



**Ojoma v Apple Green Restaurant Limited (Cause 1412 of 2018)
[2022] KEELRC 13388 (KLR) (6 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13388 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1412 OF 2018
JK GAKERI, J
DECEMBER 6, 2022**

BETWEEN

JULIET TAABU OJOMA CLAIMANT

AND

APPLE GREEN RESTAURANT LIMITED RESPONDENT

JUDGMENT

1. The claimant initiated this suit by a memorandum of claim dated March 26, 2018 and filed on April 3, 2018 alleging unlawful termination of employment, failure to pay terminal benefits and seeking compensation for unlawful termination.
2. The claimant prays for:-
 - i. The sum of Kshs 191,100/=;
 - ii. Costs of the suit;
 - iii. Interest in (i) and (ii) above; and
 - iv. Any other relief as the court may deem just.

The Claimant's Case Is Pleaded As Follows:

3. The claimant avers that she was employed by the respondent as a steward on February 5, 2016 and was transferred to the dispensing in August 2016.
4. She avers that she performed her duties with diligence, resourcefulness and honesty during her tenure until she was unlawfully summarily dismissed from work on March 5, 2018 when she was coerced to write a resignation letter by the respondent's agent. At the time of her dismissal, she was earning Kshs 13,000/= monthly.



5. It is the claimant's case that her dismissal was as a result of accusations that she was dispensing food without obtaining receipts from the cashier. She maintained that she was not accorded a proper hearing and that due procedure was not followed.
6. Finally, the claimant avers that her dismissal and subsequent refusal to pay salary and dues was unfair, inhumane and callous and amounted to bad labour practice and was tainted with illegality.

Respondent's Case

7. The respondent, while acknowledging that the claimant was its employee, denies that she was dismissed from service. It further denies that she was intimidated and forced to write a resignation letter.
8. The respondent, instead states that the claimant wrote her resignation letter and deserted her duties upon being assigned duties in the same restaurant in order to ease the workload on some of her colleagues.
9. It further avers that the claimant was not entitled to any kind of compensation as the separation was mutual given that she willingly and voluntarily resigned from employment.

Claimant's Evidence

10. During the hearing, the claimant adopted her witness statement as evidence and was cross examined.
11. She testified that she wrote the resignation letter on March 5, 2018 because she had no choice as she had been re-designated from dispensing food to cleaning. She stated that this was because she was not ready to move and the respondent told her to resign.
12. On cross examination, the claimant testified that she had a good relationship with the employer and was even promoted *vide* the letter dated February 3, 2018. She further stated that she was paid the salary for February 2018 but was not paid the salary for March 2018.

Respondent's Evidence

13. RWI, Anne Wangari testified that she was the director of the respondent and knew the claimant.
14. She testified that the claimant was employed by respondent in February 2016 as a steward and after 1 year, the respondent started noticing shortages but was unaware of the source. She testified that the respondent informed the claimant that she would be transferred after she received her salary for February.
15. The witness stated the claimant moved but wrote a resignation letter.

Claimant's Submissions

16. The claimant listed the following as issues for determination:
 - i. Whether the termination of the employment of the claimant was wrongful, unfair and unlawful in the circumstances.
 - ii. Whether the claimant is entitled to the reliefs sought.
 - iii. Whether the claimant is entitled to the costs.
17. The claimant's counsel submitted that the summary dismissal by the respondent was unlawful, as she was not accorded a proper hearing and due procedure was not followed. That the actions by the



respondent went against the provisions of section 41 as read together with sections 43 and 45 of the [Employment Act, 2007](#).

18. Counsel further submitted that the claimant was not given any notice of termination neither was any fundamental breach of obligations demonstrated by the respondent. In addition, it was argued that none of the examples of gross misconduct under section 44 (4) was proven as against her by the respondent.
19. That the respondent relied on the resignation letter which the claimant was coerced into writing and not shown before court any evidence of breach of obligations or gross misconduct by the claimant.
20. Reliance was made on the decision in [Anthony Mkala Chitavi v Malindi Water & Sewerage Co Ltd](#) [2013] eKLR to urge that the threshold was not met by the respondent as at the time of the claimant's dismissal.
21. As for the reliefs sought, counsel submitted that it follows that for an unfair dismissal which did not comply with the legal requirements, the claimant was entitled to one-month salary in lieu of notice, maximum twelve months compensation and terminal benefits.
22. In conclusion, it was submitted that the respondent was wholly liable for the wrongful, unfair and unlawful dismissal and therefore she prayed for a declaration of unlawful summary dismissal of the claimant.

Respondent's Submissions

23. The respondent maintained that the claimant had resigned voluntarily and her employment was not terminated by the respondent. It further submitted that the claimant was not entitled to any of the prayers sought in the claim.

Determination

24. The issues for determination are;
 - i. Whether termination of the claimant's employment was unfair.
 - ii. Whether the claimant is entitled to the reliefs sought.
25. As to whether termination of employment in the instant case was unlawful, the most appropriate point to start is to set out the law on termination of employment as encapsulated by the provisions of the [Employment Act, 2007](#) and case law.
26. Section 45 of the [Employment Act](#) is the bedrock of termination of employment and is supplemented by other provisions.
27. Section 45 of the [Employment Act](#) provides that;
 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 –
 - (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.



28. In addition, other provisions of the *Employment Act* address other elements of termination of employment such as notice, burden of proof and procedural precepts as summarised by the Court of Appeal in *Pius Machafu Isindu v Lavington Security Guards Ltd* [2017] eKLR.
29. In sum, for a termination of employment 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 and elaborated by the Court of Appeal in *Naima Khamis v Oxford University Press (E A) Ltd* [2017] eKLR.
30. I will now proceed to apply the foregoing provisions and principles of law to the facts of the instant case.
31. In her memorandum of claim, the claimant avered that she was summarily dismissed on March 5, 2018 when she was coerced to write a resignation letter by the respondent's agent. In her evidence, the claimant testified that she had been re-designated from dispensing to cleaning and was not ready to move and on cross-examination, told the court that she was told to write the resignation letter which read as follows;

Ojomo Juliet Taabu
Nairobi
05/03/2018
To Director of Apple Green
RE: Regsining from job as a

I thank you for the whole two years you had take me to your job. Now I am regsining from your job because of untrustworthy for me.

Yours faithfully,
Juliet Taabu.
32. Notably, the claimant adduced no evidence as to who forced her to write the resignation letter or to whom it was handed over. She adduced no evidence on the circumstances in which the letter was written. Similarly, the letter appears ordinary. Its introductory line expresses the claimant's appreciation for having been an employee of the respondent and states the reason for resignation. Instructively, the letter makes no reference to the re-designation as the reason for resignation.
33. The letter is explicit that the issue of her trustworthiness had come into question as confirmed by RWI who also testified that the claimant moved to the new work station but resigned. Puzzlingly, the letter has an unauthenticated addition that the claimant resigned due to transfer from work station.
34. Intriguingly, about one month earlier, the claimant had written an apology letter for having referred to an unnamed person as "mwanaume" and having shouted at a lady by the name Cecilia.
35. The court is wondering why an employee writing a resignation letter under coercion would introduce the letter with words of appreciation and state the reason for resignation but rely on other reasons to urge her case for unlawful dismissal by the respondent.
36. In the court's view, it appears more improbable than probable that the letter was written under duress. At any rate, the claimant's evidence provides no glimpse of the alleged coercion.



37. Consistent with the mantra that he who alleges must prove, it was the duty of the claimant to adduce sufficient evidence to demonstrate that the circumstances in which the resignation letter was written vitiated its worth.
38. Section 107 of the *Evidence Act* provides;
- (1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
39. Further, section 109 provides that;
- The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
40. For the foregoing reasons, it is the finding of the court that the claimant has failed to prove on a balance of probabilities that her employment was unfairly or unlawfully terminated by the respondent.
41. The court is persuaded that the claimant resigned from employment voluntarily and having so found, the claim for reliefs is unsustainable.
42. In the upshot, the suit before the court lacks merit and is accordingly dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 6TH 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

