents. Documents listed by the respondent included the pleadings and medical reports/documents filed in Mombasa CMCC No 1312 of 2017, terminal dues calculation dated September 3, 2016, a copy of cheque No 000369, a bank deposit slip dated September 19, 2016 and the respondent's letter dated June 30, 2016, among others.
6. On August 28, 2018, the claimant filed a further list of documents listing one document, being the statement of defence filed in Mombasa CMCCC No 1312 of 2017. On the other hand, the respondent filed a second witness statement by one Joseph Sudi Napwora, dated May 21, 2021.
7. When trial opened on November 8, 2018, the claimant adopted his filed witness statement as his testimony, and further testified that he broke his two legs as a result of an accident which occurred on March 26, 2015, and continued receiving his salary until July 2016 when he was terminated while still on a wheel chair and without being subjected to medical examination and without being given any reason for the termination. The claimant further testified that his contract was set to expire in March 2016.
8. The claimant further testified that while away from work after sustaining injuries, he was in touch with nyandwa, hr and his supervisor, and they never told the claimant to come for medical examination. It was the claimant's further evidence that he was paid KSh. 109,000 after termination, which was deposited in the claimant's account. That the claimant did not ask to be paid, and was not given a breakdown of the payment made into his account.
9. The claimant denied having received any letter asking him to go for medical examination.
10. The court's record shows that on October 22, 2020, the respondent's case was closed without any evidence being adduced on behalf of the respondent. However, on November 3, 2021, parties proceeded with hearing of the respondent's case. The respondent called one witness, Joseph Sudi Naporwa (RW-1) who adopted his witness statement dated May 21, 2021 as his testimony and produced in evidence the documents listed on the respondent's list of documents dated August 15, 2018. The witness testified that he calculated and paid the claimant's dues at KSh 111,820 after deducting statutory deductions and SACCO loan balances, and that payment was made into the claimant's bank account. RW-1 further testified that a letter written by the respondent to the claimant



was sent to the claimant's home address, and that the witness had nothing to show that postage of the letter was done.

11. Upon considering the pleadings filed and evidence adduced by both parties, issues that emerge for determination are:-
  - a. whether termination of the claimant's employment was unfair.
  - b. whether the claimant is entitled to the reliefs sought.
12. From the respondent's pleadings and evidence adduced by the respondent's witness (RW-1), it is clear that termination of the claimant's employment was on account of physical incapacity. Section 41 of the [Employment Act](#) mandatorily requires that the procedural requirements set out therein be adhered to. The respondent did not demonstrate that it in any way complied with those requirements. Section 41 of the [Employment Act](#) provides as follows:-
  - “(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.”
13. All that the respondent pleaded and testified was that the claimant refused and/or neglected to avail himself for medical assessment on his suitability to remain in employment. The respondent did not demonstrate, on a balance of probability, how communication on the requirement for medical evaluation was conveyed to the claimant. In the words of the respondent's witness (RW-1), there was nothing to show that a letter written to the claimant by the respondent in that regard was posted. The Court of Appeal held as follows in the case of [Kenfright \(EA\) 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...”
14. I make a finding that termination of the claimant's employment was procedurally unfair, and I so declare.
15. It was not enough for the respondent to strive to show that the claimant could no longer perform the duties of a turn boy due to the injury, and hence termination. An injured or sick employee is entitled to be taken through the procedure set out in law before his employment can be terminated, and is entitled to be heard before termination. After all, being injured or falling sick does not necessary spell inability



to work. If granted an opportunity to be heard, an employee may demonstrate that he is capable of performing duties within the employer's enterprise other than those originally assigned.

16. The court in the case of *Kenya Plantation & Agricultural Workers Union v Rea Vipingo Plantations Limited & another* [2015] eKLR held that an injured or sick employee did not lose their right to equality of opportunity under section 5 of the *Employment Act* 2007 and article 27 of the *Constitution*. On the basis of their being injured or falling sick. The court noted that employers have a duty to accommodate injured or sick employees based on the right to equal opportunity for all persons.
17. On the second issue, I award the claimant ten (10) months salary being compensation for unfair termination of employment. The claimant exhibited a payslip showing that his basic salary was KSh 16,112 per month. This was not disputed by the respondent. The equivalent of ten months' salary is Ksh 16,112X10= 161,120.
18. The claim for salary for the months of September 2016 to February 2017 is declined. The claimant pleaded and testified that his employment was terminated in August 2016. The claim for three months salary in lieu of notice is declined as the claimant admitted having been paid some KSh 111,820, whose calculation the respondent pleaded included two months' pay in lieu of notice.
19. It is to be noted, for record purposes, that the amount calculated and paid to the claimant by the respondent did not include compensation for unfair termination of employment.
20. Finally, and having considered written submissions filed by counsel for both parties, judgment is hereby entered for the claimant against the respondent for KSh 161,120 being compensation for unfair termination of employment.
21. The awarded sum is subject to statutory deductions pursuant to section 49(2) of the *Employment Act*.
22. The respondent shall issue the claimant with a certificate of service pursuant to section 51(1) of the *Employment Act*. This shall be done within 30 days.
23. The claimant is awarded costs of the suit and interest at court rates.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 10<sup>TH</sup> 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:

No appearance for claimant

Mr Omollo for respondent

