



**Nzangi v Mars Wrigley Confectionery Kenya Limited (Cause
1 of 2024) [2024] KEELRC 1923 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1923 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS
CAUSE 1 OF 2024
B ONGAYA, J
JULY 26, 2024**

**BETWEEN
SAMUEL ALEXANDER MUSYOKI NZANGI CLAIMANT
AND
MARS WRIGLEY CONFECTIONERY KENYA LIMITED RESPONDENT**

JUDGMENT

1. The claimant filed the Memorandum of Claim dated 14.09.2024 through M.M. Uvyu & Co. Advocates. The Claim was initially filed in the lower Court at Mavoko being ELRC Cause No. E051 of 2022. Being that the claimant was earning a salary of more than Kshs. 80,000/=, the respondent filed a preliminary objection dated 07.08.23 that caused the matter to be transferred to this court. The claimant prayed for judgment against the respondent for:
 - a. Damages for unlawful termination of employment as per paragraph 12 of the memorandum of claim (being 12 months' salaries Kshs.2,593,944.00 for unfair termination).
 - b. General damages for unlawful dismissal, unfair termination, mental torture and anguish.
 - c. That the respondent issues the claimant with a certificate of service as per provisions of section 51 of the *Employment Act*, 2007.
 - d. Reinstatement to employment in the same capacity
 - e. Costs and interest.
2. The claimant alongside his claim filed his statement and his case was as follows;
 - a. That he was employed by the respondent as a mechanical specialist on 23.08.2016 earning a gross salary of Kshs.216,062.40/=.



- b. That on 04.05.2022 there was a suspected sugar blockage in syrup line pant leg hopper and as a result while inspecting the cause of the problem, he slipped and two of his fingers were cut by the machine.
 - c. That on 08.07.2022 the respondent wrote to him a show cause letter as to why disciplinary action should not be taken against him with allegations that he did not apply personal lock-out tag-out on the sources of energy during the troubleshooting task hence a violation of the site LOTO procedure.
 - d. That he responded to the allegations to which he denied.
 - e. That on or about 19.08.2022 the respondent terminated his services without valid reasons.
 - f. That he was being discriminated since other two employees that he was with during the incident received notices to show cause and were not terminated after responding to them and because the respondent found the claimant no longer useful owing to the injuries he sustained.
 - g. That his termination was unfair as envisaged in sections 45 (1) and (2) of the [Employment Act, 2007](#).
 - h. That the claimant does pay him twelve months' salary based on gross salary being Kshs.2,593,944.00.
 - i. That he was unfairly terminated being that he was not accorded a fair hearing and that he was not given adequate information as to the reasons of his termination.
 - j. That his particulars of injuries were that he lost the distal phalanges of the middle and ring fingers of his left hand hence losing function of the two fingers distally.
3. The respondent filed its memorandum of response dated 30.09.2022 through Obura Mbeche & Co. Advocates. They also filed the witness statement of Andrew Ngure (RW), the Site Technical Manager within the engineering department dated 08.11.2022 . The respondent pleaded as follows:
- a. That on 04.05.2022 the claimant supported himself on the airlock vent opening as the airlock blades were running while working, while there was a sugar blockage, resulting in injury to the 2nd and 3rd fingers of his left hand and solely attributed it to the claimant's negligence in failing to adhere to the respondent's LOTO safety and exception permit guidelines. They attached the guidelines to their response and particularised his particulars of negligence.
 - b. That violation of the guidelines was endangering his life and that of other employees and warranted disciplinary action.
 - c. That the termination of the claimant was justifiable and that he was aware of the reasons leading up to his termination.
 - d. That the claimant was accorded an opportunity to be heard on 21.07.2022 in line with the rules of natural justice and the law.
 - e. That the claimant was not discriminated against other employees.
 - f. That the claimant has been supported to recover and the respondent has processed his work injury compensation.



was attached to the activity rather than parts of the BBU machine as RW suggested. The Court finds that there is no established lawful command that the claimant disobeyed and, there is no shown work the claimant was required to properly perform but failed to do so. The reasons for the termination are found completely unjustified and unfair. They did not relate to the claimant's misconduct, compatibility, or the respondent's operational systems. The reason the claimant was injured is that he dripped in the process of undertaking the assignment. Such was a risk inherent in the assignment and not violation of the safety protocols. RW in his testimony stated that the disobeyed lawful command was the violation of the safety measures. However, the Court has found that the claimant had complied with LOTO safety measures by seeking and obtaining the exception. Further, RW testified that the claimant and his team had executed the assignment thus, "They did what they were supposed to do." Further, that the team had verified that there was no blockage. How then can the Court find that the claimant disobeyed lawful command? It cannot be found as such. RW further testified, "They found out there was no blockage. During day shift, they reported a blockage. But we found out there was no blockage. Rotary valves were part of BBU. After event it was welded because looking at incident, we welded it because it was not source...." RW also confirmed that the other two employees who were on duty assisting or working with the claimant were not dismissed and were still in the respondent's employment. It appears to the Court that the only reason for termination, as put by the claimant, was that he got injured, he was considered less useful and especially after seeking injury compensation.

- e. The Court has considered the factors in awarding compensation under section 49 of the *Employment Act*, 2007. The claimant had performed his duty as assigned, but for the injury, he sustained due to the inherent risks of the dripping and the rotary valves at the vent his two fingers were injured. The respondent moved to unfairly dismiss the claimant for no shown valid reason per section 43 of the *Act*. The advanced reasons were unfair under section 45 of the *Act*. The Court has considered all the circumstances and the claimant is awarded 8 months' gross salary in compensation at Kshs.216,062.40 making Kshs.1,728,499.20 less payee. The certificate of service will issue. The claimant urged for compensation and the prayer for reinstatement is deemed abandoned.
7. In conclusion, judgment is hereby entered for the claimant against the respondent for:
- a. Payment of Kshs.1,728,499.20 less PAYE by 01.09.2024 failing interest at court rates be payable thereon from the date of this judgment until full payment.
 - b. The respondent to deliver the certificate of service by 15.08.2024.
 - c. The respondent to pay costs of the suit.
 - d. The Deputy Registrar to forthwith, within three days, return the file to the Machakos Sub-registry.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 26TH JULY 2024.

BYRAM ONGAYA

PRINCIPAL JUDGE

