



**Indeche v Daly & Inmdar Advocates (A FIRM) (Cause 2024 of 2016)
[2022] KEELRC 13492 (KLR) (2 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13492 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2024 OF 2016
AN MWAURE, J
DECEMBER 2, 2022**

BETWEEN

SYLVESTER HARAMBEE INDECHE CLAIMANT

AND

DALY & INMDAR ADVOCATES (A FIRM) RESPONDENT

JUDGMENT

1. The claimant filed the memorandum of claim dated the September 30, 2016 on the same date alleging wrongful, unlawful and malicious termination of employment. He says he was employed by the respondent as a conveyancing clerk since August 11, 2005 until the August 17, 2016 when he was abruptly, maliciously, wrongfully, and unlawfully dismissed from employment with no reason and proper explanation given to him.

Claimant's Case

2. The claimant states that on the August 5, 2016 he was issued with a suspension letter when he was out on official duties, which letter was received on August 8, 2016 together with a show cause letter dated the August 8, 2016 raising several allegations against the claimant that he was, inter alia, undertaking work for 3rd parties in particular one Priya Sagoo but no particulars were given to him to enable him respond appropriately.
3. The claimant says that based on this and out of respect, the claimant opted to resign upon formally denying all the allegations raised against him vide the letter dated the August 9, 2016. The claimant avers that on the August 10, 2016, in perpetuating its illegalities the respondent while rejecting the claimant's resignation with no proper reason, invited him to appear before a disciplinary committee session on the August 17, 2016 which committee was to comprise of some firm partners who had already made a pre-meditated decision about the unspecified allegations not made clear to the claimant.



4. The claimant avers that despite opting to resign on mutual respect, the respondent did not accept the same and went ahead terminating his services unlawfully without interrogating the alleged complainant whom the respondent alleged the claimant worked for while in the respondent's employment. He says the respondent did not provide any such complaint to the claimant to interrogate the alleged complainant whom the respondent alleged the claimant worked for. The claimant states that he categorically denied having admitted the charges as alleged by the respondent and restated his position why he could not attend the disciplinary committee hearing as constituted with no clear allegations for him to respond to.
5. The claimant says that the respondent's actions of arbitrarily terminating the claimant's employment and unreasonably declining to accept his resignation as provided for under the law ought to be declared unlawful, null and void and the claimant be paid his terminal dues *in lieu of* restatement as provided for under the oral contract of employment and the Employment Act 2007 which includes pay *in lieu of* notice of Kshs 43,500/=, unpaid leave of Kshs 43,500/=, severance pay @ Kshs 21,750/= and 12 months gross salary as damages for wrongful termination.
6. The claimant prays for the following remedies;
 - a. That the respondent do immediately pay the claimant his entitlements as in paragraph 4 of the claim
 - b. An order for the issue of a certificate of service
 - c. Any other relief this honourable court may deem fit to grant.

Respondent's Case

7. The respondent filed the notice of appointment of advocates dated the October 25, 2016. The respondent also filed the notice of preliminary objection on the same date which was dismissed on the September 18, 2017. The respondent preliminary objection was that it was unincorporated entity and had no capacity to be sued. Court dismissed it.

Claimant's Evidence In Court

8. CW1 Sylvester Harambee Indeché gave sworn testimony and stated that in the year 2005 to 2016 he was working with Daly & Figgis and adopted the witness statement dated the September 30, 2016. He also adopted the documents in the list of documents as exhibits 1-9. The claimant says that he got a letter of suspension dated the August 5, 2016 but before that he had not received any show cause letter and there were no allegations raised against him.
9. The claimant testified that he was not given any opportunity to respond to these allegations. He stated that he received the show cause letter on the same date, that is the August 5, 2016 and was then invited for disciplinary hearing on the August 10, 2016. The claimant says he never responded to the issue of suspension and notice to show cause. The claimant is of the view that the suspension letter was dated the August 5, 2016 but allegations are different. The claimant said that he responded on the August 9, 2016 and offered to resign. He added that he had never seen the allegations but because he received notice to show cause and suspension, he decided they wanted to terminate him and did not attend the disciplinary meeting.
10. According to the claimant, the reasons in the termination letter are not the same as in the suspension letter and notice to show cause. The claimant testified that he used to get Kshs 43,500/= at the time



of termination. The claimant says that he was ordered to surrender the firm's property and leave peacefully without engaging other firm employees and could not pick a witness in his explanation.

11. Upon cross-examination he said he was employed as a clerk and he used to receive stamp duty, money to register titles and other official fees. The claimant informed court that in the suspension letter he was accused of undertaking work for third parties. The CW1 said that he was not required to respond in the suspension letter. He also says he received the notice to show cause on August 8, 2016 and he was asked to hand over insurance card and any pending work he had. The claimant said he handed over in keeping with the suspension letter. The claimant says he opted to resign after getting both the letter of suspension and the show cause letter. He told court he did not refuse to clear his name because he was guilty as charged. The claimant further said that he knows one Priya Sagoo though he never did any work for her and he did not respond to the NTSC. The claimant said he was later called for a meeting where a reason for the termination was given.

Respondent's Case

12. RW 1 Priya Sagoo gave sworn testimony and stated that she is a lawyer but not an advocate. She adopted the witness statement signed on the March 24, 2022 as evidence in chief and a bundle of documents dated the November 26, 2018 and a supplementary list of bundles of document dated the January 11, 2019 as exhibits. She said that the claimant was known to him as she worked with Singh Gitao advocate and was a freelance land officer. She said that she gave claimant work to register documents for her which he did not do. She asked for her money and then found out that the claimant worked with Daly and Inamdar. She testified that she then informed the partners and that she never knew that before. She said that the claimant sent her a text saying he hoped the witness would achieve her motive. She said that she informed Mrs Kalpeet, a partner who was shocked that the claimant was doing work for other firms. She testified that she never got back her money and that the claimant had threatened to harm her.
13. In cross-examination she told court that she is not an advocate of the High Court of Kenya and do not have receipts of payments to the claimant. She said that her letter was confidential as the claimant had threatened to harm her but said that the threats are not before court. She said that they had a relationship with the claimant but he did not do her job as agreed with her.
14. RW2 Harpreet Ubhi gave sworn testimony and said that he lives in Nairobi and he is an advocate of the High Court of Kenya and a partner with Daly Inamdar Advocates. He adopted the witness statement dated the November 28, 2018 as his evidence in chief and the documents in the list dated the November 28, 2018 as exhibits in the case.
15. He testified that he knows the claimant in this case as he was employed by their firm as conveyancing clerk from August 2005 and left the firm as a result of a dismissal when he was found working for a rival firm whilst still employed by the respondent. The witness said that in the year 2016 he was telephoned in 2016 by Priya Sagoo and he informed him that she had given the claimant some money to register some caveats for her and claimant had refused to register the said caveats and further said that she had discovered that the claimant was working for the respondent. He said that the claimant was full time employee of his firm and was not supposed to work for any other firm.
16. The witness further said that the claimant was also supposed to be handling work on behalf of the firm and that he had talked about the claimant with another partner Miss Muthoni Rongi and they gave the claimant a chance to explain himself but the claimant apparently sent a rude message to Miss Sagoo who called their partner which led the matter being referred to the Human Resource Department. He says Priya called him on phone and they met and she explained everything to him. He testified that he



asked Priya to show the mobile messages between her and the claimant and she also sent an email also of those communications.

17. The HR personnel then initiated disciplinary proceedings and at the hearing the claimant was suspended from duty. The witness said that the claimant was informed in writing to call a witness of his choice. That the claimant responded and sent a letter dated August 9, 2016 in which he offered to resign rather than go through the disciplinary process.
18. The respondent said that the firm issued a NTSC of August 8, 2016 and the claimant was invited to make representations within 7 days as to why disciplinary action should not be taken against him. The claimant according to him opted to resign in exchange for his benefits whilst denying the allegations against him.
19. He testified that the firm by the letter dated the August 10, 2016 rejected the claimant's resignation and invited him to a hearing in line with the firm's policy to give employees a chance to defend themselves but the claimant did not turn up leading to the termination. That the claimant was then paid salary, accrued leave days and a certificate of service.
20. In cross-examination, the witness said that he has been an advocate of the High Court from the year 2005 and that the claimant was a good employee from all the years he worked for the firm. He told court that they spoke with the claimant with a partner Muthoni who used to speak to him in vernacular. He added that before the suspension they had not given him any warning letter.
21. The witness says that the said Priya was known to him professionally and socially and provided him with evidence such as the text messages but did not give him evidence of the Kshs 30,000/= said to have been given to the claimant. He added that he had no vendetta with the claimant and they followed the procedure in terminating the claimant. He also said that the matter was not reported to the police as money was paid to Priya who never reported the matter to the police. The witness was of the view that they never accepted the resignation of the claimant as they did not think it was valid.
22. On re-examination he said that he did not produce the text messages between Priya and the claimant but was in Priya's report given to the firm. He added that he had no grudge with the claimant and that his relationship with the claimant was professional and cordial and the choice to resign was not for the good of their relationship with the claimant. The claimant according to him saw no need to respond to the allegations.

Claimant's Submissions

23. The claimant in the submissions filed by Mandala & Co Advocates says that the allegations that the claimant relied on to terminate him were not interrogated and further the complaint was only addressed to the 2nd witness who was not a partner at the respondent's firm, having admitted that they were friends for quite some time and all these were personal vendettas against the claimant.
24. The claimant submitted that the termination and entire process that was undertaken by the respondent was in breach of section 41(1) and (2) of the Employment Act 2007 on the procedure for the hearing which states that:-

‘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 he or she understands, the reasons for which the employer is considering the termination and the employee shall be entitled to have another employee or shop floor union representative of his choice present during this explanation’. And subsection 2 which provides ‘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 have on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee

25. The claimant relied on the case of *Fredrick Odongo Owegi v CFC Life Assurance* 2014 eKLR for the proposition that ordinarily in workplace relations, where an employee commits acts of misconduct, such an employee may be suspended to allow the employer carry out investigations. Such investigation are supposed to give a chance in the absence of the employee to interrogate and establish if there are grounds that warrant a show cause notice against the employee that warrants a response.
26. Until such a process is concluded, the employee remains without a concluded case against him that warrant a defence. Once the investigations are complete, the employee must be recalled from the suspension to answer to any allegations leading to the process of hearing where the employee is to give his defence, and once hearing is concluded, sanctions follow.
27. The claimant says that the above was not followed as it issued the suspension and notice to show cause concurrently contrary to fair procedure as dictated by the provisions of section 45 (2), (3) and (4) of the *Employment Act* 2007. The claimant argued that by issuing a show cause and ignoring the provisions of section 41 and securing the rights therein, the resultant termination was fundamentally unfair and flawed in terms of sections 43 and 45 of the *Employment Act*.

Respondent's Submissions

28. The respondent submits that the claim is predicated on the assertion that termination of the claimant's employment was wrongful which the respondent responded to that it had valid grounds for termination of the claimant's employment on serious allegations of undertaking work for third parties, colloquially referred to as 'moonlighting'. The respondent contends the claimant was subjected to a disciplinary process but opted not to participate in the process which led to the well-founded allegations of moonlighting remaining uncontroverted. The claimant was unable to establish the allegations of moonlighting were untrue.
29. The respondent relied on the cases of *Arnold Muoki v Local Productions Kenya Ltd* 2021 eKLR where it is said the court found in favour of the claimant where similar allegations of moonlighting were in issue. The respondent says that in the instant case the allegations of moonlighting against the claimant remain uncontroverted to this day despite the claimant being given the opportunity to vindicate himself in a disciplinary process.
30. The respondent argued that it followed the proper procedure in terminating the claimant and gave the claimant 7 days within which to respond to the allegations and upon failure to respond to the NTSC, the claimant was given an invitation for a disciplinary hearing to be conducted on the August 17, 2016 and the place and time of the hearing was stated. It also says the claimant was informed of his right to have a representative present during hearing.
31. The respondent relied on the case of *National Bank of Kenya v Anthony Njue John* 2019 eKLR where it is said the court held that section 41 enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language the employee understands the reasons for which the employer is considering the termination of the employee. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or shop floor union representative of his own choice, and to hear and consider any representations which the employee may advance in response to the allegations against him by the employee. The respondent submits that it complied with the three



requirements of procedural fairness articulated in the case of *Godfrey Barasa Ochieng v Security Guards Services Limited*.

Issues for Determination

a. Whether the claimant was unlawfully/unfairly terminated

b. The remedies, if any, the claimant is entitled.

32. Section 41(1) of the *Employment Act* 2007 provides as follows:-

“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.”

33. Section 43 provides as follows:

“(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of the Section 43(2) enacts 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.”

34. Section 45 of the Act provides in part as follows: - (1) No employer shall terminate the employment of an employee unfairly. (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: - related to the employees conduct, capacity or compatibility; or -based on the operational requirements of the employer; and -that the employment was terminated in accordance with fair procedure.”

35. Section 47(5) of the Act provides as follows: -

“For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

36. Section 44 (4) (g) of the Act decrees that: -

“Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:- (g) An employee commits, or



on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.”

37. The claimant in this case tendered a resignation when he received a notice to show cause. His contract with the respondent in clause 9 provided that each party could tender a resignation after giving one month notice or one month salary payment *in lieu of* notice. This is letter of appointment dated August 23, 2005.
38. The claimant voluntarily resigned from employment on August 9, 2016. The claimant says he opted to resign from the respondent's employment upon receipt of the suspension letter. he gave a reason that he opted to resign in order not to damage his 11 years relationship with his employer. it was his right according to section 36 of the *Employment Act*, 2007 and his contract to resign.
39. By the time he was served with the termination letter on August 17, 2016, there really was no employer and employee relationship since he had already validly resigned by his letter of August 9, 2016 and was irrelevant if respondent accepted it or not. In the case of *Kennedy Obala Oaga v Kenya Ports Authority* (2018) eKLR, the court held that the claimant resigned pre-empting any inquiry by the court on the fairness of the procedure and validity reason leading to summary dismissal.
- The court went also to state “the existing framework enables employees to resign and place themselves beyond the disciplinary authority of the employer. The law as it is does not prevent claimant from taking preemptive action he took to escape summary dismissal.
40. Similarly in this case, the claimant validly resigned and so by the time he was receiving the invitation to go for disciplinary hearing, he was not under the jurisdiction of the respondent.
41. Having said so, it is very clear that the court will find no purpose will be served to interrogate whether the claimant was wrongly and unlawfully dismissed. At the time he was receiving the summary dismissal letter, he was out of ambit of the respondent. The issue of his summary dismissal is therefore null and void.
42. Having found that the claimant resigned before he was terminated, the court orders as follows;
1. Claimant lawfully resigned from the service of the respondent on August 9, 2016.
 2. The summary dismissal of the claimant by the respondent under the circumstances was null and void and the refusal of the respondent to accept his resignation was inapplicable under the circumstances.
 3. There is no justification to pay him one month salary in lieu of notice as he is the one who resigned from his employment.
 4. Unpaid leave is just claimed and there is no evidence of how the same is arrived to.
 5. Severance pay is also not applicable since claimant resigned voluntarily.
 6. Compensation for wrongful termination is not payable. It is rejected.
 7. There is no order to costs.
 8. Claimant to be issued with his certificate of service within 14 days from today's date.

Orders accordingly.



Delivered, dated and signed in Nairobi this 2nd December, 2022.

ANNA NGIBUINI MWAURE

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 had 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.

ANNA NGIBUINI MWAURE

JUDGE

