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Case Action:	Judgment
Judge:	Jacob Kariuki Gakeri
Citation:	Paul Opiyo Oyoo v Catholic Church Diocese of Ngong & another [2022] eKLR
Advocates:	-
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Sum Awarded:	-

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**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 572 OF 2017**

*(Before Hon. Justice Dr. Jacob Gakeri)*

**PAUL OPIYO OYOO..... CLAIMANT**

**VERSUS**

**THE CATHOLIC CHURCH**

**DIOCESE OF NGONG..... 1<sup>ST</sup> RESPONDENT**

**REV. FATHER JOHN O. OMBASA..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. By a Memorandum of Claim dated The Claimant initiated this suit by a statement of claim dated 22<sup>nd</sup> March 2017 and filed on 24<sup>th</sup> March 2017 alleging that his services were dismissed unlawfully and without notice by the Respondent.
2. The Claimant avers that he was employed by the 2<sup>nd</sup> Respondent on 11<sup>th</sup> March 2015 as a driver at a basic salary of Kshs.25,000/= and a house allowance of Kshs.7,000/= on permanent and pensionable terms.
3. He states that he served the 2<sup>nd</sup> Respondent diligently and faithfully in this capacity as a driver without any disciplinary issue and was shocked when on 13<sup>th</sup> March 2017, the 2<sup>nd</sup> Respondent abruptly terminated his services without prior notice and without payment of terminal dues.
4. The Claimant further avers that the 2<sup>nd</sup> Respondent's reason for termination was for "*not exploiting his skills as a mechanic*". He reiterates that he was employed as a driver and that his main duties were to drive the Bishop to various destinations, both private and official.
5. The Claimant also avers that in the fulfillment of his duties, he would leave his house at 5:00 am and depart from duty at 10:00 pm.
6. The Claimant avers that the Respondents' actions left him at a loss and without any meaningful employment given his legitimate expectation that he would not be dismissed from service provided he fulfilled all his obligations and carried out his obligations dutifully and honestly.
7. The Claimant avers that his termination had adverse effects given that he had a school going child whose education was interrupted.
8. The Claimant prays:
  - a) *That the dismissal herein was unlawful, unfair and illegal hence null and void.*

b) *That the Honourable Court to find that the Claimant is owed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents jointly and severally in terms of compensation for terminal benefits totaling to Kshs.521,831.20*

c) *That the Respondent to pay interest on (2) above at Court rates.*

d) *That the Respondents to pay costs of this cause.*

e) *That any other relief the Court deems fit to grant.*

9. The Respondents filed their response to the statement of defense on 2<sup>nd</sup> May 2017. In the response, the Respondents admit to having employed the Claimant but only as a driver and also through a formal contract dated 11<sup>th</sup> May 2016.

10. In addition to working as a driver, the Respondents aver that the Claimant was employed to play dual roles as a mechanic to undertake basic mechanic roles given that he was qualified to do so but his performance was unsatisfactory and below expectations.

11. The 2<sup>nd</sup> Respondent avers that the claim against him is misplaced and bad in law as he was not his employer.

12. The Respondents aver that given the Claimant was employed on contract, all that was required to terminate his services was a notification of the intention not to renew the same after expiry. In addition, they state that the 1<sup>st</sup> respondent was under no obligation to explain why the contract would not be renewed but still went ahead and gave the Claimant the basis for its decision not to renew the contract of employment.

13. The 1<sup>st</sup> Respondent avers that the Claimant was compensated for any extra time worked and which included being given free days than he was entitled to particularly when his services as a driver were not required.

14. The 1<sup>st</sup> Respondent further avers that when the Claimant's contract came to an end, he was paid all terminal dues and was in deed paid monies he was not entitled to and that the amount he is claiming is misleading the Court and in a bid to unjustly enrich himself.

15. The 1<sup>st</sup> Respondent states that termination of the Claimant's contract of employment was also informed by an incident in September, 2016 where a gift envelope given to its Bishop on a tour in Molot in Narok/Bomet County vanished only for same to resurface after the Claimant was confronted with the facts of its disappearance which culminated in a warning letter after the Claimant admitted to the offence.

16. The matter proceeded for hearing on 4<sup>th</sup> October 2021 where the Claimant's case was heard and was adjourned to 7<sup>th</sup> December 2021 for the hearing of the Respondent's case.

## **Evidence**

17. The Claimant adopted the written statement and was cross examined. He testified that he was issued with a letter on 13<sup>th</sup> March 2017 which indicated the Respondent's decision not to renew his contract. That he was not given an opportunity to defend himself and had not been paid for the 13 days he had worked in that month.

18. On cross examination, the Claimant confirmed that he as was employed by the 1<sup>st</sup> Respondent but had not signed the contract dated 11<sup>th</sup> March 2016.

19. He further testified that he had not been furnished with the warning letter dated 11<sup>th</sup> October 2016.

20. The Claimant testified that he had received the sum of Kshs.38,015/= which payment he presumed for a job well done during his employment with the Respondents.
21. He confirmed that he was making NSSF contributions and was also a member's staff pension.
22. On re-examination, the Claimant maintained that he had not received a warning letter and was not aware of the lost envelope and was not reported to the police for the alleged theft.
23. The Respondent had one witness RW1 REVEREND FATHER JOHN O. OMBOGA who adopted the witness statement and documents filed as his evidence in chief.
24. RW1 testified that he paid the Claimant all his dues amounting to Kshs.38,014/= paid through a cheque and that the Claimant had signed a payment voucher for the same on 20<sup>th</sup> March 2017.
25. During cross examination, he confirmed that the Claimant was employed as a driver. He maintained that the Claimant was involved in a theft that led to the issuance of a warning letter. The incident, was not reported to the police neither was he tried as there was no evidence of the same.
26. RW1 testified that the Claimant's dishonesty formed part of the reason for non-renewal of his contract but he was not given a chance to defend himself on the allegations. The Claimant's performance was also not evaluated.
27. The witness further testified that he had signed the Claimant's contract on behalf of the employer but he was aware that the Claimant did not sign. He stated that he was aware of the effects of an unsigned and undated contract.
28. On re-examination, RW1 clarified that the Claimant had refused to sign the contract despite being given to him. He confirmed that the Claimant had signed the letter of offer.
29. He testified that the contract was a fixed term of one year and was aware that it would terminate upon expiry.
30. RW1 concluded that the Claimant was treated fairly until the end of his tenure.

#### **Claimant's submissions**

31. The Claimant identified three issues for determination namely:

- i. Whether or not the termination was fair in procedure and substance;*
- ii. Whether or not the Claimant was terminated on account of poor performance and incompetence;*
- iii. Whether or not the Claimant's employment was terminated for gross misconduct;*
- iv. Whether the Claimant is entitled to the remedies sought.*

32. Regarding termination, reliance is placed on the provisions of Section 43 of the Employment Act which requires every employer to prove the reasons for termination of employment. Further reference is made on the decision in **Walter Ogal Anuro v Teachers Service Commission (2013) eKLR** on the fairness test in termination as well as the decision in **Kenfreight (EA) Limited v Benson K Nguti (2016) eKLR** on the need for an employer to issue proper notice and give reasons why termination of employment was being considered.

33. As such, the Claimant submitted that the departures from the above requirements by the Respondent were fundamental in

nature as to persuade the Court to conclude that the termination was unfair on account of breach of procedure.

34. As regards poor performance, reliance is made on the decision in **Jane Samba Mukala v OI Tukai Lodge Limited (2013) eKLR** where the Court addressed the principles of termination of employment on account of poor performance and incompetence. Further reference is placed on the decision in **Banking Insurance & Finance Union (Kenya) v Barclays Bank of Kenya Limited & Another (2016) eKLR** where the Court highlighted the need for performance improvement plans or evaluation by an employer.

35. The Claimant submitted that he was never afforded the requisite facilities to assess his performance and further he was not taken through the appropriate disciplinary process when his employment was terminated.

36. As regards gross misconduct, the Claimant relies on the decision in **Loice Otieno v Kenya Commercial Bank (2013) eKLR** where the Court held that the doctrine of natural justice or procedural fairness is now an essential part of an employment relationship where an employer is under an obligation to comply with the procedure prescribed in Section 41 of the Act. The Claimant maintains that the Respondent had not complied with the procedural parameters and as such the termination was procedurally unfair.

37. The Claimant urges that he is entitled to all the reliefs sought. That having proved that his termination was unfair contrary to the provisions of Section 45, the award of 12 months' salary as compensation suffices.

38. That having been terminated unfairly, the prayer for one month's salary is justified as provided by Section 36 of the Employment Act.

39. It is further submitted that his evidence of working for 1 year and 13 days was uncontroverted and as such is entitled to payment for annual leave. He concluded that he was not given a certificate of service upon termination as required under Section 51(1) of the Employment Act.

#### **Respondents' Submissions**

40. The Respondent identify the following issues for determination.

- i. Whether the 2<sup>nd</sup> Respondent has been properly enjoined in these proceedings;
- ii. Whether the notice to the Claimant that his contract would not be renewed amounts to wrongful termination;
- iii. Whether there is a valid contract of employment between the 1<sup>st</sup> Respondent and the Claimant;
- iv. Whether the Claimant was lawfully terminated;
- v. Whether the Claimant deserves the compensation sought or any amount thereof.

41. It was submitted that the 2<sup>nd</sup> Respondent is not a relevant party to the proceedings given that he was employed by the 1<sup>st</sup> Respondent as the Moderator in charge of Human Resource. As such, he had been wrongfully enjoined in the proceedings and is therefore seeking to have his name struck out of the proceedings with costs.

42. As regards the contract of employment, the 1<sup>st</sup> Respondent placed reliance on the case of **Kenya Medical Research Institute v Maria Mukwana (2019) eKLR** where the Court held that fixed term contracts carry no rights, obligations or expectations beyond the expiry date. It was submitted that in the circumstances Sections 41 and 45 of the Employment Act are not applicable and the non-renewal of the Claimant's contract of employment does not amount to unlawful termination.

43. As to the validity of the contract, the 1<sup>st</sup> Respondent submitted

that the Claimant was very much aware of the existence of the contract and was not being candid about the same.

44. On the amounts sought as compensation, the 1<sup>st</sup> Respondent submitted that the Claimant had admitted to receiving Kshs.38,015/= which he claimed was good will despite originally denying receipt of the cheque. It alluded to the lack of credibility of the Claimant as a witness.

45. Finally, the 1<sup>st</sup> Respondent submitted that the Claimant is not entitled to any further claims as he had been paid his overtime dues and NSSF payments had been remitted by the 1<sup>st</sup> Respondent. It contended that the amounts sought were not justified and the Claimant had failed to prove that the same were merited.

### **Analysis and Determination**

46. I have considered the pleadings, evidence on record, submissions by Counsel and the law. The issues for determination are whether:

- a) The 2<sup>nd</sup> Respondent was properly enjoined in the proceedings;
- b) Termination of the Claimant's contract of employment was unfair;
- c) The Claimant is entitled to the reliefs sought.

47. As to whether the 2<sup>nd</sup> Respondent was properly joined, it is submitted that since the 2<sup>nd</sup> Respondent was an employee of the 1<sup>st</sup> Respondent as was the Claimant, it was improper for the Claimant to enjoin him in the suit. As the Moderator In Charge of the Human Resource of the 1<sup>st</sup> Respondent, the 2<sup>nd</sup> Respondent signed all letters sent to the Claimant in his official capacity. This includes the Claimant's job description dated 11<sup>th</sup> March 2016.

48. It is trite that the Claimant was not an employee of the 2<sup>nd</sup> Respondent nor was the Claimant serving the 2<sup>nd</sup> Respondent. It is unclear why the 2<sup>nd</sup> Respondent was enjoined in these proceedings. He testified as a witness of the 1<sup>st</sup> Respondent.

49. It is the finding of the Court that the 2<sup>nd</sup> Respondent ought not to have been enjoined in these proceedings.

50. As to whether the Claimant's termination of employment was fair, the first point of call are the provisions of the Employment Act on termination. Section 45(2) of the 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.**

51. In other words, for a termination to pass as fair it must pass the tests of substantive justification and procedural fairness. See **Walter Ogal Anuro v Teachers Service Commission (supra)**.

52. In addition, Sections 43 and 47(5) of the Act provide for the burden of proof on the part of the employer and employee in

claims arising out of termination of a contract of employment.

53. Finally, Section 41 of the Act details the procedural steps anticipated by Section 45(2)(c) of the Act to guarantee procedural fairness.

54. On the other hand, the Court of Appeal and the Employment and Labour Relations Courts have unapologetically enforced these provisions to give effect to the intention of the legislature.

55. In **Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR** the Court of Appeal 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.”*

56. Similarly, in **Naima Khamis v Oxford University Press (EA) Limited [2017] eKLR** the Court of Appeal was categorical that

*“From the foregoing, termination of employment may be substantively and/or procedurally unfair. A termination is also deemed substantively unfair where the employer fails to give valid reasons to support the termination. On the other hand, procedural unfairness arises where the employer fails to follow the laid down procedure as per contract, or fails to accord the employee an opportunity to be heard as by law required.”*

57. Finally in **Walter Ogal Anuro v Teachers Service Commission (2013) eKLR**, Ndolo J. expressed herself as follows:

*“However, for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness.”*

58. I will not proceed to apply the foregoing principles to the facts of the instant case.

59. It is common ground that the 1<sup>st</sup> Respondent offered the Claimant employment as a driver on 9<sup>th</sup> March 2016. The Claimant's Supervisor was the 2<sup>nd</sup> Respondent. His salary was Kshs.25,000/= and house allowance at 30% of basic salary. The other had a three months' probationary period. The letter of offer did not state the term or duration of the contract. Both parties signed the Claimant's job description on 11<sup>th</sup> March 2016.

60. Puzzlingly, although the 2<sup>nd</sup> Respondent signed the employment contract dated 11<sup>th</sup> March 2016, the Claimant did not. The 2<sup>nd</sup> Respondent confirmed on cross examination that the Claimant refused to sign the contract even after a copy was provided for his signature.

61. Subsequently, by a letter dated 22<sup>nd</sup> August 2016, the 1<sup>st</sup> Respondent confirmed the Claimant's employment as a driver after successful completion of the probationary period. The letter of confirmation did not prescribe the duration of the contract or other relevant terms such as leave, termination, working hours, disciplinary, allowances, etc.

62. The written contractual document gave the Claimant a one-year contract till 11<sup>th</sup> March 2017.

63. The 1<sup>st</sup> Respondent purportedly declined to renew the contract by a letter to the Claimant dated 13<sup>th</sup> March 2017.

64. Since the Claimant did not sign the contractual document, he is not bound by its terms and cannot rely on it to urge his case.

65. The Claimant averred that he was a permanent and pensionable employee of the 1<sup>st</sup> Respondent as per the Human Resources

Management Policy of the 1<sup>st</sup> Respondent operational at the time. The Claimant did not furnish a copy of the policy but the Respondents did not counter the evidence and since the confirmation of employment did not **specify** the duration of the duration of contract and the Respondents were aware that the Claimant had not signed the document dated 11<sup>th</sup> March 2016. It does appear that the Respondents abandoned the contractual document altogether. Instructively, the 2<sup>nd</sup> Respondent led no evidence of what he did when the Claimant declined to sign the contract. He not only retained him in employment but confined him as an employee five months later.

66. The Respondents' submission that paragraph 2 of the letter of offer incorporated the terms and conditions of employment does not incorporate the contract dated 11<sup>th</sup> March 2016. The letter of offer was a mere **offer** which the Claimant had the right to accept or reject. Acceptance in this case would have been appending his signature on the contractual document which he did not. Contrary to the Respondents' submissions that the Claimant mentions the employment contract and was thus aware of its existence, an employment contract need not be written, it may be oral, written or implied from conduct of the parties.

67. Section 9(2) and (3) of the Employment Act provides that –

**(2) An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with subsection (3).**

**(3) For the purpose of signifying his consent to a written contract of service an employee may—**

**(a) sign his name thereon; or**

**(b) imprint thereon an impression of his thumb or one of his fingers in the presence of a person other than his employer.**

68. Evidently, it was the cardinal duty of the 1<sup>st</sup> Respondent to ensure that the contract of employment dated 11<sup>th</sup> March 2016 was finalized in every respect. An obligation the 1<sup>st</sup> Respondent failed or refused or neglected to fulfill.

69. The Court is of the view that where an employer fails/refuses or neglect to finalize the employment process by having the necessary documentation in place and consented to by the employee, it does so at its own risk and must take its relationship with the employee as such with attendant consequences.

70. For the above reasons, the Court is satisfied that the Respondent has on a balance of probabilities failed to demonstrate that the Claimant's employment was for a duration of one year.

71. The foregoing notwithstanding, there was a contract of service between the Claimant and the 1<sup>st</sup> Respondent.

72. As to whether termination of the Claimant's employment was unfair, reference is first made to the Respondents' letter dated 13<sup>th</sup> March 2017 informing the Claimant that his contract of employment would not be renewed.

73. Intriguingly, the letter makes no reference to the duration of the contract or the date of expiry nor the contract on which it is founded and attributes the non-renewal to the fact that the Claimant did not exploit his skill as a mechanic and non-accomplishment of tasks given to him.

74. Put in the alternative the purported non-renewal of the Claimant's contract of employment was actuated by poor performance. Relatedly, on cross examination, RW1 confirmed that the Claimant's dishonestly contributed to the nonrenewal of the contract.

75. However, for unexplained reasons, the Claimant was neither evaluated nor appraised by the Respondent nor taken through a disciplinary process. The Claimant testified that he was not given an opportunity to defend himself. See **Jane Samba Mukala v Ol Tukai Lodge Ltd (supra)**, **Kenya Science Research International Technical and Allied Workers Union (KSRITAWU) v Stanley Kinyanjui and Magnate Ventures Limited (Cause No 273 of 2010)**, where courts explained the obligation of an employer in circumstances in which an employee's performance is called into question.



76. Strangely the purported non-renewal of contract culminated in the payment of one month's salary in lieu of notice to the Claimant, perhaps to placate the Claimant. It begs the question why the Respondent decided to give a non-renewal notice and provide reasons and proceed to pay in lieu of notice. This letter was not merely non-renewal notice.

77. In the final analysis, having found that the Claimant's employment was not for one (1) year as alleged by the Respondent, the Court further finds that the Claimant's termination was unfair for want of procedural fairness.

78. I will now proceed to deal with the reliefs sought by the Claimant:

**i) One month's pay in lieu of notice**

79. On cross examination, the Claimant admitted having received Kshs.38,015/= from the Respondent. According to the Claimant the amount was paid for a job well done for one year, a form of appreciation for the services rendered. The Claimant led no evidence of how and by when the information about the gift was communicated to him.

80. Similarly, the Claimant did not furnish proof that the 1<sup>st</sup> Respondent had a custom or policy on monetary gifts to employees. More significantly, paragraph 3 of the letter of non-renewal of contract is clear on the payments the Claimant was entitled to.

81. For unexplained reason, the Claimant denied having received the cheque nor signing the cheque payment voucher for the sum paid. He also disowned the computation of terminal dues. The evidence on record provides otherwise. The prayer is **declined**.

**ii) 13 days worked in March 2017**

82. According to the Respondent's computation of terminal dues, the sum of Kshs.14,083.33 was paid for the 13 days in March 2017. The prayer is **declined**.

**iii) 21 days' annual leave pending for one-year Kshs.17,499.90**

83. According to the Respondent's computation, on record, the sum of Kshs.32,500/= was paid as leave pay for March 2016 to March 2017 and Kshs.12,500/= as leave allowance. The prayer is **disallowed**.

**iv) Overtime worked at three hours daily 78 hours overtime within 26 days including transport Kshs.156,000.00**

84. While the Claimant testified that he would report to work at 5 am and leave at 10.00 pm, RW1, the Claimant's Supervisor on cross examination confirmed that the Claimant's reporting time was at 8.00 am and would leave at 5 pm.

85. On cross examination, the Claimant stated that he worked overtime, six times a week but did not indicate the hours per session. When questioned by the Court amount claimed, the Claimant indicated that it included transport allowance but could not explain how the transport allowance was factored in the proportions.

86. In the absence of documentary or other evidence to authenticate the overtime and the amount claim, the prayer is **declined** for want of proof.

**v) Service pay of 15 days for one year Kshs.12,500/=**

87. On cross examination, the Claimant confirmed that he was making NSSF contributions and was a member of the staff pension. As a consequence, the Claimant is not entitled to service pay, as ordained by Section 35(6)(d) of the Employment Act.

88. In **Hassanath Wanjiku v Vanela House of Coffees [2018] eKLR**, Onyango J. stated as follows:

*“Under Section 35(6) an employee who is a member of NSSF is not entitled to service pay. The Claimant having been a member of NSSF is not entitled to service pay. She is also not entitled to severance pay as she was not declared redundant.”*

89. The prayer for service pay is **declined**.

vi) **12 months compensation for damages and loss of employment Kshs.300,000/=**

90. Having found that the termination of the Claimant’s contract of employment was unfair the Claimant is eligible for the discretionary reliefs provided by Section 49(1)(c) of the Employment Act provided the parameters set out in Section 49(4) are taken into consideration. In determining the level of compensation, the Court has taken into account the following:

- i. The Claimant was an employee of the Respondent for one (1) year and wished to continue but for the termination.
- ii. The Claimant had a warning letter dated 11<sup>th</sup> October 2016 and contributed to the termination of employment.
- iii. The Claimant did not appeal or complain after receiving the notice of non-renewal of the contract of employment.

91. In view of the foregoing, the equivalent of three (30 months’ salary is fair.

92. **In conclusion, judgment is entered for the Claimant against the Respondent for the equivalent of three (3) months’ salary with costs.**

93. Interest at Court rates from the date of judgment till payment in full.

94. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 7<sup>TH</sup> DAY OF MARCH 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**



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