



Musau v Pembe Flours Mills Limited (Employment and Labour Relations Cause E596 of 2022) [2024] KEELRC 1974 (KLR) (26 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 1974 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E596 OF 2022**

AN MWAURE, J

JULY 26, 2024

BETWEEN

DICKSON KIOKO MUSAU CLAIMANT

AND

PEMBE FLOURS MILLS LIMITED RESPONDENT

JUDGMENT

Introduction

1. The Claimant filed a Statement of Claim dated 27th July 2022.

Claimant's Case

2. The Claimant avers that he was employed by the Respondent as a security guard and diligently discharged his duties from 01/02/2013 until his termination on 01/10/2019 earning Kshs. 21,100 monthly.
3. The Claimant avers that he got an accident on 02/04/2018 in the course of his employment and his left hand was injured. He was treated at Avenue Hospital, Parklands although he has not fully recovered to date due to the adverse effects that the accident had on his left hand.
4. The Claimant avers that in 2019, while undertaking his duties at Gate B, a few items were stolen from the company and passed through Gate A assigned to another guard.
5. The Claimant avers that he was summoned by the Respondent one week later to explain how the items were stolen and dismissed him from employment without adhering to the laid down procedure stipulated in the *Employment Act*.
6. It is the Claimant's case that the Respondent never held any disciplinary meeting and did not give him a chance for a fair hearing to respond to the accusations that were levelled against him.



7. The Claimant avers that in the course of his employment, he was never given a warning letter with reference to his duties which points out to his competence and diligence.
8. The Claimant avers that the Respondent had CCTV cameras that could show nothing passed through his assigned gate and can only point to the fact that he got an accident where the Respondent was not comfortable with him around hence looked for every possible excuse to lay him off which is unlawful and against labour practices.
9. It is the Claimant's case that he has never been compensated for the injuries sustained to date and his efforts to be compensated has been futile.
10. The Claimant further avers that the Respondent did not ensure that he completes his medication and were in a rush to dismiss him from employment to avoid further medical costs and never provided the assessment that was done by the Director of Occupational and Safety Health (DOSHS) depicting the alleged sum of Kshs. 140,000.
11. The Claimant avers that he still needs proper medical care to ensure that his left hand does not get worse and dismissing him unfairly from employment has made his condition even worse because he is unable to get the required medical attention.

Respondent's Case

12. In opposition to the claim, the Respondent filed a Memorandum of Defence dated 19th December 2022.
13. The Respondent avers that on 09/08/2019, the Claimant together with another employee assigned night duties at mill six when a valuable copper wire was stolen from the premises. It turned out that the Claimant left his duty post and went to Gate B and witnessed the commission of the offence but failed to report the matter to management.
14. The Respondent avers that it issued the Claimant with a show cause notice dated 23/08/2019 which clearly indicated he was suspected to have been involved in the theft of company property and that during that time he abandoned his workstation where he was responsible for protecting company property.
15. It is the Respondent's case that vide a letter dated 24/08/2019, the Claimant responded that he left his assigned gate B and headed to gate A to look for a crane and folk lift. He stated that he noticed there was no Pembe Security at main gate A and decided to stay there and wait for the security guard to return; and so he completely abandoned his assigned station without regard to the implications.
16. The Respondent avers that the Claimant stated he returned to his assigned station and found people cutting the electricity cable within the premises and did not raise alarm or report to management.
17. It is the Respondent's case that the Claimant was provided with a walkie talkie and could have easily alerted the other security officers; and he further had the option of calling using mobile phone or raising his voice and calling out to others.
18. The Respondent avers that it was the Claimant's responsibility to keep guard at gate B and ensure the Respondent's property is protected. The copper wire was stolen from the company near gate B as confirmed by the Claimant.
19. It's the Respondent's case that the Claimant was terminated following his own admission that he witnessed and failed to report a theft incidence that occurred when he left his workstation unmanned, this is a valid reason for termination as per Section 44(4) (c) and (g) of the [Employment Act](#).



20. The Respondent submitted that it made relevant statutory deductions and remitted the same to NSSF. Further, it included gratuity pay in the Claimant's final dues although it is not a requirement in law as he was a member of NSSF as per Section 35(6) of the *Employment Act*.
21. The Respondent avers that it prepared a cheque towards the settlement of the Claimant's final dues but he refused to accept despite the same being more than fairly calculated. The Claimant was issued with a certificate of service.

Evidence in Court

22. The Claimant (CW1) adopted his witness statement dated 27/07/2022 his evidence in chief and exhibits.
23. During cross examination, CW1 testified that the Respondent explained to him what he was accused of and he is asking the court to grant him gratuity.
24. CW1 testified that he was not given time to explain his case but was asked to put what had taken place in writing.
25. CW1 testified that he was issued a termination letter and was informed the reasons which did not concern him. He admits he went to another gate but returned to his gate.
26. CW1 testified he received his certificate of service.
27. CW1 testified that what happened on 09/08/2019 was not his fault and the letter dated 24/08/2019 does not show who was the writer.
28. CW1 testified that he left gate B as he had been called by Pembe Security to check something at gate A and he went back. This was allowed but he was not allowed to explain himself.

Respondent's evidence

29. The Respondent's witness (RW1) Hamisi Bwika avers that he is a Human Resource Manager at the Respondent and produced his witness statement dated 30/12/2022 and exhibits number 1-9 as his evidence in chief.
30. RW1 testified that upon receiving the report of 09/08/2019, it did its investigations and found that the Claimant moved from his work station to another. He would be sent to gate A but not to sit there permanently.
31. During cross examination, RW1 testified that on the said day, there were workers from KPLC on the premises.
32. RW1 testified that the letter dated 28/04/2019 is signed by Dickson Kioko and he is described as a witness.
33. RW1 testified that the Claimant was sent Kshs 149,934 as his terminal dues. The Claimant sustained injuries in the course of his employment but there is no relationship between the termination and the injury.
34. RW1 testified that the Respondent wrote the Claimant a cheque of Kshs 149,934 which he refused to collect; Kshs 144,000 was for DOSH. Both cheques have never been collected.
35. RW1 testified during re-examination, the assessment of Kshs 144,000 was from DOSH but the Claimant never collected his dues. The Respondent complied with doctor's orders.



36. RW1 testified that the Claimant's termination was not because of injury but because he was implicated in the theft case.
37. RW1 testified that the terminal dues were tabulated as notice pay, gratuity, leave pay (pro rata) and this was due to him. He was paid notice pay and gratuity even though he was not entitled to the same.

Claimant's Submissions

38. The Claimant submitted that he was neither accorded a hearing to defend himself nor given an opportunity to have another employee or a shop floor union representative of his choice as required by the law during such a hearing.
39. It is the Claimant's submission that the NTSC dated 23/08/2019 was addressed to himself and Stanley Maina. Additionally, the letter from the security manager dated 22/08/2019 confirms that the date of the theft of the cable is not certain despite the review of the CCTV footage of the suspected dates. The theft was blamed on Stanley Maina, as opposed to the Claimant.
40. Further, RW1 stated that Kenya Power and Lighting Company (KPLC) officers were working at the premises and they would work as late as 10:40 p.m as presented by the Respondent's security manager's letter. Consequently, cutting cables was part and parcel of the KPLC officers' work. In this sense, the Claimant could not report the KPLC officers who were working at the premises of the Respondent as that was their work and they have been working there for some time.
41. The Claimant submitted that due to the fact that he had an injury which the Respondent thought could affect his duties is the major reason why his employment was terminated which is illegal and unlawful.
42. It is the Claimant's submission that no reason has been proven to justify his termination and consequently the termination has not passed the fairness test because both the substantive justification and procedural fairness tests have not been met.
43. The Claimant submitted that in the event that the contract of employment provided for gratuity pay or if the policies and practices of the organization provide for gratuity pay or in the event that the category of employment falls in the statutory provisions, then the Claimant herein is entitled to gratuity pay having worked for more than 5 years. This would be calculated at the rate of 15 days' pay for every year of service. (29,955*18/30*6 to get Kshs. 107,838). Furthermore, the Respondent has expressly agreed to providing the gratuity pay to the Claimant and in the proposed terminal dues included gratuity pay of Kshs. 111,736. In this regard, it is not in contention that the Claimant is entitled to gratuity pay.
44. It is the Claimant's submission that the claim to enforce the first DOSH award is not time barred as the claim is within the 3 year time provided under Section 90 of the *Employment Act* as the DOSH award was made in September 2019 while the suit was filed in July 2022. In this sense, the Claimant is entitled to the DOSH awarded as assessed from the Respondent.
45. The Claimant submitted that Section 49 of the *Employment Act* provides for compensation under unlawful employment; as he was unlawfully/illegally terminated from employment an award of the maximum compensation of 12 months' salary would be appropriate, further, he is entitled to salary lieu of notice as assessed in his terminal dues by the Respondent, gratuity pay as well as the award assessed by DOSH.



Respondent's Submissions

46. The Respondent submitted that it has proved that it had valid reasons to terminate the Claimant as contemplated under Section 43 and 45 of the Employment Act. The Claimant's services were terminated following the incident of 09/08/2019 and his failure to report the theft. The particulars of the incident were laid down in the NTSC and termination letter.
47. It is the Respondent's submission that it identified the Claimant's conduct which it genuinely believed to exist leading to the disciplinary process against him and as a result of his failure to disapprove the allegations led to his termination for valid and fair reasons in terms of Section 43 of the Employment Act.
48. The Respondent submitted that the Claimant alluded to the fact that it was normal for him to abandon his work station without proper authorization. As a security guard, the Claimant was entrusted the security of its premises and he was expected to carry out his role diligently and ensure the safety of the Respondent's personnel and premises.
49. The Respondent submitted that the Claimant was given an opportunity to fully defend himself. The Claimant confirmed in his testimony that he received his NTSC and being accorded a chance to respond vide his letter dated 24/08/2019. The Claimant's response was not sufficient hence the decision to terminate.
50. It is the Respondent's submission that oral evidence by both CW1 and RW1 proves that the Claimant was issued a NTSC that invited to make a response giving his explanation of what transpired on 09/08/2019. Hence the Respondent accorded him a fair chance to be heard.
51. The Respondent submitted that it subjected itself to DOSH procedure and the assessment of the injuries sustained by the Claimant was done. RW1 demonstrated that it prepared a cheque of Kshs 144,135 based on the DOSH assessment. However, the Claimant failed to collect the said cheque.
52. The Respondent submitted that the prayer for salary in lieu of notice is untenable as no notice was due the Claimant having been summarily dismissed on account of gross misconduct under Section 44(4) of the Employment Act.
53. It is the Respondent's submission the termination was substantially and procedurally fair and the prayer for compensation and damages should be denied.

Analysis and Determination

54. Having considered the pleadings, affidavits and submissions, the issues for determination are:

- a. Whether the termination of the Claimant's employment was unfair/ unlawful
- b. Whether the Claimant is entitled to the reliefs sought.

Whether the termination of the Claimant's employment was unfair/ unlawful.

55. In Josephat Otieno Kongo v Riley Services Limited [2022] eKLR the court held:-

“As to whether the Claimant's termination was unlawful and/or unfair, the first point of call are the provisions of the Employment Act, 2007 on termination of contracts of employment, 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.

This provision is the substratum of fair termination of employment contracts. As explained by this Court and the Court of Appeal, this provision sets out the prerequisites of a fair termination of a contract of employment irrespective of the method employed by the employer. This substratum is reinforced by other provisions, specifically Sections 41, 43 and 47(5) of the *Employment Act*.

In *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR the Court of Appeal expressed itself 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. The Respondent avers that the termination of the Claimant’s employment was grounded on the fact that he abandoned his workstation leading to the loss of copper wire whereas he was responsible for protecting company property.
57. The Claimant in response to the NTSC dated 24/08/2019, admitted that he left his assigned gate B and headed to gate A to look for a crane and folk lift; once he returned to his assigned station and he found people cutting the electricity cable within the premises and did not raise alarm or report to management.
58. In view of the foregoing, the Respondent had a valid reason to terminate the Claimant’s employment within the meaning of Section 43 of the *Employment Act*.
59. Having established substantive justification, the second phase is to establish procedural fairness provided under Section 41 of the *Employment Act* as follows: -

- “(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
- (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations



which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.”

60. From the Respondent’s own submission, the Claimant was only issued a NTSC letter and given an opportunity to respond to the same which led to the decision to terminate his employment.

61. In *John Jaoko Othino v Intrahealth International* [2022] eKLR the court held: -

“It is now trite law that the procedure provided for under section 41 of the *Act* is mandatory, it must be followed by an employer who intends to terminate an employee’s employment or summarily dismiss an employee. Procedural unfairness shall occur if there is some flaw in the process leading to the decision. Put in another way, if there is non-adherence to the procedure the termination or dismissal shall be deemed unfair.

As held by the Court of Appeal in the case of *Postal Corporation of Kenya v K. Tanui* [2019] eKLR four elements must be discernable for the procedure to pass muster; an explanation of the grounds of termination in a language understood by the employee; the reason for which the employer is considering termination; entitlement of an employee to the presence of another employee of his choice when the explanation of the grounds of termination is made; hearing and considering any representations made by the employee and the person chosen by the employee. In my view this element can be collapsed into three broad components, the information, Reliefs, hearing and consideration, components.”

62. In view of the foregoing, the termination of Claimant’s employment was in violation of section 41 of the *Act* as the Claimant was neither invited to attend the disciplinary hearing, accorded an opportunity to exercise his statutory right to accompaniment nor was his representations considered before making the decision to terminate his employment. Even though, the respondent did give a reason for termination of the claimant’s employment he did not comply with procedural fairness. The respondent therefore violated statutory obligations on termination of the claimant.

63. Accordingly, the court holds the claimant’s termination was unfair and unlawful and enters judgment in his favour.

Whether the Claimant is entitled to the reliefs sought.

64. The Respondent in its witness testimony and submission reiterated that the Claimant’s terminal dues and DOSH compensation are ready for payment and the Claimant’s only task is to receive the cheque of the same at their offices. The court orders his dues for injury be paid to him within seven (7) days hereof.

65. In addition to DOSH payment, the Claimant is entitled to the following reliefs:

1. One month salary in lieu of notice kshs 21,000/-
2. Gratuity as admitted by the respondent kshs 111,736/-
3. 5 months’ salary equivalent for compensation for general damages kshs 105,000/-
4. The total award is kshs 237,736/- as well as DOSH payment and interest will accrue on the above from date of judgment till full payment.
5. Costs will be paid by the respondent.
6. Claimant admits he has received the certificate of service.



Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 26TH DAY OF JULY, 2024.

ANNA NGIBUINI MWAURE

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 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

