



**Irungu v Kobo Safaris Limited (Cause E646 of 2020)
[2022] KEELRC 13515 (KLR) (13 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13515 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E646 OF 2020
JK GAKERI, J
DECEMBER 13, 2022**

BETWEEN

BEATRICE WARUIRU IRUNGU CLAIMANT

AND

KOBO SAFARIS LIMITED RESPONDENT

JUDGMENT

1. The claimant initiated this claim by a statement of claim filed on October 12, 2020. It is the claimant's case that she was employed by the respondent on July 11, 2012 as a management accountant and over the years rose to the position of senior account, a position she held until termination of employment.
2. That her monthly gross salary was Kshs 150,000/=.
3. The claimant avers that in December 2019, the chief cashier was suspended and she came in to assist the account assistant who had stepped in after suspension of the chief cashier.
4. That the account assistant's role included loading cash into the respondent's master cards for transmission to the Kenya Wildlife Service (KWS) for distribution to various cards held by the respondent's drivers.
5. The claimant avers that she discharged her duties diligently and with zeal and had a good working relationship with the respondent.
6. It is the claimant's case that she and the account assistant had given the master card to a rider to have it debited with funds and transfer some of the funds onto other cards by the KWS as was the norm only to discover that the card had not been credited with the requisite amount on 2nd and December 4, 2019 as the KWS raised alarm on suspicion of fraud by the respondent.
7. That KWS raised a formal complaint and according to the claimant, the matter was resolved.



8. The claimant avers that she was suspended from employment on December 13, 2019 and employment was terminated on January 29, 2020.
9. It is the claimant's averment that she was neither notified that termination of employment was being considered nor afforded an opportunity to be heard.
10. That the loss of employment has caused her emotional distress and loss.
11. That the respondent breached the actual and implied terms of the employment contract.
12. The claimant prays for;
 - i. A declaration that the respondent's actions amount to wrongful and unlawful dismissal thus for an order for payment of all terminal dues and benefits owed and full compensation for wrongful termination in the sum of Kshs 1,800,000/=.
 - ii. A declaration that the claimant is entitled to be issued with a certificate of service.
 - iii. Costs of the suit.

Respondent's Case

13. Although the respondent filed a memorandum of appearance dated October 13, 2020 through the firm of Shapley Barret & Co and was served with a hearing notice and copy of the claimant's submissions, it did not participate in the proceedings in any way.

Claimant's Evidence

14. The claimant adopted the written statement dated September 24, 2020 which rehashes the contents of the statement of claim.

Claimant's Submissions

15. The claimant identified three issues for determination, namely whether,
 - i. The claimant was in the respondent's employment.
 - ii. The claimant was unfairly terminated.
 - iii. The claimant is entitled to the reliefs sought.
16. It was submitted that the claimant's testimony was uncontroverted.
17. As regards employment, reliance was made on the provisions of section 2 of the [Employment Act](#), 2007 for the definition of an employee.
18. Equally, the decisions in [Monica Kanini Mutua v Al-Arafat Shopping Centre & another](#) (2018) eKLR and [Maurice Oduor Okech v Chequered Flag Ltd](#) (2013) eKLR, were relied upon to urge that a claimant in an undefended claim was required to establish all the facts of the claim and demonstrate that an employment relationship existed between the parties.
19. It was submitted that the claimant was an employee of the respondent from July 9, 2012 as evidenced by the letters of promotion and salary increments. That the documents on record established that the claimant was an employee of the respondent.



20. On termination, reliance was made on the provisions of section 43 and 45 of the *Employment Act* as well as the sentiments of the Court of Appeal in *Naima Khamis v Oxford University Press (EA) Ltd* (2017) eKLR on the two provisions.
21. It was urged that a valid and fair reason for termination must be given as explained in *Sylvester Oduor Oyile v Prime Fuels (Kenya) Ltd* (2013) eKLR.
22. It was submitted that the claimant was undertaking a new role as an assistant not as a supervisor and employment was terminated for double loading of the master card.
23. It was further urged that the claimant was not given a fair hearing to defend herself and had written a statement in good faith to explain what had transpired but was suspended and services terminated thereafter. That she was neither informed of the outcome of the investigation nor invited for a hearing.
24. As regards the reliefs sought, reliance was made on the provisions of section 107 and 108 of the *Evidence Act* as regards the burden of proof.
25. It was further urged that the claimant was entitled to the declaration sought, based on the holding in *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR, and compensation for wrongful termination under section 49(1)(c) of the *Employment Act*, 2007.
26. Reliance was also made on the Court of Appeal decision in *Kenya Broadcasting Corporation v Geoffrey Wakio* (2019) eKLR.
27. Finally, it was urged that a certificate of service was a statutory right of the employee as explained by Mbaru J. in *Angela Wokabi Muoki v Tribe Hotel Ltd* (2016) eKLR.
28. Finally, it was urged that the claimant had proved her case on a balance of probability.

Determination

29. The issues for determination are;
 - i. Whether the claimant was an employee of the respondent.
 - ii. Whether termination of the claimant's employment was unfair.
 - iii. Whether the claimant is entitled to the reliefs sought.
30. As to whether the claimant was an employee of the respondent, the court is guided by the sentiments of Onyango J. in *Monica Kanini Mutua v Al-Arafat Shopping Centre & another* (2018) eKLR that;

“In an undefended claim, it is trite that the claimant establishes all the facts of the claim and must establish the existence of an employment relationship with the respondent as a preliminary issue before establishing the alleged unfair termination of employment.”
31. In support of the claim that she was an employee of the respondent, the claimant relies on a letter of offer of employment dated July 9, 2012 signed on July 11, 2012 and a subsequent letter of offer dated March 21, 2016 and signed on even date.
32. Among the other documents attached are promotion letters dated October 6, 2017 and March 1, 2018 and salary increment letters dated June 23, 2016 and June 28, 2017.
33. Also attached are probation extension letters dated August 27, 2018 and November 1, 2018.



34. Equally attached is a letter dated December 1, 2018 signed by the claimant on November 22, 2018 advising the claimant to resume her role as senior accountant after having acted as chief accountant. Copies of the suspension and letter of termination are also attached.
35. A letter dated December 11, 2019 written by the claimant by hand is also attached. The letter explains what had transpired from December 3, 2019 to December 6, 2019. Finally, the claimant attached copies of her payslips for December 2018, January 2019, October 2018, November 2018, August 2018 and September 2018.
36. In the courts view, these documents establish beyond par adventure that the claimant was an employee of the respondent from 2012 to January 29, 2020. This fact is also admitted by the respondent's letter to the Kenya Human Rights Commission dated March 4, 2020.
37. As to whether termination of the claimant's employment was unfair, the starting point are the sentiments of Ndolo J. in *Walter Ogal Anuro v Teachers Service Commission* (supra) where the learned Judge stated that

“ . . . For 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.”
38. These sentiments capture the essence of fair termination of employment contracts as ordained by the provisions of sections 35, 41, 43, 44, 45 and 47(5) of the *Employment Act*, 2007 as regards notice, reason for termination, burden of proof as well the procedure. These provisions are mandatory and employers are constrained to follow them before terminating the employment of any person.

Reason for termination

39. The letter of termination of the claimant's employment dated 29th January states that there was an incident of swift double loading at the Kenya Wildlife Services (KWS) on December 4, 2019 and as a consequence, the claimant was suspended on December 13, 2019.
40. That the claimant was given an opportunity to explain what had happened at a meeting with the general manager, finance manager and the human resource and by written statement dated December 11, 2019.
41. That investigations by the KWS experts established that there was swift double loading on December 4, 2019 due to the claimant's negligence and the respondent suffered reputational loss as the transaction appeared fraudulent.
42. That the claimant had not confirmed that the swift had already been loaded before sending the rider to the KWS who detected the double loading and the respondent's services were grounded during investigation.
43. In her letter under reference 'situation at Kenya Wildlife Service' dated December 11, 2019, the claimant admitted that the double loading was discovered by the KWS who demanded an explanation.
44. The claimant did not deny that double loading had occurred when she was assisting the account assistant.
45. Finally, the claimant apologised for any inconveniences caused by her actions.



46. According to the letter of termination of employment, the claimant's action led to the grounding of the respondent's business for some time and occasioned reputational loss bearing in mind that the respondent operated internationally. The respondent genuinely believed that the double loading was attributable to the claimant's negligence.
47. Section 43(2) of the *Employment Act* provides 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.
48. Contrary to the claimant's counsel's submissions that the claimant was acting as an assistant ostensibly to the account assistant, the claimant was at the time the senior accountant of the respondent and was not an assistant. She was a professional.

Procedure

49. Section 41 of the *Employment Act* articulates the procedural precepts to be complied with in the termination of an employment contract and in cases of summary dismissal and as underscored by the Court of Appeal in *Pius Machafu Isindu v Lavington Security Guards Ltd* (2017) eKLR, the procedure is mandatory for a termination of employment or dismissal from employment to pass muster.
50. In *Naima Khamis v Oxford University Press (EA) Ltd* (supra), the Court of Appeal stated *inter alia*
“ . . . section 45(2)(c) requires a termination to be done according to a fair procedure. From the foregoing, termination of employment may be substantively and/or procedurally unfair. Termination is also deemed substantively unfair when the employer fails to give valid reasons to support the termination. On the other hand, procedural unfairness arises where the employer fails the laid down procedure as per contract or fails to accord the employee an opportunity to be heard as by law required.”
51. The court is guided by these sentiments.
52. The claimant testified that she was not given an opportunity to defend herself.
53. Although the termination letter makes reference to a meeting with the general manager, finance manager and human resource, it makes no reference to the date and timing and whether the claimant had been invited to the meeting or a notice to show cause had been issued and she had been notified of the right to be accompanied by a colleague.
54. Relatedly, it is also unclear whether the claimant's letter dated December 11, 2019 was written before or after the alleged meeting.
55. In the absence of minutes of the alleged meeting, it is the finding of the court that the meeting could not have been a disciplinary meeting.
56. Similarly, the claimant was suspended from employment on December 13, 2019. It is unclear whether the alleged meeting was held before or after the suspension.
57. The letter is explicit that the suspension was to facilitate the conduct of investigations into the irregularities and the letter promised to notify the claimant the outcome of the investigation. The respondent adduced no evidence of an investigation report or its recommendations or outcome as promised.



58. For the foregoing reasons, it is the finding of the court that the claimant was not given an opportunity to defend herself as required by the provisions of section 41 of the *Employment Act*, 2007.
59. It is essential to underscore the fact that the mantra that he who alleges must prove applies whether a suit is undefended or not. It is the obligation of the claimant to establish the allegations made against the respondent.
60. This position is reinforced by the court in *Nicholas Kipkemoi Korir v Hatari Security Guards Ltd* (2016) eKLR, where Abuodha J. stated as follows;
- “The burden of proof does not become any less on the employee simply because the employer has not defended the claim or absent at trial.
- The claimant must still prove his or her case. it is therefore not enough for the employee to simply make allegations on oath or in the pleadings, which are not backed by any evidence and expect the court to find in his or her favour.”
61. The court is guided by these sentiments.
62. In this case, it was the onus of the claimant to discharge the burden of proof of an employment relationship with the respondent and unfair termination.
63. From the evidence on record, it is clear that the claimant was an employee of the respondent and although the respondent may have had a valid reason to terminate her employment, it did not do so in accordance with a fair procedure as ordained by the provisions of section 41 of the *Employment Act*.
64. It is therefore the finding of the court that termination of the claimant’s employment was unfair for want of procedural propriety.
65. I will now proceed to examine the appropriate reliefs for the claimant.
- i. Having found that termination of the claimant’s employment was unfair, a declaration to that effect is merited.
 - ii. Compensation
66. Having found that the respondent terminated the claimant’s employment unfairly, the claimant is entitled to discretionary relief provided by section 49(1)(c) of the *Employment Act* subject to compliance with the provisions of section 49(4) of the Act.
67. In determining the quantum of compensation, the court has taken into account the following;
- i. Cumulatively, the claimant was an employee of the respondent for about 6 years, 4 months.
 - ii. The claimant had no record of misconduct or disciplinary issues.
 - iii. It is unclear whether the claimant wished to continue in the employment of the respondent.
 - iv. The claimant substantively contributed to the termination of her services.
 - v. The respondent paid all the other dues as necessary.
68. In light of the foregoing, the court is satisfied that the equivalent of 2 month’s salary is fair, Kshs 300,000/=.
- iii. Certificate of service



69. The claimant is entitled to a certificate of service by dint of section 51 of the *Employment Act*.
70. In conclusion, judgement is entered for the claimant against the respondent as follows;
- a. Declaration that termination of the claimant's employment by the respondent was unfair.
 - b. Equivalent of 2 month's salary.
 - c. Certificate of service to issue within 30 days of the date hereof.
 - d. Costs of this suit.
71. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 13TH DAY OF DECEMBER 2022

DR. JACOB GAKERI

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 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 has 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.

DR. JACOB GAKERI

JUDGE

