



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Mulweye v Repelectric (K) Limited (Cause 2402 of 2017)  
[2022] KEELRC 13151 (KLR) (1 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13151 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 2402 OF 2017  
AN MWAURE, J  
NOVEMBER 1, 2022**

**BETWEEN**

**WYCLIFFE KEROTE MULWEYE ..... CLAIMANT**

**AND**

**REPELECTRIC (K) LIMITED ..... RESPONDENT**

**JUDGMENT**

1. This claim was instituted by the memorandum of claim filed on the December 5, 2017. The claimant alleges wrongful, unfair and illegal dismissal from employment. The claimant says he was employed on or about 1<sup>st</sup> day of February 1994 as a winder on permanent basis. He states that he was registered on payroll as an employee and at the time of termination of his employment he was earning a salary of ksh 30,000/= payable monthly.
2. The claimant asserts that on the July 11, 2017 the respondent without any colour of right, just cause or excuse and in complete disregard of the relevant employment laws and without giving the claimant one month notice in writing or any other notice at all approached the claimant and forcibly removed him from the work station and sent him home telling him to go away.
3. That the said termination was done by the respondent's officers under the pretext that the claimant was working for a competitor and had given notice on July 1, 2017. The claimant contends he has never failed to come to work at any time. The Claimant further says that the principles of good industrial relations, natural justice tenets and section 41 of the *Employment Act* 2007 were never applied by the respondent.
4. The claimant is of the view that his service was exemplary and that he never had any warning and or any disciplinary action taken against him in respect of indiscipline, absenteeism, or poor performance. He says the dismissal on the alleged ground was unlawful, punitive, humiliating and done in bad faith to the claimant.



5. The claimant prays for the following;
- a. Declaration that the respondent's dismissal or termination of the claimant's employment was arbitrary, unfair, unlawful and inhuman and the claimant is entitled to payment of his due terminal benefits and compensatory damages.
  - b. Payment of July 2017 salary 30,000 x 1 month = 30,000/=
  - c. Payment of one month salary in lieu of notice by virtue of section 49(1) (a) of the Employment Act.
  - d. Service pays under section 35 of the Employment Act Ksh 644, 000.00
  - e. Damages for wrongful dismissal and unfair termination of employment contract as per section 49 and 50 of the Employment Act 30 x 12 months= Ksh 360,000.00
  - f. Punitive damages proposed Ksh 200,000/=
  - g. Any other remedy that this honourable Court may deem fit to grant
  - h. Costs of the cause.

### **Respondent's Case**

6. The respondent filed a memorandum of appearance on the January 17, 2018 through the firm of Mwamuye, Kimathi and Kimani Advocates. The respondent filed a statement of defence and counter claim on the February 20, 2018. The respondent says that the claimant voluntarily left employment and notified the respondent of his intention to leave employment by end of July, 2017 vide a letter dated the July 5, 2017 and stated in the resignation letter that he wanted to go for early retirement to join his wife in running their grocery shop, which letter gave a one-month notice.
7. The respondent avers that pursuant to the said letter of the claimant the senior management of the respondent determined that the claimant should not be present at the work place during the notice period and advised him to proceed on leave but expressly told him he would not be deducted leave days for the time he would be away from the office during his notice period. The respondent says the claimant was advised to report to work at the end of his notice period for the purpose of clearance which he never did.
8. The respondent says that it is in possession of material documentation which ostensibly proves that the claimant was engaged in illicit parallel employment with a third party/ Competitor during the time of his employment. The respondent says the claimant was paid his final dues at the end of his notice period but he never went for it as he was probably aware that he owed the respondent money and feared he would be requested to repay the same.
9. The respondent by way of counter claim avers that the claimant breached the Employment contract between himself as the employee and the respondent as the employer. He also owed a staff loan which he had been advanced by the respondent as the employer which when the claimant resigned on July 31, 2017 was outstanding to the tune of Ksh 152,000/=.
10. The respondent says that it advanced a loan on the February 12, 2016 of ksh 200,000/= following a request by the Claimant through application for staff loan. The Respondent alleges that the Claimant on or about April 29, 2016 the respondent advanced the claimant a further loan of ksh 76,000/=.
11. The claimant, the respondent says, was to repay the loan at the rate of 6,000 ksh per month which amount was enhanced to 8,000 ksh per month after the further loan with repayment being through



deductions from the claimant's monthly salary. That as at the date of resignation of the claimant on July 31, 2017 the loan balance outstanding was ksh 152,000/= which amount remains outstanding despite numerous requests to repay the same. The respondent alleges the claimant's conduct is mischievous and a blatant attempt to defraud the respondent as seen from the material disclosures and omissions contained in the claim.

12. The respondent prays for the following;
- a. The honourable Court be pleased to find and declare that the claimant voluntarily resigned from the employment of the respondent.
  - b. The memorandum of claim herein be dismissed with costs to the respondent as against the claimant, with the honourable Court further entering Judgment in favour of the respondent as against the claimant in terms of counterclaim as prayed.
  - c. That the honourable finds that the claimant owes the respondent the sum of ksh 152,000/= as at July 31, 2017, being the balance of the staff loan advanced.
  - d. That the honourable Court orders the claimant to repay the amount owed to the respondent as stated in (c) above together with interests at the rate of 1 % per month until settlement in full
  - e. The honourable Court be pleased to award the respondent general damages for breach of contract, bad faith, mischief and attempted fraud; all due to it from the claimant.
  - f. Costs of the suit be awarded to the respondent as against the claimant, and,
  - g. This honourable Court be pleased to make any such finding, declaration, order or award; favourable to the respondent, as this honourable may deem fit, just and proper to issue.

### **Claimant's Case**

13. CW1 Wycliff Kerote Mulweye testified under oath. He testified that he used to repair electric motor. He adopted his witness statement dated the November 27, 2017 as his evidence in chief as well as the list of documents dated the December 4, 2017 as exhibits his exhibits therein number 1-11.
14. On cross-examination, he said that he wrote the letter of resignation on pg 21 of the claimant's list of documents and it is dated July 5, 2017 and was received by the respondent on the same date. He stated that on the July 11, 2017 he was asked to go home and return after the expiry of notice period then he would go for his salary. He mentioned that he had taken a loan from the Respondent which by June 2017 had a balance of ksh 152,000/=. That the loan has never been repaid from the year 2017 to date.
15. He said he wanted the amount to be deducted from service dues and that salary for that month was not paid. He further stated that he never cleared with the company as he was refused entry to the company premises when he went to clear. He says he was told to clear the loan before doing the clearance and was issued with a P.9 from KRA form with an email to his new employer. Upon being referred to the payslip he says it shows he owes the company ksh 121, 752/90 as at July 2017.
16. Upon re-examination he said he was called to go clear the loan end of July 2017 which he was ready to clear with the company at the end of July 2017 but was not allowed to enter the building. He also said that he used to work for the respondent the whole day and so could not work for a competitor. The loan according to him was to be deducted from salary but there was no policy as to how the amount was to be paid once somebody leaves employment.

### **Respondent's Case**



17. RW1 Rachel Catherine Wooton gave sworn evidence and adopted the witness statement dated the 8<sup>th</sup> /2/2018 as her evidence in chief. She also produced the list of documents of the respondent dated the 8/2/2018 numbered as exhibits 1-11.
18. The witness referred to the counter claim dated the 8/2/2018 with the verifying affidavit which she swore. The witness says she worked for the respondent since 1992 and the claimant was not an employee of the Respondent then as he was employed around 1994.
19. On cross-examination the witness said that the claimant was a motor repairer and was employed on permanent basis. She maintained that the claimant resigned and was not terminated and they had no handover. She further testified that the claimant owed a loan of ksh 152,700/= and there is a policy on application for loans by employees from the Company. On being asked whether there was a company policy on how to repay the loan after an employee had left employment, she said that the policy was not there.
20. On re-examination she said that there is accountability for every job and there is need to hand over and so there was no need to give him time before he left to join other employment. The witness said that the claimant was paid in July when he was on leave and the leave days is put in the salary slip which the witness said she is to sign. She stated that if one absconds, there would be a deduction from his salary. She further mentioned that they allowed the claimant to go on leave but would have recalled him if at all they needed him.

#### **Claimant's Written submission**

21. The claimant submits that there was no unequivocal acceptance of the claimant's letter of resignation but what followed was summary dismissal of the claimant from employment on the July 11, 2017. The claimant submits that he was still an employee of the Respondent as his termination had not taken effect. The claimant says that under section 43 of the *Employment Act* there must be valid reasons to dismiss an employee which reasons must be established at the time of termination which would be followed by due process as envisaged under section 41 of the *Employment Act* 2007.
22. The claimant relied on the Court of Appeal case of *Fredrick Kariuki Kamau v Bank of India* (2015) eKLR where it is said the Court held that dismissal pursuant to section 44 of the *Employment Act* are also subject to the requirements of procedural fairness under section 41 of the *Employment Act*, 2007. The same position was emphasized in *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR where it is said the court held that for termination to pass the fairness test, there must be both substantive justification and procedural fairness.
23. The claimant submits that the employee was terminated without following due process as the termination was done by the respondent's officers accusing him falsely of working for a competitor during his employment with the Respondent but the claimant had already tendered his resignation.

#### **Respondent's Submissions \_\_\*\***

24. The respondent submits that the claimant resigned as seen from the evidence in court which resignation was to take effect on July 31, 2017. The voluntary resignation was to take effect on July 31, 2017 but the respondent waived the notice period on July 11, 2017 sending the claimant home on fully paid leave until the notice period lapses. The claimant was then to return to clear with the respondent which he failed to do. The respondent submits that the claimant having voluntarily resigned from employment as per the provisions of *Employment Act* cannot sustain a claim under sections 43 and 45 of the *Employment Act* 2007.



25. The respondent also submitted on the counter claim saying that the claimant admitted having taken a loan which remained unpaid at the time of his voluntary departure from the Respondent. The loan, the Respondent submits, had a balance of Ksh 152,700 which was reduced to ksh 121,752.90 as indicated on the July 2017 payslip. The respondent prayed that the claim be dismissed and that the counterclaim be allowed.

### **Determination**

26. Section 41(1) of the *Employment Act* 2007 provides as follows: -

“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.”

27. Section 43 provides as follows:

“(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of the section. Section 43(2) enacts that the reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”

28. Section 45 of the Act provides in part as follows: -

- (1) No employer shall terminate the employment of an employee unfairly.
2. A termination of employment by an employer is unfair if the employer fails to prove: -
  - (a) That the reason for the termination is valid;
  - (b) That the reason for the termination is a fair reason: - Related to the employees conduct, capacity or compatibility; or -Based on the operational requirements of the employer; and -That the employment was terminated in accordance with fair procedure.”

29. Section 47(5) of the Act provides as follows: -

“For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

30. The claimant wrote the letter dated the 5<sup>th</sup> of July 2017 as

the formal notification to leave employment and he explained he wanted to go and support his wife in the grocery business. The notice was to effect from July 31, 2017. The respondent in his pleadings avers waived the period of notice on July 11, 2017 and sent the claimant home on a fully paid up leave until the lapse of the notice period. The court finds the respondent did not act wrongfully or unlawfully because he accepted the claimant's resignation and waived claimant's right to serve the notice period and at a pay of the notice period.



31. The claimant's account on the termination is somewhat inconsistent. In the claim, he says that that he was informed on the July 11, 2017 to go and would be called to come back to pick his salary. In the witness statement adopted as his evidence in chief, he says that the respondent Company without any notice approached and forcibly removed him from his work station and hence dismissed him. In paragraph 3 of the statement, he says that his termination was done by the Respondent's officers on the said date under the pretext that he was working for a competitor. And on cross-examination in his evidence in court he says that he was asked to go home and come back after the expiry of the notice period without mentioning the issue of being terminated by forcible removal from the respondent's premises. There is therefore definite inaccuracies and inconsistencies by the claimant as to how the termination of his employment happened. The clear thing in all this is the resignation letter he wrote on July 5, 2017 which is not disputed.
32. In the submissions, the claimant appears to be saying that his resignation was not accepted by the Respondent. The respondent maintained that the claimant had voluntarily resigned on the July 5, 2017 and went on leave on the July 11, 2017 and was to come back to hand over which respondent says he did not do.
33. The Employment Act section 35(1)(c) provide that each party can give notice to terminate the contract if any party gives notice to terminate the employment then the same should be honoured except in the case of an employer giving notice without complying with section 41 and 45 of Employment Act. In this case the claimant requested to leave employment by July 31, 2017. He voluntarily resigned from his employment and there is absolutely no evidence to show the respondent unlawfully terminated the claimant from his employment and that the claimant is entitled to any compensation for unlawful or wrongful termination. The claimant's claim therefore fails for lack of proof and so is dismissed accordingly. In the case of Robert Indiazzi vs Tembo Sacco Limited (2018) eKLR the court held that the claimant had resigned from employment without notice. He was not therefore entitled to any reliefs but is actually the one who owed respondent one month salary in lieu of notice.
34. The claimant owed staff loan to the respondent to the tune of Kshs 121,757. The claimant must pay the same and so the said amount is awarded to the Respondent.
35. The court orders each party to pay their costs if nothing else for the long service claimant had given respondent.

Orders accordingly

**DELIVERED, DATED AND SIGNED IN NAIROBI THIS 1ST NOVEMBER, 2022.**

**ANNA NGIBUINI MWAURE**

**JUDGE**

**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 March 15, 2020 and subsequent directions of April 21, 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.**

**ANNA NGIBUINI MWAURE**

**JUDGE**

