



**Mulovi v KIP Melamine Company Limited (Cause 688 of 2018)  
[2024] KEELRC 1112 (KLR) (9 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1112 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 688 OF 2018  
NJ ABUODHA, J  
MAY 9, 2024**

**BETWEEN**

**PETER MUINDE MULOVI ..... CLAIMANT**

**AND**

**KIP MELAMINE COMPANY LIMITED ..... RESPONDENT**

**JUDGMENT**

1. By a memorandum of claim filed on 29<sup>th</sup> May, 2018, the claimant averred in the main that:-
  - a. At all material times pursuant to this claim, the claimant is a former employee of the Respondent, employed as a casual worker in the Respondent's company since 3<sup>rd</sup> February, 2015 and worked continuous up to 26<sup>th</sup> February, 2018, earning a monthly salary of Kshs.19,233/=.
  - b. On or about 26<sup>th</sup> February 2018, the claimant was terminated without notice and/or any reasonable cause and the Respondent refused to pay him his terminal benefits hence this claim.
  - c. The claimant's claims against the respondent are as follows:
    - i. One month salary in lieu of notice Kshs.19,233/=.
    - ii. Leave earned but not taken for three years at kshs.57,699/=.
    - iii. Service  $19,233 * 3 * 4 = 230,796$
    - iv. 12 months salary for unfair termination Kshs.230,796/=.
    - v. House allowance for the period worked 36 months Kshs.103,858.20/=.
    - vi. Certificate of service.
  - d. The claimant holds the Respondent for unfair termination of employment.



- i. Terminating the claimant without notice
- ii. Refusing to give audience to the Claimant nor to explain to him the reason for his termination.
- iii. Refusing to pay salary in lieu of notice.
- iv. Failing to explain to the claimant in a language he could understand the reason for his termination
- v. Being malicious against the claimant
- vi. Terminating the claimant on mere suspicion of theft without proof.

2. The respondent filed a response dated 26<sup>th</sup> June, 2018 and averred among others that:

- a. The Respondent admits the contents of paragraph 3 and 4 of the Memorandum of Claim (hereinafter "the Claim") in so far as they are merely descriptive of the parties save that the Respondents address of service for the purpose of these proceedings is care of Marube & Company, NACICO Chambers, 1<sup>st</sup> Floor, Moi Avenue, P.O Box 705-00100 Nairobi,
- b. In answer to paragraph 4, the Respondent admits that the Claimant was employed by the Respondent as a Machinist on or about 3<sup>rd</sup> January 2017.
- c. On or about early February 2018 the Respondent discovered that the Claimant together with other Employees were systematically stealing various goods of the Respondent by falsely declaring them to be faulty and or rejects. He readily admitted the offence in writing and sought to be forgiven. As a result of these actions, the Respondent suffered loss and damage.
- d. Paragraph 6 is denied and the Claimant is put to strict proof. The Respondent lawfully suspended the Claimant, invited Him for a hearing and thereafter He was summarily dismissed after failing to attend the meeting.
- e. The Respondent scheduled a disciplinary hearing. The Respondent exercised its rights under the Employment Act and called the Claimant to show cause why disciplinary action should not be taken against Him. The notice contained the charges he was facing at the hearing and also informed him that he had a right to be accompanied by a fellow employee of his choice during the hearing which was scheduled for 28<sup>th</sup> February 2018. The Claimant opted not and or failed to attend.
- f. Paragraph 7 is denied and the Claimant is put to strict proof. The Respondent states that the Claimant was initially employed as a casual worker and was paid weekly and as such the Claimant was not entitled to annual leave, house allowance etc.
- g. Paragraph 8 is denied and the Claimant is put to strict proof. The Respondent contends that the Claimant failed to attend the hearing despite receiving notice of the disciplinary hearing thereof.
- h. The allegations that the termination was unlawful, unfair or unjust are without basis and are denied. The Claimant admitted being involved in declaring some goods rejects, refused to attend the disciplinary hearing and is therefore precluded from asserting that he was subjected to an unfair termination process.
- i. The Respondent denies that the Claimant is entitled to the reliefs set out in the Statement of Claim. Further and in response, the Respondent states:



- a. The Claimant was summarily dismissed. He is therefore not entitled to any of the declarations sought.
  - b. The Claimant is not entitled to leave days and house allowance when He was working as a casual worker.
  - c. The Claimant is not entitled to Service Pay as he was a member of National Social Security Fund (NSSF).
  - d. The Claimant is not entitled to 12 months' pay for unfair termination.
  - e. The Respondent has not denied issuing the Claimant with a Certificate of Service. The Claimant is at liberty to collect the Certificate from the Respondent's offices but chosen not to collect it.
3. At the hearing the claimant testified in the main that he wrote a witness statement on 4<sup>th</sup> May, 2018 and adopted the same as his evidence in chief. He also relied on his documents filed with the claim. According to him, he was employed on 3<sup>rd</sup> February, 2015 as a machine attendant and worked until February, 2018. His monthly salary was Kshs.19,233/-. It was further his evidence that he and some of her colleagues were accused of theft of factory rejects. He denied being together with his accused colleagues.
  4. According to him, on the material day he reported to work as usual and operated the machine. The rejects were placed on the dumpsite. He further stated that he wrote an apology letter. It was dated 23<sup>rd</sup> February, 2018. The apology was over producing rejects. He was suspended for two days by Jacktone, the quality control manager. According to him he developed hearing problems in the course of his work and when he complained, he was compensated. Thereafter he started having problems with Jacktone. Jacktone complained I was producing a lot of rejects. I was further his evidence that he was not responsible for the maintenance of the machine. He was called for the disciplinary hearing but never went because he feared he would be arrested since the issue of theft had been reported to the police. He further stated that he was never paid house allowance between 2015 and 2017.
  5. In cross-examination he confirmed that he was called for the disciplinary hearing but never attended for fear of arrest. He further stated that he was issued with a letter of appointment in 2017 and that his salary included house allowance. Concerning the apology letter, he stated that he was forced to write it. The storekeepers were to collect rejects and dump them. It was further his evidence that he was arrested with his four other colleagues however he did not know if his other colleagues too were suspended and that he never went back to the respondent's premises to return property in his possession. Between 2015 and 2017 he was paid weekly.
  6. In re-examination he stated that he was not with his arrested colleagues and the apology was over rejects and not theft.
  7. The respondent's witness Mr. Fayaz Ladha informed the Court that he was a director of the respondent and that he knew the claimant as the respondent's employee. He adopted his statement dated 27<sup>th</sup> February, 2018 as his evidence in chief. In cross-examination he stated that the claimant was served with notice and it was found at page 9 of the respondent's bundle of documents. The notice was not served but the intention was there. It was his evidence that the claimant's apology was over the stolen goods however he admitted that he was aware in the letter the claimant was not apologizing for the theft.
  8. Regarding the claimant's terms of service, he stated that clause 5 of the claimant's letter of appointment stated that the claimant's salary was Kshs. 16,000/- per month and house allowance was 15% of the



salary which was Kshs. 2,400/-. The salary included house allowance. Concerning disciplinary hearing, he stated that one was called but the claimant never responded to calls and never turned up at the respondent's premises. In re-examination he reconfirmed the claimant never turned up and that this was captured by the minutes at page 8 of the respondent's bundle of documents. The respondent could therefore do nothing but terminate the claimant's service. The claimant never collected his termination letter and further that the respondent did not know the claimant's home address.

9. The respondent's second witness Mr. Bernard Langat informed the Court that he was working for the respondent as production manager and that in 2018 he was working as quality control manager. He wrote his statement on 28<sup>th</sup> February, 2018 which he relied on as his evidence in chief. In cross-examination he stated that he did not table anything to show he was the quality control manager. It was his evidence that at page 10 of the respondent's bundle of documents there was a police abstract. He stated that he found the claimant stealing but did not get him arrested immediately because there was a procedure to be followed. It was his evidence that the respondent was not concerned about the number of rejects and it was not the only theft case involving staff. It was further his evidence that they were concerned with hidden items and that they were able to tell which mould was from which machine.
10. In final submissions, Mr. Ondanda for the claimant submitted that between 3<sup>rd</sup> February, 2015 and January, 2017 the claimant worked as a casual worker at a weekly pay of Kshs. 2,400/-. He was not registered for NSSF hence is entitled to service pay. This fact was not disputed by the respondent. Counsel therefore urged the Court to award the claimant the sum of Kshs. 11,076.90 as service pay. Counsel similarly submitted on the issue of leave for the same period. On the issue of notice of termination counsel submitted that the claimant was only served with a notice of suspension and not termination. According to Counsel, on the material date, the claimant was on a night shift and the machine he was operating was set by the respondent's engineer. The claimant's work was only to operate it. In the process and unfortunately, the machine produced 12 rejected pieces which were dumped at the designated garbage bin. CW1 told the court that this was not the first time the machines produced rejected goods.
11. Mr. Ondanda further submitted that CW1 told the Court that his Supervisor Mr. Jackton developed a sour relationship with him after he complained of hearing problems caused by the noisy machine he was using. Mr. Jactone therefore seized the present opportunity to get the claimant out. According to Counsel, the claimant worked without any case of misconduct leading to his confirmation into permanent employment and his salary revised. Counsel however contended that whereas the respondent's witness Mr. Fayaz testified that the claimant was involved in theft, he was not immediately arrested and taken to the police station. Counsel therefore urged the Court to find that no theft took place and that the police abstract produced was an afterthought and could not justify the claimant's dismissal. The claimant was denied audience by the respondent and threatened with arrest, the reason he never dared approach the respondent to discuss the issue of summary dismissal.
12. Mr. Marube for the respondent submitted that the claimant had not discharged the burden of proof cast upon him by section 47(5) of the *Employment Act*. On the issue of procedural fairness under section 41(1) of the Act, Counsel submitted that the respondent served the claimant with suspension informing him of the reasons for the suspension and a notice to show cause letter with a date for hearing but the claimant did not show up because he feared arrest. Counsel therefore submitted that the respondent complied with the provisions of section 41(1).
13. As observed by both Counsel in the matter, the burden of proof in any claim for employment is apportioned under section 47(5) of the *Employment Act*. That is to say the employee has the responsibility to prove that an unfair termination occurred while the employer has the duty to show that there existed valid reasons for the termination. These responsibilities are mutually exclusive and



failure by one party does not discharge the other's burden. Further, under section 107 of the Evidence Act, any party who alleges a fact the basis upon which he seeks a determination by a court of law in his favour, must prove that fact. Hence the ordinary cliché that "he who alleges, must prove". The claimant brought this claim to Court alleging the respondent dismissed him without notice and for no lawful cause. The respondent however maintained that the claimant was dismissed for gross misconduct after being found attempting to steal from the respondent. He was not just alone but four other colleagues were involved. The claimant was *vide* a letter dated 26<sup>th</sup> February, 2018 suspended from work and informed that he would be contacted for disciplinary hearing. The suspension letter emphasized that the investigations and pending hearing could result in his dismissal. It was the claimant's evidence that he never visited the respondent's premises after the suspension for fear of arrest.

14. Fear of arrest is not reason enough for the claimant for failure to present himself for disciplinary hearing where he could have exonerated himself if innocent. In any event an arrest on suspicion of an offence is not a conviction for that offence. He would if at all was arrested as a result of the allegations be presumed innocent until he either pleaded or was proved guilty. The claimant therefore squandered the opportunity to defend himself hence cannot fault the respondent for summarily dismissing him.
15. In conclusion the claim is found without merit and is hereby dismissed with costs.
16. It is so ordered.

**DATED THIS 9TH DAY OF MAY, 2024**

**DELIVERED THIS 9TH DAY OF MAY, 2024**

**ABUODHA NELSON JORUM**

**JUDGE**

