



**Ngigi v H. Young & Company (EA) Ltd (Cause 442 of 2017)  
[2022] KEELRC 13439 (KLR) (7 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13439 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 442 OF 2017  
JK GAKERI, J  
DECEMBER 7, 2022**

**BETWEEN**

**ANTHONY KIRUNYE NGIGI ..... CLAIMANT**

**AND**

**H. YOUNG & COMPANY (EA) LTD ..... RESPONDENT**

**JUDGMENT**

1. The claimant instituted this claim by a memorandum of claim filed on March 7, 2017 alleging unfair termination of employment and non-payment of terminal dues.
2. The claimant avers that he was employed by the respondent as a prime mover driver until December 13, 2016 when he was dismissed from employment due to an accident that happened on December 8, 2016 while he was transporting K-170 in motor vehicle registration number KAV 711P to Webuye.
3. It is the claimant's case that the respondent's action amounted to unfair and unlawful practice and a breach of the *Employment Act*, 2007.
4. The claimant further avers that the charges levelled against him were false and baseless and due process was not followed.
5. The claimant prays for;
  - i. A declaration that the respondent's action of terminating the claimant's employment is unlawful, unfair and contrary to fair labour practices and the claimant is entitled to terminal dues and compensatory damages.
  - ii. An order that the respondent pays the claimant terminal dues and damages amounting at Kshs 748,860.00 comprising; One month's salary *in lieu* of notice Kshs 53,490.00 Salary for December 2016 Kshs 53,490.00 12 months' salary compensation Kshs 641,880.00



- iii. Interest on (ii) above from the date of filing the suit till payment in full
- iv. Costs of this suit plus interest.

### **Respondent's Case**

6. The respondent admits having employed the claimant as a prime mover driver on August 2, 2016 at a monthly gross salary of Kshs 53,490/=.
7. The respondent avers that the claimant was dismissed on the grounds of not performing his duties carefully and properly and was given an opportunity to be heard and a report written.
8. That the claimant was paid for the month of December 2016 and pending leave days.
9. The respondent denies that termination of the claimant's employment was unfair and unlawful.
10. The respondent further avers that an investigation conducted showed that the claimant could have avoided the accident.
11. The respondent prays for dismissal of the claimant's suit with costs.

### **Evidence**

12. Documentary evidence on record reveals that the claimant was employed by the respondent on August 2, 2016 having previously worked for the respondent until March 17, 2016 when he was declared redundant.
13. By letter dated December 13, 2016, the respondent terminated the claimant's employment summarily for occasioning an accident due to careless and poor judgement.
14. The respondent relied on section 44 (1) (c) of the [Employment Act](#).
15. The dismissal was effective December 10, 2016.
16. The claimant's payslip for December 2016 shows that he was paid a salary for the entire month as well as leave for outstanding days.

### **Claimant's Submissions**

17. The claimant identified three issues for determination namely;
  - i. Whether the claimant was summarily dismissed.
  - ii. Whether the claimant's employment was unfairly terminated.
  - iii. Whether the claimant was entitled to the reliefs sought.
18. As to whether the claimant was summarily dismissed, the claimant's advocate submitted that he was not, in that the letter dated December 13, 2016 did not meet the test in [Stephen Irungu v Brinks Security Services Ltd](#) (2021) eKLR where the court outlined the requirements of section 41 of the [Employment Act](#).
19. It was submitted that the claimant's carelessness was not established since the accident report on record was a mere opinion of the investigator. That there was no police abstract and the investigators qualification or expertise was not disclosed. It is urged that the respondent's action did not amount to summary dismissal.



20. As to whether termination of the claimant's employment was unfair, it was submitted that the claimant was not accorded a fair hearing or an opportunity to explain himself.
21. Reliance was made on the provisions of section 41 and 45 of the *Employment Act* to urge that the claimant was condemned unheard.
22. It was submitted that termination of the claimant's employment was unfair.
23. On the reliefs sought, it was submitted that the claimant was entitled to the reliefs sought. It was further urged that the claimant was not paid his rightful dues as the payslip for December 2016 showed a gross salary of Kshs 40,593/=.
24. Finally, counsel submitted that the claimant was entitled to the reliefs sought.

### **Respondent's Submissions**

25. By the time the court retired to prepare this judgement, the respondent had not filed its submissions.

### **Determination**

26. The issues for determination are;
  - i. Whether termination of the claimant's employment was unfair and unlawful.
  - ii. Whether the claimant is entitled to the reliefs sought.
27. As to whether termination of the claimant's employment was unlawful and unfair, the homeport are the provisions of the *Employment Act*, 2007 on termination of employment and summary dismissal.
28. A summary of the essential provisions was provided by the Court of Appeal in *Pius Machafu Isindu v Lavington Security Guards Ltd* (2017) eKLR where the court underlined the heavy obligation placed on the employer in cases of termination of employment and summary dismissal.
29. It behoves the employer to establish that it had a valid and fair reason for the termination of employment or dismissal as provided by section 45 of the Act, that it had a reason or reasons to do so as required by section 43, that the termination of employment or dismissal was justifiable and it was conducted in accordance with the mandatory procedure provided by section 41 of the Act.
30. Another important provision is section 35 which prescribes the notice period to be given by the party that desires to terminate an employment contract.
31. For a termination of employment or dismissal to pass muster, it must be substantively justifiable and procedurally fair as aptly captured by Ndolo J in *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR.
32. Similar sentiments were expressed by the Court of Appeal in *Naima Khamis v Oxford University Press (EA) Ltd* (2017) eKLR.

### **Reasons For Termination**

33. It is not in dispute that on December 8, 2016 at 10.00 am, the claimant was driving an Isuzu lorry registration No KAV 711P along the Ntulele-Narok road on his way to Webuye when the vehicle overturned at an ascending slope.
34. It is also not in dispute that it was a self-road accident and according to the respondent, the claimant's explanation of the accident implicated careless driving.



35. In his statement dated March 3, 2017, the claimant mentions the accident but does not explain how it happened or exculpate himself from blame.
36. The statement is reticent on what he did after the accident including reporting it to the police and whether he was injured. It is puzzlingly why the claimant left out such essential details in his statement yet he was dismissed from employment on account of the accident.
37. The only insight on how the accident could have happened is the unsigned report by Mr John Oluoch dated December 9, 2016 which appear to blame the claimant.
38. In the absence of a detailed account of the circumstances surrounding the accident on December 8, 2016, the court is satisfied that the respondent has on a balance of probabilities demonstrated that it had a valid and fair reason to terminate the claimant's employment consistent with the provisions of section 43 (2) of the *Employment Act* 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.

### **Procedure**

39. As explained by the Court of Appeal in *Pius Machafu Isindu V Lavington Security Guards Ltd* (supra), section 41 of the employment provides the mandatory process to be complied by the employer in the termination of employment or dismissal of an employee.
40. The specific procedural precepts have been summarized in various decisions of this court and the Court of Appeal such as *Postal Corporation of Kenya v Andrew K Tanui* (2019) eKLR and *Loise Otieno v Kenya Commercial Bank Ltd* (2013) eKLR. These elements include explanation to the employee in a language he/she understands the reasons why termination of employment was being considered, entitlement of the employee to a colleague or union representative during the explanation, entitlement of the employee and the representative or colleague to made representations and the obligation of the employer to hear and consider the representation.
41. In the instant case, the claimant urges that the provisions of section 41 of the *Employment Act* were not complied with in that he was not given an opportunity to defend himself.
42. The court is in agreement with this submission as there is no scintilla of evidence on record to demonstrate that the claimant was taken through any disciplinary process.
43. In the circumstances, it is the finding of the court that the claimant has on a balance of probabilities demonstrated that termination of his services by the employer was unfair for want of procedural propriety.
44. As regards the reliefs sought, the court proceeds as follows:

#### **i. Declaration that the respondent's action of terminating the claimant's employment is unlawful, unfair and contrary to fair labour practices.**

45. Having found that termination of the claimant's employment was unfair for want of procedural propriety, a declaration to that effect is hereby issued.



## ii. One month's salary in lieu of notice

46. From the evidence on record, the alleged accident occurred on December 8, 2016 and the claimant was summarily dismissed effective December 10, 2016, two days thereafter and was not paid *in lieu* of notice.
47. In the premise, the claimant is awarded one month's salary *in lieu* of notice Kshs 53,490/=.

## iii. Salary for the month of December, 2016

48. The claimant's written statement makes no reference to any outstanding salary for December 2016.
49. More significantly, a copy of the claimant's payslip for December 2016 show that he earned a gross salary of Kshs 40,593/= inclusive of leave encashment of Kshs14,881.00 for having worked for 13 days only.
50. In the absence of evidence that he was not paid the sum of Kshs 34,484.00 as net pay for the month of December, the court finds this prayer unsustainable and is accordingly dismissed.

## iv. Compensation

51. Having found that termination of the claimant's employment was unfair, the claimant is entitled to the relief provided by section 49 (1) (c) of the Employment Act subject to taking into consideration, the relevant circumstances under section 49 (4) of the Act.
52. The court has taken the following into account;
- i. The claimant had served the respondent for about 4 months 8 days which is a very short time.
  - ii. The claimant substantially contributed to the summary dismissal.
  - iii. The claimant did not appeal the decision to terminate his employment or demonstrate a desire to continue in the respondent's employment.
53. In the circumstances, the court is satisfied that the equivalent of one month's salary is fair.
54. In the upshot, judgement is entered for the claimant as follows;
- a. Declaration that termination of his employment by the respondent was unfair.
  - b. One (1) month's salary *in lieu* of notice Kshs 53,490/=
  - c. One (1) month's salary compensation Kshs 53,490/=
- Total Kshs 106,980/=
- d. Costs of this suit
  - e. Interest at court rates from the date hereof till payment in full.
55. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 7<sup>TH</sup> 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**

*JUDGEMENT Nairobi ELRC Cause No.442 of 2017* Page 8 of 8

