



**Odhialo v Kenbro Industries Limited (Cause E196 of 2022)  
[2024] KEELRC 1191 (KLR) (9 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1191 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E196 OF 2022**

**BOM MANANI, J**

**MAY 9, 2024**

**BETWEEN**

**JOEL HABIL ODHALO ..... CLAIMANT**

**AND**

**KENBRO INDUSTRIES LIMITED ..... RESPONDENT**

**JUDGMENT**

**Background**

1. On 11<sup>th</sup> November 2013, the Respondent hired the services of the Claimant as its IT Manager. The parties continued in the relation until 1<sup>st</sup> March 2022 when the Claimant was summarily dismissed from employment.
2. The Claimant contends that the Respondent's decision to terminate the employment relation between them was without valid reasons. Further, he contends that the Respondent did not give him the opportunity to be heard before the impugned decision was rendered.
3. On the other hand, the Respondent accuses the Claimant of committing acts of insubordination when he allegedly assisted a co-employee to draft a response to accusations that had been leveled against him by the Respondent. The Respondent contends that the Claimant's involvement in the matter was captured on its CCTV footage.
4. The Respondent also accuses the Claimant of failing to correctly install some IT equipment at the workplace. This allegedly resulted in malfunctions within the IT department.
5. The Respondent contends that the Claimant's actions amounted to insubordination for which it was entitled to terminate his services. As a result, it issued him with a letter of summary dismissal from employment dated 1<sup>st</sup> March 2022.



6. The Respondent contends that before it took the impugned action, it gave the Claimant a chance to be heard. It refers to the meetings with the Claimant on 23<sup>rd</sup> February 2022 and 8<sup>th</sup> March 2022 as evidence of the fact that he was offered an opportunity to ventilate on the matter before he was released from employment. As such, the Respondent contends that it complied with the requirements of procedural fairness.

### **Issues for Determination**

7. After analyzing the pleadings and evidence on record, I am of the view that the following are the issues for determination in the cause:-
  - a. Whether the decision to terminate the Claimant's contract of service was substantively and procedurally fair.
  - b. Whether the parties are entitled to the reliefs that they seek through their respective pleadings.

### **Analysis**

8. According to the Respondent's letter dated 1<sup>st</sup> March 2022, the sole reason why it terminated the Claimant's services was that he was captured on its (the Respondent's) CCTV cameras assisting another employee by the name Daniel Oiro to respond to an issue which the Respondent had accused him of. According to the Respondent, this action by the Claimant constituted insubordination for which his contract was terminated.
9. Although the Respondent introduced the issue of a dysfunctional IT network which the Claimant had allegedly installed, it is apparent from the letter of his (the Claimant's) dismissal that this was not one of the factors that led to the Respondent's decision. Therefore, it was unhelpful for the Respondent to harp on it as one of the justifications for its impugned action.
10. At the center of the Respondent's decision was the alleged assistance which the Claimant extended to Daniel Oiro to respond to accusations against him. The Respondent avers that this amounted to insubordination.
11. Black's Law Dictionary defines the term insubordination to mean "a willful disregard of an employer's instructions... an act of disobedience to proper authority; refusal to obey an order that a superior officer is authorized to give." Thus, in order to accuse an employee of insubordination, it must be apparent that the employee had acted in defiance of lawful directions by the employer. The employee must have been involved in conduct that is patently unlawful.
12. The question that we must ask is whether the Claimant's assistance to a co-employee to respond to accusations against him by the Respondent amounted to insubordination assuming that it is true that he did this. The answer is in the negative.
13. There is nothing wrong with an employee assisting another to offer a response to an issue that the employer has raised. Indeed, section 41 of the *Employment Act* recognizes the right of an employee to be assisted by a co-employee to respond to issues that have been raised against him by the employer.
14. Unless the employer is able to demonstrate that the Claimant's actions were contrary to law or its internal regulations, the mere fact that he was spotted assisting a colleague to respond to accusations against him cannot be an act of insubordination. As the record shows, the Respondent did not provide evidence to suggest that the Claimant's purported assistance to his co-employee to respond to issues that the Respondent had raised was outside what the law permits.



15. Importantly, the Respondent did not offer evidence to demonstrate that the Claimant was indeed involved in the alleged infraction. Daniel Oiro, the employee whom the Claimant was accused of assisting to prepare a response to the Respondent was not called to give evidence. The CCTV footage which allegedly captured this activity was not produced in evidence. Therefore, what the two were discussing, if at all, remains unknown.
16. The Respondent alleged that the said Daniel Oiro had confessed to its General Manager that the Claimant was assisting him to prepare his response. However, the said General Manager was not called to verify this assertion. Instead, the Respondent called one Zaverio Mwangi, its Human Resource Manager to testify on the matter. This witness did not indicate whether he was present when the Claimant was allegedly coaching the said Daniel Oiro to prepare his response. Thus, his evidence on the matter was valueless.
17. The foregoing leads me to the conclusion that the Respondent has failed to demonstrate that it had valid reasons to consider terminating the Claimant's services. It is so declared.
18. With respect to whether the Claimant was given a chance to be heard as is required under section 41 of the *Employment Act*, the answer is once again in the negative. The Respondent tries to rely on the meetings of 23<sup>rd</sup> February 2022 and 8<sup>th</sup> March 2022 to assert that the Claimant was offered the opportunity to respond to the accusations against him before the impugned decision was made.
19. However, it is apparent that the issue regarding the Claimant's dismissal from employment was not in the agenda for the meeting of 23<sup>rd</sup> February 2022. As a matter of fact, the question of the Claimant's dismissal from employment was not raised at that meeting.
20. With regard to the meeting of 8<sup>th</sup> March 2022, it is apparent that it was held long after the Claimant's contract had been terminated on 1<sup>st</sup> March 2022. Therefore, it cannot by any stretch of imagination be considered as a disciplinary meeting for purposes of this case.
21. During cross examination, the Respondent's witness confirmed that the Claimant was not subjected to a disciplinary meeting that is contemplated under section 41 of the *Employment Act* before his services were terminated. As such, it is apparent that the Respondent failed to afford the Claimant the right to be heard on the charges against him in contravention of the law. It is so declared.
22. It is also apparent that although the Respondent heavily relied on its CCTV footage to advance its case against the Claimant, the said recordings were not shared with the Claimant. As such, there was no way he (the Claimant) could have verified the accuracy of the Respondent's assertion that there were CCTV recordings that implicated him in some impropriety.
23. From the foregoing, it is undoubted that the Claimant's contract of service was terminated unfairly and therefore illegally. It is so declared.
24. The next question for determination is whether the Claimant is entitled to the reliefs that he seeks in the Statement of Claim. The Claimant has prayed for salary in lieu of notice to terminate his contract. He prays for three months' salary under this head.
25. That the Claimant was entitled to notice before his contract could be terminated is not in doubt. Section 35 of the *Employment Act* entitled him to such notice.
26. However, the clause on termination of contract in the contract between the parties provides for a notice period of one month. As such, the Claimant's contention that he was entitled to three months' notice is unfounded.



27. Under section 36 of the *Employment Act*, a party to a contract of service is entitled to pay the other an amount that is equivalent to salary for the notice period in lieu of issuing the actual notice to terminate. As such, the Respondent was obligated to pay the Claimant salary for one month in lieu of notice. Accordingly, I award the Claimant salary for one month in lieu of notice to terminate his contract under this head. This is equivalent to Ksh. 136,423.00.
28. The Claimant has also prayed for commuted leave for fifteen (15) days. The Respondent did not provide evidence to controvert this claim.
29. The employer is obligated by law to maintain employment records (see section 10 (6) and section 74 of the *Employment Act*). Thus and in terms of section 112 of the *Evidence Act*, he is deemed to have special knowledge of issues such as whether an employee has taken leave.
30. Thus, the burden of disproving the claim for accrued leave rested with the Respondent (*Jackson Muiruri Wathigo t/a Murtown Supermarket v Lilian Mutune* [2021] eKLR). As the record shows, it was not discharged. Accordingly, I enter judgment for the Claimant for fifteen (15) commuted leave days totaling Ksh. 68,211.50.
31. The Claimant has prayed for salary for the month of February 2022. The Respondent does not deny that this amount was yet to be paid at the time that the Claimant's contract was terminated.
32. The Respondent only contends that when the Claimant's services were terminated, a cheque for his salary for February 2022 was prepared in his favour. However, there is no evidence that the cheque was given to the Claimant or cashed by him.
33. Indeed, in his oral evidence in court, the Respondent's witness stated that the cheque was handed over to the Respondent's lawyers. However, he was not sure if it was given to the Claimant.
34. Having regard to the foregoing, it is evident that the Claimant was not paid salary for the month of February 2022. As such, I award him the sum of Ksh.136,423.00 to cover this part of the claim.
35. The Claimant has claimed for service pay under section 35 of the *Employment Act*. However, his pay slip shows that he was a contributor to the National Social Security Fund. As such and by virtue of section 35 (6) of the aforesaid Act, he is excluded from pursuing this prayer. It is thus declined.
36. I award the Claimant compensation for unfair termination of his contract which is equivalent to his gross salary for seven (7) months. In making this assessment, I have taken into account the fact that the parties had been in the employment relation for close to nine (9) years. I have also considered the fact that there is no evidence to suggest that the Claimant's conduct contributed to the Respondent's decision. As such, I award the Claimant the sum of Ksh. 136,423 x 7 = Ksh. 954,961.00.
37. I award the Claimant interest on the aforesaid sums at court rates from the date of this decision.
38. I award the Claimant costs of the case.
39. The award is subject to the applicable statutory deductions.
40. The Respondent is ordered to issue the Claimant with a Certificate of Service in terms of section 51 of the *Employment Act*.

#### Summary of the Award

- a. The Respondent's decision to terminate the Claimant's contract of service is declared wrongful and therefore unlawful.



- b. The Claimant is awarded pay in lieu of notice to terminate his contract that is equivalent to his gross salary for one (1) month, that is to say, Ksh. 136,423.00.
- c. The Claimant is awarded fifteen (15) days' leave pay of Ksh. 68,211.50.
- d. The Claimant is awarded salary for February 2022 in the sum of Ksh. 136,423.00.
- e. The prayer for service pay is declined.
- f. The Claimant is awarded compensation for unfair termination of his contract of service in the sum of Ksh. 954,961.00 being equivalent to his gross salary for seven (7) months.
- g. The Claimant is awarded interest on the amount decreed at court rates from the date of this decision.
- h. The Claimant is awarded costs of the case.
- i. The award is subject to the applicable statutory deductions.
- j. The Respondent is ordered to issue the Claimant with a Certificate of Service in terms of section 51 of the *Employment Act*.

**DATED, SIGNED AND DELIVERED ON THE 9<sup>TH</sup> DAY OF MAY, 2024**

**B. O. M. MANANI**

**JUDGE**

In the presence of:

..... for the Claimant

.....for the Respondent

**ORDER**

In light of the directions issued on 12<sup>th</sup> July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**B. O. M MANANI**

