



Njeri v Kenol Kobil Limited (Employment and Labour Relations Cause 668 of 2018) [2022] KEELRC 13489 (KLR) (8 December 2022) (Judgment)

Neutral citation: [2022] KEELRC 13489 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 668 OF 2018**

JK GAKERI, J

DECEMBER 8, 2022

BETWEEN

VINCENT KIMANI NJERI CLAIMANT

AND

KENOL KOBIL LIMITED RESPONDENT

JUDGMENT

1. The Claimant initiated this claim by a Statement of Claim filed on May 8, 2018 alleging unfair termination of employment, non-payment of dues and compensation.
2. The Claimant avers that he was employed by the Respondent on February 21, 2005 as the Assistant Data Controller at a monthly salary of Kshs 25,000/= until January 31, 2018 when his employment was unfairly terminated.
3. It is the Claimant's case that owing to his diligence and exemplary performance, he rose to the position of LPG Deport Accountant at a gross salary of Kshs 172,425.00 per month.
4. The Claimant further avers that as an employee, he was entitled to reasonable housing or payment of housing allowance which the Respondent did not offer.
5. The Claimant contends that his right to compensation for termination of employment on account of redundancy under the provisions of the *Employment Act*, 2007 was violated by the Respondent.
6. The Claimant prays for;
 - i. One (1) month salary in lieu of notice Kshs 172,425/=.
 - ii. 22 days of untaken and unpaid leave days Kshs 172,425/=.
 - iii. 12 months salary for wrongful and unfair termination Kshs 2,069,424/=.



- iv. Housing allowance at 15% of the Basic salary Kshs 3,724,380/=.
- v. Costs of the suit.
- vi. Interest on the above prayers at court rates till payment in full.

Respondent's case

7. In its Memorandum of Defence filed on June 22, 2018, the Respondent states that it employed the Claimant as an Assistant Data Controller on March 1, 2005 and he agreed to comply with the terms of the contract of employment and the Respondent's policies and regulations.
8. The Respondent avers that in 2017, the Claimant's performance fell below expectations and an appraisal rated his performance as poor and no improvement was registered despite reasonable efforts by the Respondent and his employment was terminated on January 31, 2018.
9. It is the Respondent's case that the Claimant was not entitled to housing allowance and it had been ready and willing to pay the Claimant's terminal dues.
10. Finally, the Respondent asserts that termination of the Claimant's employment was justified in the circumstances and prays for dismissal of the suit with costs.
11. The Claimant filed a response to the Memorandum of Defence on February 1, 2020 which raised no new issues.

Claimant's evidence

12. The Claimant adopted the written statement dated March 15, 2018 and was cross-examined. The statement sets out in detail the Claimant's journey with the Respondent from March, 2005 including a merit award in 2006 and salary adjustment from Kshs 25,000/= to Kshs 50,000/=, promotion in 2008, employee of the year award in 2011, promotion to Depot Accountant in 2015, a management bonus in December 2015, merit increase of salary in July 2016, gift voucher worth Kshs 135,000/= in November 2016, salary review in April 2017 and a bonus of Kshs 85,000/= in December 2017.
13. It was the Claimant's testimony that sometime in July 2017, the Finance Manager, Mr John Githiomi informed him that one, Mr Conrad Malenye had been recruited as the LPG Accountant (position the Claimant held) and was requested to conduct on the job training for a period of 6 months. He was also informed that after the 6 months, he would be redeployed on job rotation with no specific details on the re-deployment and no merit adjustment was given in July 2017.
14. The Claimant testified that on January 28, 2018, at around 8 pm, the Senior Stocks Accountant, his immediate supervisor informed him that he was required to report to the Head Officer at 10.00 am the following day where the Finance Manager informed him that the Management had resolved that he resigns from employment which he declined. That in the afternoon, the Finance Manager informed him that he either resign or his employment would be terminated and was not supposed to report to the work place.
15. That on January 31, 2018, the Finance Manager called at around 8.30 pm inquiring about the resignation and informed the Claimant that his employment had been terminated and was requested to collect the letter the following day, which the Claimant did and cleared on February 8, 2018 but Respondent did not pay his terminal dues.
16. On cross-examination, the Claimant confirmed that he was claiming housing allowance of 15% of the basic salary although his salary was consolidated.



17. It was his testimony that there was no salary review in 2017 and did not respond to the letter dated December 1, 2017 on bonus as none was required.
18. On re-examination, the witness testified that the payslip for October 2017 had no entry for housing allowance and the issue of poor performance had not been communicated to him and no performance appraisal was conducted in 2017.

Respondent's evidence

19. RWI, Mr David Itubia's statement rehashes the Respondent's defence.
20. On cross-examination, the witness testified that he was not the Human Resource Person at the time nor was he an employee of the Respondent.
21. The witness informed that court that he had no evidence of a notice to show cause on information on the Claimant's performance.
22. The witness testified that there was no disciplinary hearing before the Claimant's employment was terminated and no warning letter had been issued to the Claimant on the alleged poor performance.
23. On re-examination, the witness testified that the Claimant's payslips had no entry for housing allowance because his salary was inclusive of housing allowance according to the letter of employment.

Claimant's submissions

24. The Claimant identified two issues for determination, namely;
 - i. Whether termination of the Claimant's employment was substantively justified and procedurally fair.
 - ii. Whether the Claimant was entitled to the reliefs sought.
25. As regards the 1st issue, the Claimant's counsel urged that the answer was in the negative and referred to the Respondent's letter to the Claimant dated December 1, 2017 on the Claimant's loyalty, an issue not previously raised and his performance was unquestioned.
26. It was submitted that the Respondent's witness did not state that the Claimant was a poor performer.
27. Reliance was made on the decision in [National Bank of Kenya V Anthony Njue John \(2019\)eKLR](#) cited the decision in *Jane Samba Mukala V Ol Tukai Lodge Ltd* to demonstrate the duty of the employer in cases where poor performance is relied upon as the basis of termination of employment.
28. It was submitted that RWI adduced no evidence of a performance appraisal of the Claimant in 2017 or warning letter to the Claimant.
29. Further, reliance was made on the provisions of sections 43, 45 and 47(5) of the [Employment Act](#) to reiterate the onus of the employer in a termination of employment.
30. On procedural fairness, it was submitted that termination did not pass muster.
31. The decision in [John Kisaka Masoni V Nzoia Sugar Co Ltd \(2016\)eKLR](#) was relied upon to underscore the essence of procedural propriety in termination of employment.
32. It was urged that termination of the Claimant's employment was unfair.
33. As regards the reliefs sought, the Claimant urged that he was entitled to one month's salary in lieu of notice as he was not given notice prior to termination of employment.



34. It was submitted that the 22 leave days were not disputed.
35. The court was urged to award 12 months compensation in light of Claimant's long service and a housing allowance of 15% of the basic salary.

Respondent's submissions

36. According to the Respondent, the issues for determination were whether the Claimant was entitled to the prayers set out in the Memorandum of Claim.
37. As to whether the Claimant was entitled to the 12 months salary, the Respondent urged that the Claimant's failure to respond to some letters strained their relationship and thus the Claimant contributed to the breakdown of the employment relationship and as such no compensation was due. That if the court is inclined to award compensation, it should not be 12 months.
38. The sentiments of the Court of Appeal in *Kenya Airways Ltd V Alex Wainaina Mbugua (2019) eKLR* were relied upon to reinforce the submission. In this case, the court found inter alia that the appellant had treated the Respondent in a shabby manner.
39. It was submitted that the termination of the Claimant's employment should be considered as a 'normal termination.'
40. As regards the 22 leave days, it was submitted that Claimant was not entitled to payment as he had not provided any particulars of the leave days and parties are bound by their pleadings.
41. The decisions in *Okumu Aziz Ramadhan V China Roads and Bridge Corporation (Kenya) (2021) eKLR* and *Stephen Mukite Wasike V Pinkertons Kenya Ltd (2022) eKLR* were relied upon to reinforce the submission.
42. On housing allowance, it was urged that Claimant's salary was consolidated and no housing allowance was due.
43. The decisions in *Evans Gato Orina V Aggreko International Project Ltd (2019) eKLR* was relied upon to buttress the submission on consolidated salary.
44. Finally, the Respondent submitted that the Claimant had not demonstrated that his consolidated salary was not inclusive of housing allowance.

Determination

45. The issues for determination are;
 - i. Whether termination of the Claimant's employment by the Respondent was unfair.
 - ii. Whether the Claimant is entitled to the reliefs sought.
46. As to whether termination of the Claimant's employment was unfair, the starting point are the relevant provisions of the *Employment Act* and judicial decisions.
47. The provisions of sections 35, 41, 43, 44, 45 and 47 (5) of the *Employment Act* set out the basic architecture on termination of contracts of employment other than by way of redundancy which is provided for under section 40 of the Act. These sections set out detailed provisions on notice, procedural precepts, burden of proof, reason(s) for termination of employment and justification. Observance of these elaborate and mandatory provisions of law determines whether the termination passes muster.



48. As captured and articulated in innumerable decisions of this court and the Court of Appeal, these provisions ordain that for a termination of employment to pass as fair and lawful, it must have been substantively justifiable and procedurally fair.

49. This proposition was succinctly captured by Ndolo J in *Walter Ogal Anuro V Teachers Service Commission (2013) eKLR* and the Court of Appeal in *Naima Khamis V Oxford University Press (EA) Ltd (2017) eKLR* and *CMC Aviation Ltd V Mohammed Noor (2015) eKLR* among others.

50. In the latter, the Court of Appeal held as follows;

' In view of the foregoing, we find that the appellant's act of summarily dismissing the respondent from employment without giving him an opportunity to be heard amounted to unfair termination as defined under section 45 of the *Employment Act*. In Kenya Union of Commercial Food & Allied Workers V Meru North Farmers Sacco Ltd (2013) eKLR, the Industrial Court held that whatever reason or reasons that arise to cause an employer to terminate the services of an employee, that employee must be taken through the mandatory process outlined under section 41 of the *Employment Act*. That applies in a case for termination as well as in a case that warrants summary dismissal. See also Mary Chemweno Kiptui V Kenya Pipeline Co Ltd (2014) eKLR. We respectfully agree. Unfair termination involves breach of statutory law. Where there is a fair reason for terminating an employee's service but the employer does it in a procedure that does not conform with the provisions of statute, that still amounts to unfair termination.'

51. Similar sentiments were expressed in the Naima Khamis Case (Supra).

52. Finally, section 45 of the *Employment Act*, which is bedrock of fair termination of employment provides that for a termination of employment to pass muster, the employer must demonstrate that;

- i. There was a valid and fair reason for the termination.
- ii. The reason was related to the employee's conduct, capacity or compatibility or operational requirements of the employer.
- iii. The termination of employment was conducted in accordance with fair procedure.

Reason for termination

53. The letter of termination of the Claimant's employment dated January 31, 2018 stated in part;

' You have consistently performed below expectations as has been communicated by your Supervisor both verbally and in writing. The expected performance standards are well known to yourself and are documented. Your performance, running from the year 2017, has been below expected standards, which led to your adverse appraisal rating in July 2017 subsequently leading to no salary adjustment.

Subsequently, management had hoped that your performance would improve, which regrettably has not happened.

Management is thus left with no option but to terminate your services effective immediately on account of poor performance.'

54. From the foregoing, it requires no gainsaying that the Claimant's services were terminated for poor performance.



55. The emerging jurisprudence on termination of employment on the ground of poor performance was articulated in the decision in *Jane Samba Mukala V Ol Tukai Lodge Ltd* (supra) as follows;
- a. Where poor performance is shown to be the reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the *Employment Act*, 2007. The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance.
 - b. It is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further, what measures they have taken to address poor performance once the policy or evaluation system has been put in place. It will not suffice to just say that one has been terminated for poor performance as the effort leading to this decision must be established.
 - c. Beyond having such an evaluation measure and before termination on the ground of poor performance, an employee must be called and explanation on their poor performance shared where they would in essence be allowed to defend themselves or given an opportunity to address their weaknesses.
 - d. In the event a decision is made to terminate an employee on the reasons for poor performance, the employee must be called again and in the presence of an employee of their choice, the reasons for termination shared with the employee.'
56. These sentiments were cited by the Court of Appeal in *National Bank of Kenya V Anthony Njue John* (Supra).
57. The court is guided by these sentiment.
58. In the instant case, although the letter of termination adverts to communication of poor performance to the Claimant, verbally and in writing, the Respondent adduced no evidence of the communication.
59. RWI was neither the Respondent's Human Resource then nor availed the verbal or written communication to the Claimant on the issue of performance.
60. Although the letter dated December 1, 2017 intimated that the management had concerns about the Claimant's loyalty and it was hoped that there would be improvement in the coming year 2018, it is unclear what loyalty meant in this context.
61. On cross-examination, RWI confirmed that this was not a warning letter and did not indicate the Claimant's performance was poor.
62. Relatedly, the Respondent led no evidence on the alleged 'adverse appraisal rating in July 2017.'
63. More significantly, however, the Respondent adduced no evidence that it had a performance management system or at the very least a verifiable annual appraisal system from which the alleged consistent 'below expectation performance' of the Claimant would have been discernible.
64. Similarly, the Respondent did not furnish any scintilla of evidence to demonstrate that it had a target setting and evaluation system of the expected performance standards. It is unclear how the performance of employees was evaluated or assessed. It is unclear how the Respondent noticed that the Claimant's performance was poor and made him aware of the same. The Claimant testified that he was never summoned by his supervisor or issued with a letter raising such concerns. The only letter on record before December 2017 is the one dated April 3, 2017 about the COLA increase for 2017 by which



the management thanked the Claimant sincerely for the part he was playing in the continuing success of the company.

65. In the court's view, there is a clear disconnect between the Respondent's alleged consistent poor performance by the Claimant and the evidence on record.
66. In sum, there is neither a document nor other evidence on record questioning the Claimant's performance.
67. If the Respondent's theory of consistent performance by the plaintiff is to be believed, why was it not raised with the Claimant and if it was, why was the Claimant not placed under a performance improvement plan for a reasonable time to assess his performance before the decision to terminate his services was made?
68. Finally, the Claimant's evidence that he was requested and trained a new LPG Depot Accountant sometime in 2017 would appear to suggest that the decision to terminate his employment had already been made as his performance had not been questioned at any point.
69. For the foregoing reasons, it is the finding of the court that the Respondent has on a balance of probabilities failed to demonstrate that it had a valid and fair reason to termination the Claimant's employment. Thus, termination of employment was substantively unjustifiable and consequently unfair.

Procedure

70. As the Court of Appeal has observed in countless decisions, the procedure prescribed by section 41 of the *Employment Act* is mandatory if termination of employment is to pass muster. See *Pius Machafu Isindu V Lavington Security Guards Ltd (2017) eKLR* and *CMC Aviation Ltd V Mohammed Noor (Supra)*.
71. In *postal Corporation of Kenya V Andrew K. Tanui (2019) eKLR*, the Court of Appeal outlined the specific steps to be taken by an employer before terminating the services of an employee.
72. In the instant case, the evidence on record is clear that the provisions of section 41 of the *Employment Act* were not complied with.
73. The Claimant testified that the Respondent did not issue a notice to show cause a fact confirmed by RWI on cross-examination who also further confirmed that no disciplinary hearing took place.
74. Other than the calls made by the Finance Manager on the night of 28th and January 31, 2018, and the Claimant's unchallenged evidence that he had been prevailed upon to resign but declined, the Claimant was not accorded notice of termination before the letter was issued on February 1, 2018.
75. In view of the foregoing, the irresistible finding of the court is that termination of the Claimant's service was unfair for want of procedural propriety.

Reliefs

76. Having found that termination of the Claimant's employment was unfair for non-compliance with the provisions of the *Employment Act*, 2007, I will now examine the reliefs which commend themselves for award as follows;
 - i. In light of the foregoing finding, a declaration is hereby issued that termination of the Claimant's employment by the Respondent was unfair.



- ii. Certificate of service to issue by dint of section 51 of the *Employment Act*.
 - iii. One month's notice Kshs 172,425.00.
77. The Respondent did not issue a notice of termination as provided by the provisions of section 35 of the *Employment Act*. The Claimant is awarded Kshs 172,425/= as pay in lieu of notice.
- iv. 22 days of untaken and unpaid leave (Kshs 172,425/=)
78. The Respondent did not specifically contest this prayer in its response and the same is awarded.
- v. Housing Allowance at 15% of basic pay Kshs 3,724,380.00
79. The right to housing is provided by section 31 of the *Employment Act*. Under this provision, the employer may
- i. Provide reasonable accommodation to employees.
 - ii. Pay a housing allowance to enable an employee obtain reasonable accommodation.
- However, this provision does not apply where the contract of service contain a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or the same is covered by a CBA which provides consolidation of wages.
80. The Claimant's prayer for housing allowance is premised on the ground that the payslips on record had no entry for housing allowance which was a statutory right. RWI on the other hand testified that the Letter of Appointment provided that the Claimant's salary was consolidated and thus inclusive of housing allowance.
81. The Claimant's employment letter dated February 21, 2005 and which he signed on even date stated in paragraph I
- ' This letter confirms the offer made to you by Kenya Oil Company Ltd for employment as Assistant Data Controller in our A & F Department reporting to AR Accountant, commencing March 1, 2005, at a starting salary of Kshs 25,000/= per month consolidated, in salary Group 7.'
82. The Claimant urges that the term consolidation was ineffectual as the payslips showed a zero entry for housing allowance a fact confirmed by RWI. Thus, the Claimant was entailed to housing allowance.
83. The Respondent relied on the decisions in *Evans Gato Orina V Aggreko International Project Ltd* (Supra) and *Charity Wambui Muriuki V M/s Total Security Surveillance Ltd (2017)* to urge that consolidated salary was inclusive of housing allowance.
84. The issue appears to be which of the two documents is authoritative on the issue of housing allowance, i.e the letter of appointment or the payslip.
85. To answer the question of housing allowance in the instant case, the court is guided by the sentiments of the Court of Appeal in *Grain Pro Kenya Inc Ltd V Andrew Waitbaka Kiragu (2019) eKLR* where the court stated as follows;
- ' We cannot fault the Judge for that interpretation because house allowance is a benefit that is required under the *Employment Act* and the contract did not provide that house allowance was consolidated in the basic wage. Counsel for the appellant invited us to look at the payslip that indicated the sum of USD600 was the gross salary.



We hold the primary document of contract here was the letter of appointment as the payslip does not constitute a contract. It is merely issued by the employer, the employee has no part in its preparation or even a place to sign for it.'

86. The court is guided accordingly.
87. In this case, the letter of appointment dated February 21, 2005 stated that the sum of Kshs 25,000/= per month was consolidated as are the letters dated July 20, 2015 and July 8, 2016 when the Claimant's salary rose to Kshs 150,000/= per month.
88. Guided by the decisions cited above, the court is satisfied that the Claimant's salary was inclusive of housing allowance and none is due from the Respondent.
- The prayer for housing allowance is disallowed.
- vi. 12 months compensation for unfair termination
89. In light of the above-stated findings, the Claimant is entitled to the remedy of compensation as ordained by section 49(1)(c) of the Employment Act in light of the provisions of section 49 (4) of the Act.
90. In arriving at the quantum of compensation to award, the court has considered the following;
- i. The Claimant was an employee of the Respondent from March 1, 2005 to January 31, 2018, a duration of about 13 years which is a long time and wished to continue but for the termination of services.

This is evidenced by his uncontroverted evidence that he declined to resign when called upon to do so by the Finance Manager, one Mr John Githomi.
 - ii. The Claimant had no warning letter or disciplinary issues. The letters on record from the Respondent paint a portrait of a diligent employee who rose from the position of Assistant Data Controller in 2005 to the position of LPG Depot Accountant in 2015. His salary doubled within 15 months of employment and was the employee of the year in 2011 and was evaluated as a Very Good until 2016 when the last appraisal took place.
 - iii. The Claimant did not cause or contribute to the termination of his employment.
 - iv. The Claimant did not appeal the decision of the Respondent or in any way express his dissatisfaction with the decision.
91. In view of the foregoing, the court is satisfied that the equivalent of 8 months salary is fair compensation.
92. In the end, judgement is entered for the Claimant against the Respondent as follows;
- a. Declaration that termination of the Claimant's employment was unfair.
 - b. One month salary in lieu of notice.
 - c. 22 untaken leave days.
 - d. Equivalent of 8 months salary.
 - e. Costs of this suit.
 - f. Interest at court rates from the date hereof till payment in full.



93. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 8TH 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

