



**Atingo v Borderless Tracking Limited (Cause 713 of 2017)
[2022] KEELRC 1467 (KLR) (16 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1467 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 713 OF 2017
JK GAKERI, J
JUNE 16, 2022**

BETWEEN

READON ELISHA ATINGO CLAIMANT

AND

BORDERLESS TRACKING LIMITED RESPONDENT

JUDGMENT

1. The claimant initiated this action by a memorandum of claim filed on April 13, 2017 alleging unfair termination of employment and non-payment of dues.
2. The claimant prays for –
 - a. Kshs.844,073/- comprising:
 - i. One month's salary in lieu of notice Kshs.70,000
 - ii. Rest days per week for two years Kshs.210,000
 - iii. Unpaid leave for two years Kshs.97,986
 - iv. Salary for July to October 2016 Kshs.280,000
 - v. Compensation for unfair termination Kshs.840,000
 - vi. Allowances 3rd July 2016 to 29th July 2016 at Kshs.3,500 per day Kshs.66,000
Transport Mombasa to Nairobi Kshs.8,000
Malaba and KPA housing office Kshs.28,500
 - vii. Service pay for 15 days for 2 years Kshs.69,990



- b. Costs of this suit.
 - c. Certificate of service.
 - d. Interest on (a) from 30th October 2016 till payment in full.
3. The respondent filed a reply to statement of defence on August 22, 2017 praying for dismissal of the suit with costs.

Claimant's Case

4. The claimant avers that he was employed by the respondent in December 2014 as a security manager and remained an employee until October 30, 2016, at a monthly salary of Kshs.70,000/-.
5. The claimant further avers that he discharged his duties diligently and competently.
6. It is the claimant's case that his employment was unfairly terminated by the Chief Executive Officer of the company. That he was neither accorded notice or opportunity to be heard and was terminated for unexplained reason(s).
7. It is further averred that attempts to seek audience with the Respondent on terminal dues fell through.

Respondent's Case

8. In its statement of response, the respondent denies having unfairly or unlawfully terminated the claimant's employment but admits that the claimant earned Kshs.70,000/- per month.
9. That the claimant was negligent as head of security in that he failed to follow up on the prosecution of fraudsters, which was expensive to the respondent by way of fines imposed by the Kenya Revenue Authority (KRA) due to the theft and fraud he was supposed to prevent.
10. The respondent denies all other allegations except the contents of paragraph 18 and 19 of the memorandum of claim.

Claimant's Evidence

11. The Claimant testified that after employment as a Security Manager in December 2014, his first assignment was at the Respondent's dairy farm at Mumias and he visited Malaba to familiarise himself with his work.
12. That the respondent dealt in electronic cargo tracking system (ECTS) and had been contracted by the KRA and individuals to track goods to border points to avoid dumping or tax evasion.
13. It is the claimant's testimony that on 15th January 2015 he went to Mombasa to establish a security office there and recruited two officers in his department on January 17, 2015, and acted a supervisor reporting to the Chief Executive Officer (CEO).
14. That on July 28, 2016, he received a message from the CEO to proceed on leave for 2015 and did so. The leave was approved on July 29, 2016.
15. That on July 30, 2016 the CEO wrote an email stating that he no longer needed the claimant's services effective August 1, 2016.
16. That in October 2016, the CEO called the claimant to go for work in Mombasa and the two were to meet at Laico Hotel on October 3, 2016 but the CEO did not turn up but later called for a meeting



- in the office and facilitated the claimant's travel to Mombasa and promised to pay terminal dues after completion of the Mombasa assignment.
17. It is the claimant's testimony that on October 10, 2016 the CEO called him to inform him he had left the country for medical attention and the claimant has to clear with the Secretary who referred him to the company lawyer who gave the claimant a schedule of terminal dues which the found unacceptable and refused to sign it.
 18. It is the claimant's testimony that the Respondent catered for travelling and accommodation.
 19. On cross examination, the claimant confirmed that his advocate forwarded a demand letter to the respondent dated 5th September 2016. That the termination notice was sent by email on 30th July 2016.
 20. The claimant feigned ignorance of his Counsel's letter of September 5, 2016 or the response from the respondent's Counsel dated September 13, 2016. The witness further confirmed that he was not in employment in September 2016 or in 2017 as previously testified.
 21. That he was terminated by the CEO through an sms and no reason was given. The witness testified that he had caused the arrest of not less than seven employees who recorded statements but had no evidence of the arrests or statements.
 22. The witness disclosed that he had been offered the salaries for July and August 2016 but declined the same and have never collected the amount.
 23. The claimant further confirmed that the amounts claimed by the demand letter and the suit herein were arbitrary.
 24. On re-examination, the witness indicated that he was terminated on July 29, 2016 by an email from the CEO a copy of which he did not file.
 25. It was his testimony that he subsequently did some private work for the employer for and was paid.

Respondent's Evidence

26. In her undated written statement, the respondent's witness testified that the claimant was an employee of the company but denied that the claimant was unfairly terminated. RW1 testified that the claimant was lawfully, justly and fairly terminated from employment for failing to protect company property from fraud and theft.
27. That in addition, the claimant failed to follow up on the prosecution of one of the fraudsters he had apprehend. That the claimant's negligence led to hefty fines by the KRA.
28. It was RW1's testimony that the claimant was paid as the letter dated October 7, 2016 attests.
29. On cross examination, the witness confirmed that the claimant was the head of security and his duties included ensuring the safety of company assets and follow up on violations. That the claimant's employment was terminated because he did not perform.

Claimant's Submissions

30. The claimant isolates two issues for determination:
 - i. Whether termination of the claimant's employment was conducted in accordance with the provisions of the *Employment Act*, 2007.
 - ii. Whether the claimant is entitled to the reliefs sought.



31. As to whether the termination of employment was conducted in consonance with the provisions of the Act, it is submitted that although the respondent alleges that the claimant was negligent, inept and unable to perform, which occasioned loss the allegations were never put to him for a rebuttal or response and he was not accorded a hearing.
32. The sentiments of Radido J. in *Alphonse Maghanga Mwachanya v Operation 680 Limited* [2013] eKLR are relied upon to buttress the submission that the provisions of section 41 of the *Employment Act* were not complied with.
33. Articles 50 of *the Constitution* of Kenya, 2010 and section 41 and 45 of the *Employment Act* are relied upon to urge that an employer is bound to accord an employee a fair hearing before termination of employment.
34. It is urged that the respondent violated the claimant's right to livelihood.
35. As regards the reliefs sought, it is submitted that the claimant is entitled to compensation for the unlawful termination.
36. The decisions in *Ezekiel Mburu Kangethe & 2 others v Mugoiri Five Farmers Co-operative Society Limited* [2017] eKLR, *Grace Muthoni Gitonga v Rosa Project* Nairobi Cause No. 264(N) of 2009 (unreported) as well as *Martin Wekesa Wamalwa v Barrow & Grundy (Ukunda) Ltd* [2013] eKLR are relied upon to urge that the claimant is entitled to terminal benefits as set out in the memorandum of claim for the unlawful manner in which he was dismissed from employment.

Respondent's Submissions

37. The respondent identifies three issues for determination:
 - i. Whether the respondent had justifiable reason to terminate the claimant's employment;
 - ii. Whether the claimant's termination of employment was procedural;
 - iii. Whether the claimant is entitled to the reliefs sought.
38. With regard to the first issue, it is submitted that the respondent genuinely believed that there existed valid reasons to terminate the claimant's employment pursuant to the provisions of section 43 of the *Employment Act*.
39. That although the claimant arrested some people who were defrauding the company (respondent) and handed them over to the police, he refused to follow up to ensure successful prosecution. That he refused to hand over the evidence fathered, a fact he did not contest.
40. That his refusal to follow up amounted to gross misconduct. Reliance is made on the decision in *George Okello Munyolo v Unilever Kenya Limited* [2019] eKLR where the court relied on the decision in *Thomas Sila Nzivo v Bamburi Cement Limited* [2014] eKLR to urge that the Respondent had reasonable and sufficient reason to suspect that the Claimant had acted to the substantial detriment of the Respondent and its properly.
41. As to whether termination of the claimant's employment was procedural, it is submitted that the respondent complied with the prescribed procedure and specifically section 44(4)(c) of the *Employment Act* summary dismissal for gross misconduct, that the claimant wilfully neglected to perform the work given to him by the employer.



42. The respondent relies on the decision in *Benjamin Maundu Syanda v Telkom Kenya Limited* [2020] eKLR to urge that since the financial stability of the respondent was at stake, and the respondent acted, consonance with the law, its decision should not be interfered with.
43. Further reliance is made on the decisions in *Republic v Egerton University Ex-parte Robert Kipkemoi Koskey* [2006] eKLR as well as *Jacob Oriando Ochanda v Kenya Hospital Association Ltd t/a Nairobi Hospital* [2019] eKLR on procedural issues.
44. As regards the reliefs sought, it is submitted that the claimant is not entitled to the reliefs because the respondent agreed to pay the claimants due but he did not pick them.
45. It is further submitted that since the claimant was dismissed from employment for gross misconduct, and the prescribed procedure was followed, he is not entitled to any compensation. The decision in *Benjamin Maundu Syanda v Telkom Kenya Limited* (supra) is relied upon to urge that no compensation is due to the claimant.
46. Finally, on costs the respondent submits that this is a discretionary matter for the court to determine and relies on section 27 of the *Civil Procedure Act*. It is submitted that costs follow the event and to a penalty to the losing party. The decision in *Cecilia Karuru Ngavu v Barclays Bank of Kenya Limited & another* [2016] eKLR is relied upon.
47. It is the respondent's submission that termination of the claimant's employment was procedural and the suit should be dismissed with costs to the respondent.

Analysis and Determination

48. The issues for determination are: -
 - a. Whether the termination of the claimant's employment was unlawful and/or unfair; and
 - b. Whether the claimant is entitled to the reliefs sought.
49. As to whether termination of the claimant's employment was unfair, the home port are the provisions of the *Employment Act* on termination of employment.
50. Sections 41, 43, 44, 45 and 47(5) of the *Employment Act* set out the basic framework on lawful termination of employment contracts.
51. In *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR, the Court of Appeal summarised the essence of some of these provisions as previously explained by this court and the Court of Appeal in legions of decisions. The court stated as follows:

“There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47(5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”
52. In Walter *Ogal Anuro v Teachers Service Commission* [2013] eKLR, the court stated that for a termination to pass the fairness test it must have been substantively justifiable and procedurally fair.



53. The proposition was reinforced by the Court of Appeal in *Naima Khamis v Oxford University Press (EA) Limited* [2017] eKLR. According to the Court of Appeal a termination of employment is unfair if it is not substantively justifiable or is procedurally unfair or both.

Reason for Termination

54. In the instant case, the claimant testified that he was notified of the dismissal by email on July 30, 2016. A copy of the email was not filed as evidence by either party. The email allegedly came from the CEO and the dismissal was effective as of August 1, 2016. The claimant did not set out the reasons for the dismissal.
55. The respondent on the other hand pleaded and testified that the claimant was negligent, inept and did not perform his duties as expected and the company incurred losses by way of fines paid to the KRA. That it was the claimant's duty as head of security to follow up cases of abused devices as well as prosecutions in cases where suspects were charged.
56. On cross examination, the claimant testified that he had instigated the arrest of at least seven persons but had no evidence to support the claim nor the status of the cases or investigation. The respondent's witness confirmed that the claimant had reported some people who had abused devices in Mombasa and further confirmed that the claimant was terminated because he did not perform or assist the respondent as was required of him as head of security. That he neither followed up nor provided evidence to facilitate their protection.
57. Intriguingly, the reasons cited by the respondent in its pleadings and evidence as the causa causan for the termination of employment were never made to the claimant for a rebuttal. The court is in agreement with the submissions by the claimant's counsel that this was serious omission by the respondent and a violation of the claimant's right to fair hearing as ordained by law.
58. In a similar vein, although the reason for termination of employment implicated the claimant's performance, the respondent led no evidence of a performance appraisal or warning letter or a performance improvement plan to boost the Claimant's performance.
59. Contrary to the respondent's submissions that the claimant was guilty of gross misconduct, the court is not satisfied the evidence on record demonstrate with specificity what the claimant did not do or amounted to gross misconduct.

Procedure

60. Section 45(2)(c) of the *Employment Act* provides –
- (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.
61. Section 41 of the Act sets out the specific steps that an employer is enjoined to comply with or follow before terminating employment.



62. The specific steps have been elaborated in a catena of decisions, including *Alphonse Maghanga Mwachanya v Operation 680 Limited* [2013] eKLR and *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR among others.
63. In the instant case, the claimant testified that he was neither given a hearing nor taken through a disciplinary process before termination of employment. notice of termination was communicated to him via email or sms the claimant's confusion between email and sms notwithstanding. The respondent's witness had no record of the termination but appear to have had no option but urge that its former CEO acted lawfully.
64. It would appear that the CEO did not copy the email to anyone else, after all, he was the claimant's Supervisor. More significantly, the Respondent adduced no evidence that the Claimant was taken through any form of disciplinary hearing or was afforded an opportunity to explain himself.
65. In a nutshell, it is the finding of the court that although the respondent may have had sustainable reasons to terminate the claimant's employment, it did so in total disregard of the provisions of the *Employment Act* which rendered the termination of employment unlawful and unfair for want of procedural fairness. The respondent's submission that it followed the prescribed procedure is not supported by evidence.
66. As to whether the claimant is entitled to the reliefs set out in paragraph 19 of the memorandum of claim, it is essential to underscore the centrality of the principle of law encapsulated in section 107 and 108 of the *Evidence Act*, that he who alleges must prove.
67. Regrettably, the claimant tendered no evidence in support of the bulk of the prayers catalogued in paragraph 15 of the memorandum of claim and no computation is provided. It is unclear how the figures given were arrived at.
68. The court proceeds as follows:
 - a. Kshs 844,073

i. One month's salary in lieu of notice

69. The respondent did not contest this claim and had previously offered the sum of Kshs 140,000 which the claimant declined. Similarly, the claimant's employment was terminated without the requisite notice. The sum of Kshs 70,000 is awarded as pay in lieu of notice.

ii. Rest days per week for two years Kshs.223,997/-

70. The claimant adduced no evidence to prove his entitlement to the amount claimed. He did not testify about his reporting to work length of the day or work schedule. The claim is dismissed.

iii. Unpaid annual leave for two years

71. In the written statement, the claimant admits that he proceeded on leave (for 2015) on July 29, 2016 the date leave was approved. The only pending leave was for the seven (7) months worked in 2016 which the court hereby awards.

iv. Salary for July to October 2016

72. This prayer is unsustainable. Having testified that his employment was terminated via email from the CEO on July 30, 2016 and his advocate had written a demand letter to the Respondent on September



5, 2016, the claimant cannot purport to have been in the employment of the respondent after August 1, 2016.

73. Relatedly, on re-examination, the claimant testified that he did some private work for the former employer and was paid. For these reasons the prayer is dismissed.

v. Allowances

3rd July to July 29, 2016 at Kshs 3,500 per day

Transport Mombasa – Nairobi – Kshs 8,000

Malaba and KPA housing office – Kshs 28,500

74. The claimant led no evidence on any of the allowances mentioned in the memorandum of claim. He tendered no evidence that he made a claim to respondent and the same was rejected. The claimant adduced no evidence on whether these allowances and claims were contractual or otherwise and how they were computed. Lastly the claimant did not avail receipts to demonstrate that the amount claimed were actually spent to justify the award.

75. The prayer is declined.

vi. Service for 15 days for every year worked for two years December 2014 to October 2016

76. In his written statement, the claimant admits that the respondent was deducting NSSF contributions from his salary and tendered no evidence that the contributions were not being remitted to the NSSF. A statement from the NSSF would have demonstrated the correct position but none was filed.

77. Since the claimant has not established that he was not a member of the NSSF as the deductions from his salary would suggest, the claim for service pay is unsustainable by virtue of the provisions of section 35(6)(d) of the *Employment Act*. The claim is dismissed.

Vii. Compensation for unlawful termination

78. Having found that termination of the claimant's employment was unfair for non-compliance with the provisions of the *Employment Act*, the claimant becomes entitled to the relief provided by section 49(1)(c) of the Act subject to compliance with the provisions section 49(4) of the Act.

79. In determining the quantum of compensation, the Court has considered the following factors: –

- i. The claimant was an employee of the respondent for a duration of one (1) year and eight (8) months, a reasonably short time.
- ii. It is unclear whether the claimant wished to continue working for the claimant. He neither appealed nor engaged the Respondent on the dismissal. He led no evidence on whether he responded to the CEO's email of July 30, 2016.
- iii. The claimant had no previous record of wrongdoing for most of the duration served.
- iv. The claimant contributed to the termination of the employment contract.

80. For these reasons, the court is satisfied that the equivalent of two months' salary is fair, Kshs.140,000/=.

b. Certificate of Service

81. The claimant is entitled to certificate of service by dint of section 51 of the *Employment Act*.



82. In the final analysis, judgment is entered for the claimant against the respondent in the following terms:
- a. One month's salary in lieu of notice.
 - b. Unpaid leave for seven months worked in 2016.
 - c. Equivalent of two months' compensation.
 - d. Certificate of service.
 - e. Costs of this suit.
 - f. Interest on the amount due at court rates from the date hereof till payment in full.
83. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 16TH DAY OF JUNE 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

