



REPUBLIC OF KENYA



KENYA LAW
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**Libechi & another v Robinson Investment Limited (Cause 119 of 2018)
[2022] KEELRC 13427 (KLR) (6 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13427 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 119 OF 2018
HS WASILWA, J
DECEMBER 6, 2022**

BETWEEN

GEORGE JAPHETH LIBECHI 1ST CLAIMANT

KEVIN OCHANDA 2ND CLAIMANT

AND

ROBINSON INVESTMENT LIMITED RESPONDENT

JUDGMENT

1. The claimants filed a joint Memorandum of claim dated May 3, 2018, alleging to have been unfairly terminated and seeking for compensation for the unfair termination. They sought for the following prayers for each of the Claimants;
 - a. One month gross wages in lieu of notice.
 - b. Underpayments.
 - c. Normal overtime.
 - d. Public holidays.
 - e. Off duties.
 - f. Leave.
 - g. Salary for 18 days worked in February, 2018.
 - h. Uniform fees.
 - i. Compensation.
 - j. Certificate of service.



- k. Costs of this suit to be paid by the Respondent.

Claimants' case.

2. The claimants were employment by the respondent as night guards, with the 1st claimant starting employment on July 5, 2014, while the 2nd claimant commenced employment on the August 7, 2018.
3. They aver that as night guards, they reported to work everyday of the week from 6pm till 6am clocking 12 hours without overtime pay. They allege that they worked all days of the week with only 2 days off in a month instead of 4 days provided for under the *Employment Act*. Additionally, that they worked on all public holidays without compensation for the same. With regard to leave, they maintained that the Respondent denied them leave for the years in the service.
4. That they both served the respondent's client in different assignment until sometimes in January, when they were both assigned Kenya Women Finance Trust (KWFT) as night guards. On February 17, 2018 at around 1:30am at night, their manager by the name Nicholas came to the said premises and knocked on the door without uttering a word. The claimant refused to open it and upon peeping through a hole at the door they noted that their manager was the one knocking and upon opening the said door, they were ordered to go to see a pickup parked about 300M outside the said premises, which had trappers loaded on it. That the said manager suspected that the said trappers were from KWFT. While standing beside the said pickup, the owner arrived with a Jerrican full of fuel and the manager inquired whether the materials were from KWFT building which the driver denied and indicated that he did not know either of the claimants. The manager then directed them to get back to work and left the said premises.
5. The next morning, the manager arrived at KWFT premises at around 6am and ordered them to surrender their uniforms and informed that their services were terminated with immediate effect.
6. They contend that their termination was not preceded by any notice, reason or disciplinary hearing as envisioned under the Employment laws. They urged for compensation with the 1st claimant seeking Kshs 1, 017, 720.60 and the 2nd claimant seeking compensation of Kshs 316,776, 45 in accordance with the number of years each worked for the respondent.
7. During hearing both claimants testified with the 1st claimant testifying as CW-1. He adopted his witness statement of May 3, 2018 and produced the documents as his list of documents. In addition, he testified that he was employed by the respondent on July 5, 2014 as appearing in his statement from Equity Bank. He testified that on the fateful day, he took over from his colleague as usual and everything seemed okay. At around 1:30am they were visited by the respondent's manager and taken to about 300 meters from their assigned premises where they found a pick-up parked beside the road and they were asked, whether, they knew or had seen the vehicle and they answered in the negative. While still standing beside the said vehicle, the owner arrived and informed the said manager that he had run out of fuel. At that point the manager directed them to go back to work.
8. At 6am of February 18, 2018, the manager, visited them once again and directed them to pass by the office at 8am which they complied. That they met with the operation manager who informed them that they had been fired. He maintained that he was verbally employed and never signed any employment contract.
9. Upon cross examination by Oseko advocate, the witness testified that he was employed on July 5, 2014 and taken for training at KK. That his salary was Kshs 7,000. He testified that the pickup was not packed outside KWFT but about 300 meters away. He denied signing the muster roll produced in court. He then admitted that he was given 2 off days but the same could have been increased to 4 days if he asked.



10. On re-examination he testified that in his equity Bank statement produced, he at times received Kshs 6500 and at times Kshs 3786 because he had taken some salary advance.
11. CW-2 is Kevin Ochanda, the 2nd claimant. He also adopted his witness statement of 3/5/2018. This witness testified that he was employed on August 7, 2017 for only 6 months and paid Kshs. 7,000. He equally denied signing any employment contract and denounced the one produced by the Respondent and aver that the signature appearing in the said employment letter was forged. He denied asking Mr. Nicholas to be lenient with them or bribing him.
12. Upon cross examination by Oseko Advocate, the witness testified that he was fired by Didi the Operations manager. He stated that he never took any salary advance with the Respondent. On his statement, he stated that the discrepancies showing his salary at Kshs 7690 in November, 2017 was due to Overtime which was paid once only. He maintained that the signature on the muster roll is not his.

Respondent's case.

13. The respondent entered appearance on the May 31, 2018 and filed a response to claim on the July 25, 2018 denying all the contents of the claim and in addition stating that the 1st claimant was employed on the 19th May, 2017 and not in 2014. It was stated that during his tenure at the respondent, the 1st claimant was given various assignments and that there were theft related complaints, which the respondent always issued warning on the 1st claimant. Also that there was another complaint from its client, Imani Guest house of the claimant sleeping while on duty, which secured him a warning letter from the respondent. Further warning letter was served on him on May 19, 2017 for deserting his place of work from 7th to May 17, 2017.
14. It is alleged that when the claimant was assigned duty to guard KWFT premises which was under construction, they conspired with others to steal from the said client. According to the respondent, a vehicle was seen by the respondent's patrol team, one Mr. Nicholas Otieno and Solomon Nyamewa, outside the premises of KWFT on the night of February 17, 2018 and on approaching the said vehicle, people who were standing beside the vehicle ran in different directions and one went inside KWFT premises and locked the gate and a closer look at the vehicle revealed that it was loaded with trappers which the respondent suspected were stolen from KWFT premises which was under construction at the time. Upon further inquiry, the patrol team discovered that the claimants were the ones who were standing beside the said vehicle, that they both asked for forgiveness and leniency in handling the issue.
15. It is averred that the claimants were invited for disciplinary hearing, scheduled for the next day but they both failed to turn up and the respondent was left with no other option but to terminate their services by the letters of termination dated February 19, 2018 on the basis of attempted theft.
16. The respondent took issue with the fact that the matter was filed before this court before the same was considered in the labour office and allege that the suit was filed prematurely.
17. On the reliefs sought, the respondent avers that the claimant was dismissed for justified reason as such do not deserve Notice pay. On leave pay, the respondent states that the 1st claimant applied for leave vide the letter of July 3, 2016 which was allowed as such that he utilized his leave days. However, with regard to the 2nd claimant, it is stated that he had not worked for the respondent for more than 12 months to deserve leave or pay for that matter. Off days pay is also denied and the respondent maintained that the claimants were granted all off days and never worked on any public holiday as alleged. On uniform fees, the Respondent states that the claimants have not returned their uniforms to deserve a refund.



18. In conclusion the respondent urged this court to find that the claimants deserted employment upon being found in the act of attempting to steal from its client as such are not deserving of the reliefs sought.
19. During hearing of the defence case, the parties recorded consent with regards to the 2nd claimant case and agreed to pay him an all-inclusive sum of Kshs 90,000. Which consent was adopted by the court on the June 30, 2022, therefore leaving the 1st claimant's case for determination.
20. The respondent called two witness Nicholas Otieno and Stephen Nyangwono, as respondent RW-1 and RW-2 respectively.
21. RW-1 testified that he was the claimant's supervisor and that the claimant was a casual employee. He adopted his statement which basically reiterated the defence to claim.
22. Upon cross examination by Ogange Advocate, the witness testified that he found the 1st claimant beside the Pickup and upon seeing him, he ran away into KWFT premises. He stated that they never reported the issue to the police.
23. RW-2 -Stephen, Nyangwono, is the respondent's Human Resource manager. He adopted his witness statement of October 31, 2018 and in addition testified that he invited the claimants to disciplinary hearing but they failed to attend. It was his testimony that the claimant was a casual employee and worked only depending on availability of work informing the discrepancy in salary payable in different months. He maintained that the claimant never worked for any overtime. With regard to leave pay, he testified that the 1st claimant did not deserve any leave as he never worked continuously for 12 months.
24. Upon cross examination by Ogange Advocate, the witness testified that the 1st claimant had been warned on other issues. He testified that they called the claimant to collect the inviting letter on February 18, 2018 which he did but did not show up for the disciplinary hearing. He testified that he did not know the Claimant's signature and this could not ascertain if it is the same as the one appearing in the muster roll.

1st Claimant's Submissions.

25. The claimant herein identified three issues for determination; whether the 1st claimant was a regular employee of the respondent, whether the dismissal was unfair and whether the 1st claimant is entitled to the reliefs sought.
26. On the first issue, it was submitted that that the claimant was indeed employed on July 5, 2014 as evidence by the bank statement produced which shows that the claimant was paid regularly throughout this period. That the allegation by the respondent that the 1st claimant was employed on May 19, 2017 is not backed up with any evidence as such the most plausible and believable date ought to be the one indicated by the 1st claimant as the same is backed up with evidence which the respondent did not dispute its authenticity. On that note it was submitted that even though the claimant was engaged on casual basis the employment converted to that of regular employees as envisaged under section 37(1) of the [Employment Act](#).
27. On the second issue, whether the termination was unfair, it was submitted that the claimants were both terminated for the same reason and the fact that the 2nd claimant's suit was comprised is an admission on the part of the Respondent that the reason for termination was not justified. It was argued that the termination was not preceded by any valid reason, neither was the claimant subjected to any disciplinary hearing as such the termination was unfair in all facets. To support this argument, they relied on the case of [Walter Ogal Anuro v Teachers Service Commission](#) [2013] eklr where Justice L.



Ndolo expounded on the fairness test, that for termination of employment to be fair it must be fair both substantively and procedurally.

28. Accordingly, it was submitted that the reason for termination was on alleged attempted theft, which issue was neither reported to the police nor investigated further, a clear indicated that the reason for termination was not justified. It was further argued that the eye witness's testimony was not corroborated by the team members who he was on patrol with or the backup team he alleged to have called.
29. On procedure followed, it was submitted that no disciplinary hearing was conducted as pleaded by the 1st claimant and admitted by the respondent, which is contrary to section 41 of the *Employment Act*. In this he relied on the case of *Anthony Mkala Chitavi v Malindi Water and Sewarage and Company Limited* where the court gave the ingredients for procedural fairness that;

“The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee. Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible. Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.”

30. The claimant reinforced his argument by citing the case of *Kenya Petroleum Oil Workers Union v Kenya Petroleum Refineries Limited* [2013] eKLR where the court held that;

“Section 41 of the *Employment Act* has outlined the essential requirements which an employer should comply with when terminating the services of an employee on the grounds of misconduct, poor performance and physical incapacity. The essential requirements in brief are that the employer should explain to the employee in a language the employee understands the reasons for which the employer is contemplating terminating the services of the employee and hearing any representations to be made by the employee. The employee is also entitled to be accompanied by a fellow employee or shop floor union representative and to be heard and his explanations considered. This is what is called procedural fairness in employment law and the rule of natural justice in administrative law. The rule is captured in the Latin maxim *audi alteram partem*.”

31. On the reliefs sought, it was submitted that the 1st claimant has made out a case against the respondent to the required standard as such deserves the reliefs sought and urged this court to allow the claim as prayed.

Respondent's Submissions.

32. The respondent also submitted on employment status of the 1st claimant and argued that the claimant was employed on casual basis on the May 19, 2014 on availability of employment basis and did not at any time work continuously for more than 12 months at a time for his employment to convert to that of a regular employee as envisaged under section 37 of the *Employment Act*.
33. It is the respondent's submissions that the response to claim was filed far back in 2018 which gave the claimant sufficient time to file any responses to support his argument that the respondent's forged his



- signature or the general authenticity of the respondent's documents and having filed none, the said argument should not be considered by this court. In this they relied on the case of *EO V COO*[2020] eklr.
34. Accordingly that in absence of any evidence countering the argument that the claimant was a casual employee, the same stands as such the termination of a casual employee should apply in this case.
 35. On whether there was substantive and procedural justification for the termination, it was argued that the claimant was guilty of various misconduct as evidence in various letters such as the one of March 9, 2017 where the claimant was giving an explanation to the Human Resource as to lost clothes under his watch; the warning letter issued to him on admission of gross misconduct on November 3, 2014; the complaint raised by Imani Guest House of the claimant herein sleeping while on duty, warning letter of May 19, 2017 for being absent from duty from May 7, 2017 to July 17, 2017 and finally the latest being attempted theft of KWFT properties that caused the respondent to serve him with an invitation letter to a disciplinary hearing which he absconded leading to his termination. It was argued that all these acts gave the respondent all reasons to terminate the claimant's services.
 36. The respondent argued that disciplinary hearing was not conducted because the claimant failed to attend the same despite being invited for hearing, it was argued that the failure by the claimant to attend the disciplinary hearing cannot now be visited upon the respondent. To support their case, they relied on the case of *Amos Kitavi Kivite v Kenya Revenue Authority* [2020] eklr.
 37. On the reliefs sought, it was submitted that the claimant was terminated for gross misconduct, a move that is sanctioned by section 44 of the *Employment Act* as such the claimant does not deserve the reliefs sought. He urged the court to dismiss the claim but award them costs.
 38. I have examined all evidence and submissions from both parties herein.
 39. From the 1st claimant's evidence he was terminated by the respondent's manager for no reason. He was not given any notice and neither was he taken through any disciplinary process.
 40. The respondents aver that they had suspected the 1st claimant of theft and he was summoned for a disciplinary hearing and he declined to attend leading to his termination.
 41. The Respondent produced a letter dated 17/2/2018 apparently addressed to the 1st claimant inviting him to a disciplinary hearing on the same day.
 42. The 1st claimant denied being summoned to any such disciplinary hearing. There is also no evidence that this letter was served upon the 1st claimant or even posted to his last known address.
 43. The respondent also produced minutes of the alleged disciplinary hearing for a meeting held on 18/2/2018. The meeting however proceed in absence of the claimants and was held on 18/2/2018 whereas the invite was for a meeting of 17/2/2018.
 44. It is apparent therefore that the claimant was condemned without being given a chance to defend himself as per section 41 of the *Employment Act* 2007 which states as follows:-



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| <p>“41.</p> | <p>Notification and hearing before termination on grounds of misconduct</p> <table border="1"> <tr> <td data-bbox="858 309 1123 1368">(1)</td> <td data-bbox="1123 309 1390 1368"> <p>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.</p> </td> </tr> <tr> <td data-bbox="858 1368 1123 1995">(2)</td> <td data-bbox="1123 1368 1390 1995"> <p>Notwithstanding any other provision of this Part, an 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 grounds of misconduct or</p> </td> </tr> </table> | (1) | <p>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.</p> | (2) | <p>Notwithstanding any other provision of this Part, an 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 grounds of misconduct or</p> |
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| | poor performance, and the person, if any, chosen by the employee within subsection (1), make”. |
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| (2) | Notwithstanding any other provision of this Part, an 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 grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make”. |

45. The 1st claimant having been condemned unheard, I find his termination unfair and unjustified and I declare it so as per section 45 (2) of the Employment Act 2007 which states as follows;

“ 45. (1).....

(2) A termination of employment 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-

(i) related to the employee’s conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure”.

46. In terms of remedies, I find for 1st claimant and I award him as follows;-

1. 1 month salary in lieu of notice

= 15,374.90/= as per legal notice No. 112 of 1/5/2017

2. 18 days salary for days worked in February 2018



= $18/30 \times 15,374.90 = 9,224.94/=$

3. Underpayments of salary as pleaded from 2015 to 2018 = 211,431.05
4. Leave for 1 year not taken
= 15,374.90/=
5. Uniform fee deducted = 4,900/=
6. 6 months' salary as compensation for the unfair and unjust termination
= $6 \times 15,374.90$
= 92,249.40/=

TOTAL AWARDED = 348,555.19/=

Less statutory deductions

47. The respondent will pay costs of this suit plus interest at court rates with effect from the date of this Judgment.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 6TH DAY OF DECEMBER, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ogange for claimant – present

Oseko holding brief Githiru for respondent – present

Court Assistant – Fred

