



**Webukha v East Africa Packaging Industries Ltd (Cause  
128 of 2018) [2024] KEELRC 1037 (KLR) (8 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1037 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 128 OF 2018**

**JK GAKERI, J**

**MAY 8, 2024**

**BETWEEN**

**ABRAHAM WEBUKHA ..... CLAIMANT**

**AND**

**EAST AFRICA PACKAGING INDUSTRIES LTD ..... RESPONDENT**

**JUDGMENT**

1. The Claimant commenced this suit by a Statement of Claim filed on 7<sup>th</sup> February, 2018 alleging unfair dismissal, retention of leave days and defamation.
2. The Claimant avers that he joined the Respondent on 21<sup>st</sup> February, 2006 as a Welder Grade 7 and was subsequently promoted and served the Respondent well until 4<sup>th</sup> April, 2017 when he received a notice to show cause for alleged misconduct which he responded to on same day and was dismissed from employment on 10<sup>th</sup> April, 2017.
3. It is the Claimant's case that the letter of dismissal was defamatory as the allegations therein were unsubstantiated and was copied to the accounts department and he was condemned unheard.
4. The Claimant prays for;
  - i. Accumulated leave days Kshs.84,468.75
  - ii. 12 months compensation Kshs.579,216.00
  - iii. General damages for defamation Kshs.2,000,000.00
  - iv. Reliance loss damages Kshs.462,255.00  
In the alternative Kshs.9,846,672.00 for prospective future earnings;
  - v. Certificate of service.



- vi. Costs of this suit.
- vii. Any other relief the court may deem just to award.

### **Response**

5. By a Response to Claim filed on 21<sup>st</sup> June, 2018, the Respondent avers that on 30<sup>th</sup> March, 2017, the Claimant went to the office of the Production Clerk, Mr. Munyao Mboya to enquire about lost hours, swearing that he would cut someone with a panga and he was given a print out of the clock-in for March 2017 and informed that he had lost hours on 3 days for various reasons which infuriated him. That he held Mr. Mboya's neck and it took the intervention of one Samuel Kung'u who calmed him down and the matter was reported to the Operations Director.
6. The Respondent further avers that the Engineering Manager issued a notice to show cause on 4<sup>th</sup> April, 2017 and the Claimant responded on the same day and a hearing was slated for 6<sup>th</sup> April, 2017 at 3.00 pm and the Claimant was notified.
7. That the Claimant was accompanied by the Worker's Representative, Mr. Peter Gaita Kung'u and the committee's decision was communicated to the Claimant vide letter dated 10<sup>th</sup> April, 2017 and a review of the decision affirmed the same by letter dated 11<sup>th</sup> May, 2017.
8. The Respondent denies the Claimant's allegations of defamation and unfair termination and avers that it paid the Claimant all his dues and prays for dismissal of the Claimant's suit with costs.

### **Claimant's evidence**

9. On cross-examination, the Claimant confirmed that he was paid for the hours worked as per the clocking system and knew Mr. Munyao Mboya as the one in charge of checking the hours clocked in.
10. The witness admitted that he went to Mr. Munyao's office on 30<sup>th</sup> March, 2017 with a payslip as it did not reflect the hours he had worked as there was a discrepancy. That he was not given a printout but saw it.
11. That Mr. Munyao refused to show him the hours he had worked for.
12. The witness further admitted that one Mr. Kung'u came to Munyao's office and told him to report the matter to the supervisor but did not do so.
13. The Claimant denied that there was a disagreement between himself and Mr. Munyao.
14. He admitted that he received all the letters sent to him and filed them.
15. It was his testimony that he was neither invited for a meeting nor heard and could not recall whether Mr. Kung'u, attended the disciplinary hearing having looked for him in 2023 not 2018.
16. That the other departments of the Respondent had no complaint against him and clocking-in was electronic.
17. The witness testified that he had a challenge with the print out but the machine was alright and computed overtime.
18. On re-examination, the Claimant testified that he did not assault Mr. Munyao and had gone to inquire about working hours and talked to Mr. Munyao without raising his voice and Mr. Samuel Kung'u was there.



19. That after the incident, he reported to the supervisor and was not invited for any investigation or a hearing but was called by the supervisor 3/4 days before the hearing and was not informed of his rights and did not sign the minutes of the meeting.
20. CWII, Mr. Samuel Burugu Kung'u confirmed that he found the Claimant in Mr. Munyao's Office but they did not enter at the same time.
21. That he heard an argument going on in the office, a disagreement.
22. It was his testimony that he attended the hearing and signed the minutes.
23. RWI testified that he merely passed by Mr. Munyao's office.
24. On re-examination, the witness admitted that Mr. Munyao and the Claimant had a disagreement.
25. That he was called to the meeting by his supervisor, Mr. Moses Matheka.

### **Respondent's evidence**

26. RWI, Mr. Paul Mboya confirmed that he was the Payroll Clerk in 2017 and was in charge of the hours worked by staff.
27. The witness testified that on 30<sup>th</sup> March, 2017, the Claimant came to his office at around 4.30 pm to enquire about his hours and the witness gave him a print out of his hours. That the Claimant was agitated and grabbed his neck and another employee intervened and the Claimant left the office having indicated that he would cut someone with a panga.
28. The witness admitted that the Claimant found him in the office alone and Mr. Samuel Kung'u came in later.
29. RWI testified that the Claimant presented his case at the hearing and his written complaint was undated as it was attached to an email.
30. He confirmed that Mr. Kung'u was present during the incident standing at the door but came in when the Claimant became physical and he did not report the incident to the police but reported to the employer.
31. The witness confirmed that breaks were programmed and the canteen was within the compound.
32. That overtime was computed after 42 hours as per the Weekly Time Card.
33. Finally, the witness confirmed that the hearing took place at the Director's office and the Claimant was present.

### **Claimant's submissions**

34. Counsel submitted that the Claimant was condemned unheard for want of an invitation letter and the alleged assault was not reported to the authorities and the complaint by RWI was not prima facie evidence of a crime.
35. Counsel urged that the Respondent had failed to discharge its burden of proof that it had a lawful justification to dismiss the Claimant.
36. That the dismissal was verbal yet the Claimant made reference to the letter dated 10<sup>th</sup> April, 2017 in his plea for amicable settlement dated 27<sup>th</sup> April, 2017.



37. Counsel, further submitted that the Respondent did not avail evidence of a written contract of service or other employment records including Muster Roll, Payslip, leave application form among others.
38. Reliance was made on the sentiments of the Court in *Abigael Jepkosgei Yator & another V China Hanan International Co. Ltd (2018) eKLR* on employment records.
39. Concerning termination of employment, decisions in *Daniel Mburu Muriu V Hygrotech East Africa Ltd (2021) eKLR*, *David Gichana Omuya V Mombasa Maize Millers Ltd (2014) eKLR* and *Walter Ogal Anuro V Techers Service Commission (2013) eKLR* were cited to urge that termination of employment ought to be substantively and procedurally fair and urge that the Claimant's dismissal was unfair.

### **Respondent's submissions**

40. On the alleged incident, counsel submits that the Claimant's evidence on record confirms its occurrence from his contradictory evidence denying having assaulted the Claimant and stating that he had gone to the office to confirm his leave days yet Mr. Munyao was not in the human resource department. Counsel urges that the Respondent's evidence, on the other hand was consistent.
41. Counsel submits that the Claimant had a history of reporting to work late and did not testify that there was any bad blood between him and the Payroll Clerk.
42. On procedural fairness, counsel urged that the provisions of Section 41 of the [Employment Act, 2007](#) were complied with as the Claimant was accompanied to the hearing.
43. On the reliefs sought, counsel submits that the prayer for accumulated leave days lacked supportive evidence as were the alternative claims of prospective future earnings and for damages for alleged defamation.
44. Counsel urged that the loss suffered by a guarantor or surety is unrelated to the Claimant's employment and thus irrecoverable.
45. According to counsel for the Respondent, the Claimant had not alleged that his constitutional rights were violated and is thus not entitled to damages.

### **Determination**

46. It is common ground that the Claimant was employed by the Respondent effective 1<sup>st</sup> March, 2006 at Kshs.15,967.00 per month, which was raised to Kshs.29,575/= per month on January 1<sup>st</sup> 2010 and he was promoted to the position of Fitter Grade VIII effective 1<sup>st</sup> January, 2017 at a basic salary of Kshs.25,255/=.
47. The salary was further enhanced in October 2013, October 2015 and March 2016 raising to Kshs.45,970/= excluding allowances and was arguably a dutiful employee but had had at least three warning letters due to reporting to the workplace late.
48. Equally, the Weekly Time Card for 1<sup>st</sup> January, 2017 to 6<sup>th</sup> February, 2017 reveal that out of the 29 days the Claimant reported to work, he was late on most days except 5 and on 2 days reported after 9.20 am.
49. The Claimant admitted that he received a notice to show cause, responded, attended a hearing but did not sign the minutes and was dismissed by letter dated 10<sup>th</sup> April, 2017, appealed but the dismissal was affirmed.



50. The Claimant faults the dismissal on the ground that no investigation was conducted on the alleged incident in Munyao's office and was condemned unheard and the Respondent did not comply with its Human Resource Manual.
51. The issues for determination are;
- i. Whether termination of the Claimant's employment by the Respondent was unfair or unlawful.
  - ii. Whether the Claimant is entitled to the reliefs sought.
52. Concerning the summary dismissal, parties have adopted contrasting positions with the Respondent maintaining that it was procedural and fair as the Claimant attended the hearing, was accompanied by a Workers Representative, responded to the notice to show cause and appealed the decision. The Claimant maintains that it is unfair.
53. As correctly submitted by the Claimant's counsel, for a termination of employment to pass muster, the law requires that it must have been substantively justifiable and procedurally fair as ordained by the provisions of the Employment Act, 2007 and as held by Ndolo J. in Walter Ogal Anuro V Teachers Service Commission (Supra) that;
- “ . . . there must be both substantive justification and procedural fairness for a termination of employment to pass the fairness test.”
54. While the provisions of Sections 43, 44, 45(2)(a) and (b) and Section 47(5) of the Employment Act, 2007 address the substantive justification for termination of employment, the provisions of Sections 45(2)(c) and 41 of the Act deal with the precepts of procedural fairness.

#### **Reason for termination**

55. The notice to show cause to the Claimant dated 4<sup>th</sup> April, 2017 states that Claimant threatened the Payroll Clerk and physically held his neck and collar of his shirt until another employee came to his rescue.
56. The letter demanded a response within 48 hours and the Claimant responded on the same day stating that he did not engage Mr. Munyao as alleged and had gone to his office to confirm leave days from him.
57. According to the Claimant, no altercation took place and in any case he was enquiring about his leave days yet Mr. Mboya was the Payroll Clerk, not in human resource.
58. On cross-examination, the Claimant admitted that he went to the payroll Clerk's office on 30<sup>th</sup> March, 2017 because his payslip did not reflect the hours worked. He claimed that there was a discrepancy which Mr. Munyao did not explain and denied that there was any disagreement yet there was a discrepancy in the hours, a narrative he repeated on re-examination. Similarly, his evidence makes no reference as to when he left the office of the Payroll Clerk bearing in mind that he was not given the print out.
59. Significantly, CWII, confirmed that he was passing near Mr. Munyao's office and heard an argument, a disagreement but what evasive as to what he did stating that he merely passed by yet the Claimant confirmed that CWII, Mr. Samuel Kung'u found him in Mr. Munyao's office and advised him to report the matter to the supervisor.
60. Similarly, RWII testified that at all material times, CWII was at the door and only came in when the Claimant assaulted Mr. Munyao.



61. Relatedly, Mr. Munyao’s undated written complaint to the Technical Director captures what transpired on 30<sup>th</sup> March, 2017 confirming that the Claimant had gone there to enquire about working hours which he did not agree with and the clerk’s explanation does not appear to have assuaged his rage and Mr. Samuel Kung’u had to separate them.
62. From the evidence of the Claimant, Mr. Samuel Kung’u and the Payroll Clerk, Mr. Munyao, it is decipherable that there was a disagreement in Mr. Munyao’s office and but for Mr. Samuel Kung’u, the Claimant would have battered Mr. Munyao.
63. The foregoing is confirmed by the minutes of the disciplinary meeting held on 6<sup>th</sup> April, 2017 and which the Claimant attended and denied all the allegations made against him including having raised an issue on working hours which contradicted his testimony in court.
64. The salient issue is whether the Respondent has demonstrated that the Claimant misconducted himself at the workplace and in particular in Mr. Munyao’s office on 30<sup>th</sup> March, 2017.
65. Section 43(2) of the *Employment Act*, 2007 provides;
- “The reason or reasons for termination of a contract are the matters that the employer at the time of the termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”
66. Judicial authority is consistent that Section 43(2) of the *Employment Act*, 2007 requires the employer to demonstrate that it genuinely believe that there were reasonable grounds for termination of employment.
67. In *Kenya Revenue Authority V Rewel Waithaka Gitahi & 2 others* (2019) eKLR, the Court of Appeal expressed itself as follows;
- “The standard of proof is on a balance of probability not beyond reasonable doubt, and all the employer is required to prove are the reasons that it “genuinely believed to exist”, causing it to terminate the employee’s services. That is a partly subjective test.”
68. (See also *Bamburi Cement Ltd V William Kilonzi* (2016) eKLR).
69. The foregoing sentiments are consistent with the band or range of reasonable responses test in *Halsbury’s Law of England*, 4<sup>th</sup> Edition, Vol. 16 (1B) Paragraph 642 as follows;
- “... In adjudicating on the reasonableness of employer’s conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee’s conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if the dismissal falls outside the band, it is unfair.
70. In the instant case, the court is persuaded that Respondent has shown that it had reasonable ground for the belief that termination of the Claimant’s employment was substantively justifiable.



71. Contrary to counsel's submission that the alleged assault did not exist as it was not reported to the police that does not diminish its seriousness at the workplace.
72. Typically, the employee affected determines what action to take but must report to the employer. In this case, Mr. Munyao reported to the employer as opposed to the police.
73. For the foregoing reasons, it is the finding of the court that the Respondent has proved on a balance of probabilities that it had a valid and fair reason to terminate the Claimant's employment.

### **Procedure**

74. As adverted to elsewhere in this judgment, it is common ground that the Claimant was issued with a notice to show cause dated 4<sup>th</sup> April, 2017 and responded on the same day. He however refused to acknowledge receipt of the letter.
75. Similarly, documents availed by Respondent reveal that a hearing took place on 6<sup>th</sup> April, 2017 from 3 pm to 3.45 pm and the Claimant attended.
76. The summary dismissal letter was issued on 10<sup>th</sup> April, 2017 and the Claimant appealed vide letter dated 27<sup>th</sup> April, 2017.
77. The Claimant faulted the summary dismissal on the following grounds;
  - i. That the dismissal was actuated by malice and bad faith seen against the background of having served the Respondent faithfully and diligently for 11 years and 2 months.
  - ii. That he did not assault Mr. Munyao Mboya.
  - iii. That the payment of Kshs.17,250/= by cheque without explanation was oppressive, unjust and unfair.
  - iv. That the procedure employed by the Respondent was unfair and was not accorded the opportunity to appeal in accordance with the Staff Terms and Conditions of Service Handbook 2014.
78. The appeal demanded an immediate and unconditional rescission of the dismissal as well as written confirmation to avail the Claimant an opportunity to appeal and threatened court action if the demands were not honoured within 10 days.
79. By letter dated 11<sup>th</sup> May, 2017, the Respondent informed the Claimant that decision it had arrived at was final.
80. As correctly submitted by counsels for the parties, the provisions of Section 41 of the Employment Act, 2007 prescribe the procedural tenets in termination of employment.
81. In Pius Machafu Isindu V Lavington Security Guards Ltd (2017) eKLR, the Court of Appeal held that the elaborate procedural prescribed by Section 41 of the Employment Act, 2007 was mandatory for a termination of employment is to pass the procedural fairness test.
82. In Postal Corporation of Kenya V Andrew K. Tanui (2019) eKLR, the Court of Appeal itemised the requirements of Section 41 of the Employment Act, 2007 as follows;

“Four elements must be discernible for the procedure to pass muster:-



- i. an explanation of the grounds of termination in a language understood by the employee;
- ii. the reason for which the employer is considering termination;
- iii. entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination are made;
- iv. hearing and considering any representations made by the employee and the person chosen by the employee.”

83. The court is guided accordingly.

84. The Claimant faults the procedure employed by the Respondent on the ground that he was not invited for a hearing or notified of his rights. He however admitted that he was notified of the hearing by the supervisor and attended the hearing.

85. The Respondent on the other hand argues that the Claimant attended the meeting with a workers representative, one Peter Gaita Wachira

86. It is unclear to the court who Mr. Peter Gaita Wachira was as the Claimant did not allege or tender any evidence of union membership.

87. Similarly, the Respondent adduced no evidence as to who invited him to the meeting.

88. In the court’s view, the procedure adopted by the Respondent was faulty in the following respects.

- i. The Respondent did not formally invite the Claimant for the hearing. The notice is an essential element of procedural fairness as it sets out the allegations the invitee is expected to defend her/himself against as well as the date, place and time of the meeting.
- ii. Second, and more significantly, the notice sets out the entitlements of the invitee including right to call witness or avail documentary evidence, right to cross-examine witnesses and the right to be accompanied by an employee of his choice or the shop floor union representative. The law does not envision an oral notice.

Third, the Claimant received and responded to the notice to show cause on 4<sup>th</sup> April, 2017 and the hearing took place on 6<sup>th</sup> April, 2017 and was thus not accorded time to prepare for the hearing.

89. For the foregoing reasons, the court is satisfied that the employer did not act in accordance with justice and equity in terminating the Claimant’s employment on 10<sup>th</sup> April, 2017.

90. It is the finding of the court that the Claimant has demonstrated termination of his employment by the Respondent was procedurally flawed and thus unfair.

Whether the Claimant is entitled to the reliefs sought

**a. Leave days**

91. Neither the Claimant’s written statement nor the oral evidence on record make reference to any outstanding leave days or when they accrued how many they are.

92. In the absence of essential particulars, the prayer is unproven and is declined.



### **b. General damages for defamation**

93. The court is in agreement with the Respondent's submission that this claim lacks particulars of the alleged defamation and is unmerited.
94. The Claimant made no attempt to particularize the alleged defamatory words or demonstrate that the alleged libellous words or phrases fulfilled the principles of defamation.
95. More significantly, neither the written witness statement nor the oral evidence adduced in court advert to the alleged defamation.
96. The claim is unproven and is declined.

### **c. Reliance loss damages**

97. Puzzlingly, the Claimant did not submit on this relief if only to explain its context and entitlement.
98. It is unclear to the court what the claim entails or the loss being prayed for.
99. The Respondent submitted that the loss suffered by a guarantor of a loan could not be part of the Claimant's employment.
100. It is trite that a contract of guarantee or suretyship is a tripartite agreement and unless procured by misrepresentation, duress, undue influence, mistake or other vitiating element, the guarantor's secondary liability is triggered by the failure of the principal debtor to make good his/her obligations under the contract.
101. The loss, if any, suffered by the guarantor is consensual and thus irrecoverable from the employer in an employment relationship.
102. The claim lacks a legal justification and is dismissed.

### **d. 12 months compensation**

103. Having found that termination of the Claimant's employment by the Respondent was unfair, the Claimant is entitled to compensation under the provisions of Section 49(1)(c) of the [Employment Act, 2007](#).
104. In determining the quantum of compensation, the court has taken the following into consideration;
  - i. The Claimant was an employee of the Respondent for a period of 11 years and 1 month which is long.
  - ii. Although the Claimant was promoted and received salary increments in 2010, 2011, 2013, 2015 and 2016 and thanked for loyalty and hard work in 2015, he had at least 3 warning letters on reporting to work late, insubordination and absenteeism between 2007 and 2016.
  - iii. By his letter dated 27<sup>th</sup> April, 2017, the Claimant expressed his wish to remain in the employment of the Respondent.
  - iv. The Claimant substantially contributed to the termination of employment by behaving dishonourably at the workplace. In the court's view, assaulting a colleague at the work place is exceedingly egregious and ought not be tolerated by an employer.
105. In the circumstances, the court is satisfied that the equivalent of two (2) months gross salary in fair.



**e. Sum of Kshs.9,846,672 for prospective future earning**

106. This claim lacks particulars including what it relates to and how the figure was arrived and it is accordingly dismissed.

**f. Certificate of service**

107. The Claimant is entitled to a certificate of service by dint of Section 51 of the Employment Act, 2007.

108. In conclusion, judgment is entered in favour of the Claimant against the Respondent as follows;

- a. Equivalent of two (2) months gross salary.
- b. Certificate of service to issue within 30 days.
- c. 50% of the costs of the suit.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 8<sup>TH</sup> DAY OF MAY 2024**

**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.

