



**Otiato v Federation of Kenya Employers (Cause 827 of 2019)
[2024] KEELRC 2041 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2041 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 827 OF 2019
K OCHARO, J
JULY 26, 2024**

BETWEEN

FELIX ODUOR OTIATO CLAIMANT

AND

FEDERATION OF KENYA EMPLOYERS RESPONDENT

JUDGMENT

Introduction

1. The Claimant instituted this suit vide a Memorandum of Claim dated 9th December 2019 seeking: -
 - a. A declaration that the termination was wrongful, unlawful and unfair.
 - b. An order that the Respondent pays the Claimant a sum of Kshs. 8,187,183.
 - c. Costs of the claim and interest.
2. Alongside the Memorandum of Claim dated 9th December 2019, the Claimant filed a Verifying Affidavit sworn on the same day; a Written Statement dated 9th December 2019; and documents under a List of Documents dated 9th December 2019. The Claimant filed a further List of Documents dated 22nd March 2021, and additional documents under a Further List of Documents dated 9th December 2021.
3. In response to the Memorandum of Claim, the Respondent filed a Memorandum of Defence dated 27th November 2020 alongside a Witness Statement dated 27th November 2020; and documents under a List of Documents dated 27th November 2020. The Respondent subsequently filed another List and Bundle of Documents dated 1st April 2021, and a Further List and Bundle of Documents dated 19th October 2021.



4. Upon hearing the parties on their respective cases, I directed them to file their written submissions. The Claimant filed his dated 22nd March 2023, and the Respondent filed theirs dated 5th May 2023.

Claimant's case

5. The Claimant's case is that he first came into the employment of the Respondent as a PR and Communications Manager on 24th January 2013 on a two-year contract. In 2015, the contract was renewed for a further 3 years. Under the second contract, he earned a salary of Kshs. 303,229/.
6. The relationship between him and the Respondent got into headwinds on 9th December 2016. On this day, he experienced serious stomach pains while at work, forcing him to visit the Nairobi Hospital, for medical attention. He was diagnosed as suffering from food poisoning. On 13th December 2016, he returned to the same hospital for review, since his condition had not improved. The Doctor recommended a two-day sick-off for him. Nonetheless, he returned to work on 14th December 2016.
7. The Claimant alleges that on 14th December 2016, despite having explained to the Acting Chief Manager in charge of human resources that he had been unwell, he received a Notice to Show Cause from the Respondent requiring him to explain why he left work early on 13th December 2016 and reported late on 14th December 2016. He responded through a letter dated 15th December 2016 duly explaining the happenings of the material days. He furnished the Respondent with the doctor's report and medical receipts.
8. On 16th December 2016, he was invited for a disciplinary hearing slated for 19th December 2016. He attended the hearing. Subsequently, the Respondent summarily dismissed him from employment through a letter dated 21st December 2016.
9. The Claimant asserts that the summary dismissal from employment was unfair and unlawful. It was without justifiable reasons, as he was absent from work on the material days with good reason. Further, the Respondent's action was against Section 45 (2) of the *Employment Act* 2007, the terms of his employment contract, and the provisions of *the Constitution* on fair labour practices.
10. He further stated that the contract provided for sick leave subject to him availing evidence of illness. By being absent from work due to illness, he did not violate any of the Respondent's rules and regulations to warrant dismissal from employment. Without justifiable cause, the Respondent refused to pay his terminal benefits.
11. According to him, the dismissal was inspired by his Supervisor's desire to frustrate him. In May 2016, the Supervisor had with ill faith instigated disciplinary proceedings against him, proceedings which he successfully defended to the dismay of the Supervisor. The dismissal was therefore actuated by malice.
12. Cross-examined by the Respondent's Counsel, the Claimant testified that he was later on paid the sum that was paid into his account but reversed. He executed a document acknowledging the payment.
13. The Claimant admitted that he was issued with a show-cause letter and responded to the same. Further, he was invited to a disciplinary hearing, which he attended. The dismissal letter that was given to him had reasons for the dismissal.
14. He testified that the official working hours were, 8.00 am to 4:30 p.m. In between there was a lunchtime, 12:30 pm-2:00 pm. On the 13th of December 2016, he left work sometime in the afternoon for the hospital. After the hospital, he didn't get back to his workstation. The payment receipt issued to him that day by the hospital indicates that the payment was made at 9:00 pm.



15. The Claimant testified that if one fell sick and was absent from duty on that account, he or she was obligated to notify his or her supervisor before the end of that day. He didn't notify his immediate supervisor of his illness and absence on 13th December 2016, as she was out of the country. However, he notified Mr. Samuel Mugane who was acting in her place.
16. He testified that in the disciplinary hearing, as evidenced by the minutes, he admitted that on the 14th day of December 2016, he didn't report to duty in time. Though he had a sick note, he decided to report to work on that day for the love of his work. Having informed the Respondent on the 13th of his health situation, he didn't find it necessary to notify them of his absence on the 14th.
17. The Claimant admitted that in the past, as evidenced by the documents tendered by the Respondent, he had been accused of late coming and cautioned.
18. He testified further that his relationship with his colleagues was cordial and professional. He didn't at any time have an altercation with the Human Resource Manager. However, referred to one of the Respondent's documents, he admitted that he was subjected to a disciplinary hearing over an incident involving him and the Human Resource Manager. The Disciplinary Committee admonished both of them.
19. He further testified that he signed a final payment voucher. On it, he declared that he had no further claim against the Respondent. However, he executed the document in protest and frustration.

Respondent's case

20. The Respondent presented one witness, Ms. Koome to testify on its behalf. Like the Claimant, the witness adopted her witness statement filed herein as her evidence in chief. She stated that the Claimant was employed by the Respondent first under a two-year fixed term dated 24th January 2013, commencing on 3rd March 2013. Further, through a letter dated 10th March 2015, the Claimant's contract was renewed for another term of 3 years and his consolidated salary was reviewed to Kshs. 303,229/-.
21. The witness asserted that contrary to the Claimant's held position, he, lacked diligence in the discharge of his duties, was perpetually late in reporting to work, had run-ins with colleagues, and was plagued with disciplinary issues during his period of employment.
22. The witness further stated that on 7th December 2016, the Claimant reported to work late at 10.30 am without prior authorization from his immediate supervisor and without communicating the reason for his lateness.
23. On 13th December 2016, the Claimant again left his station at 3.30 pm, an hour before the end of official working hours, without communicating the reason for his absenteeism and obtaining prior authorization from his immediate supervisor. On 14th December 2016, the Claimant similarly reported late without communicating the reason for his absenteeism of obtaining and or seeking prior authorization from his supervisor. This conduct was in contravention of the terms of his contract of employment.
24. The witness stated that as a result of the above set out infractions, the Respondent issued him with two Notices to Show Cause dated 13th December 2016, and 14th December 2016.
25. It was further asserted that the Claimant responded to the show cause letters through his letter dated 15th December 2016, with a rude tone, inappropriate language and condescending attitude.



- Subsequently, through a letter dated 16th December 2016, the Respondent invited the Claimant to a disciplinary hearing on 19th December 2016.
26. After hearing the Claimant on the above-stated date, the disciplinary committee found his representations unsatisfactory and decided that he should be summarily dismissed. The decision was communicated through a letter dated 21st December 2016. He was paid all his dues in January 2017.
 27. The witness stated that during the disciplinary hearing, the Claimant admitted to having left the office at 3.30 pm and the fact that he didn't inform his immediate supervisor before or after leaving. Further, on the 14th of December 2016, he reported to work late.
 28. It was a requirement under the Claimant's contract of employment that whenever he was absent from work he would inform the Respondent as soon as possible in any event not later than the end of the working day on which absence first occurs. He had done this before.
 29. She summed it up by stating that the allegation by the Claimant that the summary dismissal was malicious and unfair is not founded as the same was on valid reasons – breach of the employment contract, and fair process adhered to.
 30. Cross-examined by Counsel for the Claimant, the witness testified that the accusations that led to the Claimant's discipline emanated from the Chief Executive Officer and the Finance Director. The show cause letter dated 13th December 2016 was issued by the Acting Finance Director, while that dated 14th December 2016, was by the Chief Executive Officer.
 31. The Respondent didn't have a clock-in and out system. The Claimant's contract provided that he could work from 8 am to 5 pm. Whenever an employee wanted to leave earlier than the stipulated time, he was supposed to communicate prior. There was a process to be followed, therefore.
 32. The witness testified that when the Claimant was issued with the show cause notice on the 14th of December 2016, he didn't inform her that his absence from work was as a result of her visit to the hospital. He didn't give the Respondent any document to show that he had visited the hospital.
 33. The Claimant didn't share the letter dated 13th December from Nairobi Hospital with the Respondent at the end of that day as was required by the terms of his contract. He produced it much later to support his response to the show cause letter.
 34. Clause 6[1] of the contract provided that the reason for absence was to be communicated as soon as possible or within the day of absence. According to her understanding, communication was mandatorily required before the end of the day.
 35. The subject matter of the notice to show cause dated 14th December 2016, was his late reporting to work on the same day. Further, a show cause letter dated 16th December 2016 was issued to the Claimant, which emanated from how he answered the show cause letters. He in his response used a language which was improper and disrespectful. Through the show cause letter, he was informed that the infraction, the subject matter therein, was to feature in the disciplinary hearing slated for the 19th of December 2016.
 36. The Chief Executive Officer, Jacqueline Mugo and the Finance Director, Sammy Mugode were members of the Disciplinary Committee.
 37. The witness asserted that his past character and indiscipline were necessary for consideration in the disciplinary process.



38. The witness stated that on the 21st of December 2016, the Respondent credited into the Claimant's account a sum of Kshs. 209,214.55. By error, the amount was reversed. However, the error was later on corrected, and the amount was paid to the Claimant. He did acknowledge the payment.
39. In her evidence in re-exam, the witness stated that, if indeed the Claimant reported back to work on 13th December 2016, as he alleged then, he had a perfect opportunity to submit his sick sheet that day.

Analysis and Determination

40. I have reviewed the parties' pleadings, oral and documentary evidence, written submissions and authorities relied on, and return that the issues for determination are as follows: -
- a. Whether the Claimant was summarily dismissed from his employment unfairly.
 - b. Whether the Claimant should be awarded the terminal dues sought.
 - a. Whether the Claimant was summarily dismissed from employment unfairly.
41. Before I delve further into this issue, I find it imperative to note and first consider the Claimant's submission that the summary dismissal against him was premeditated. He alleged that this is a fact comes out clearly from the statement in the summary dismissal letter to the effect that the Claimant did not appreciate the disciplinary process or that the charges levelled against him were not about his illness but on his misconduct and failure to adhere to the set procedures and standards at work. I am unable to fathom what informs the Claimant's impression of the statement. I get the Respondent as saying that in its view, the Claimant didn't in his direct sufficient effort to answer the accusations against him. It cannot be faulted on this. In any event, the Claimant has not alleged that this was a mis-conclusion.
42. The Claimant further raised an issue with the fact that the Chief Executive Officer who was undeniably the supervisor attended the Disciplinary hearing as a member, therefore, the disciplinary process was procedurally flawed. I agree with the Respondent's submissions that the matter was not pleaded, as such, nothing should turn on it. The Court of Appeal in the case Independent Electoral and Boundaries Commission & Ano. Vs Stephen Mutinda Mule & 3 others [2014] eKLR cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji [NIG] v Nigeria Breweries PLC SC 91/2002 where Adereji JSC stated;
- “ It is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”
43. Further, there was no evidence to establish that the presence of the Claimant's supervisor in the Disciplinary Committee in one way or the other, vitiated the propriety of the disciplinary process. Submissions are never a substitute for evidence.
44. At this point it is imperative to point out that an employer contending that the summary dismissal of an employee from his employment was fair must meet two statutory requirements. Demonstrate the reason[s] for the dismissal [section 43 of the *Employment Act*] and that the reason[s] was valid and fair [section 45[2] of the Act], and that there was conformity with the canons of procedural fairness established under Section 41 of the Act.



45. The two requirements speak to substantive justification and procedural fairness. Elaborating on the same, the Court of Appeal in the case of *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR, cited by Counsel for the Respondent stated;
- “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]; and 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.”
46. The mandatory procedure contemplated under Section 41 of the Act embodies three components. The notification component – the employer contemplating the summary dismissal, or termination, must inform the affected employee of the reason[s] the basis for the intended action, second, the hearing component- the employer must give the employee an adequate opportunity to prepare and defend himself or herself against the accusations levelled against him and the employee shall be entitled to have another employee or a shop floor union representative of his choice present, third, the consideration component- the representations by the employee must be considered by the employer before making a final decision.
47. I have carefully considered the events starting with the issuance of the show cause letters up to the issuance of the summary dismissal letter, I take a clear view that there was due compliance with the dictates of Section 41 of the *Employment Act*. Through the three show cause letters, the Claimant was informed of the accusations against him. He responded to the letters. Further, he was invited to a disciplinary hearing where he was allowed to defend himself against the charges. As can be discerned from the summary dismissal letter, his representations were considered.
48. The Claimant asserted that the Respondent took into account his past infractions notwithstanding that they were not the subject of the show cause letters and therefore, a subject matter[s], in the impugned disciplinary process. In my view, the dismissal was not in any way based on the past conduct of the past conduct of the Claimant. I have carefully considered the material placed before me, and conclude that the reference to the past infractions was only relevant for determining the weight of the sanction.
49. In the upshot, I hold that the summary dismissal was procedurally fair.
50. Having rendered myself on the aspect of procedural fairness, I now turn to consider that of substantive justification. I get the Respondent as stating that the reasons for the summary dismissal were that the Claimant; absented himself from his place on the 13th of December 2016 at around 3.30 pm without authority and communication on the reasons for absence; and unjustifiably reported late to work on the 14th December 2016 without prior authorization from his supervisor. Considering the material that was placed before this Court by the parties, I hold that these are reasons that were not just stated, they genuinely existed. In fact, the Claimant didn't deny at the disciplinary hearing and before this Court, that on the 13th December 2016, and 14th December 2016, he left work earlier than the set time, and reported late to work, respectively. As a result, I hold that the Respondent discharged its legal burden under section 43 of the Act.
51. The Claimant testified that he fell ill on 9th December 2016, forcing him to visit the hospital for treatment. He then returned to the hospital on 13th December 2016 as his condition had not improved.



He was issued with a sick off sheet by his doctor requiring him to rest on 13th and 14th December 2016. But he elected to still report to work on 14th December 2016 although late. I have carefully considered the Respondent's evidence on the Claimant's illness, and the documents availed to albeit late i.e. the two payment receipts dated 9th December 2016 and 13th December 2016, and a Sick Off Sheet dated 13th December 2016 issued and executed by one Dr. Wanjau, and hold that it does not cast aspersions on them. They remain unrebutted.

52. Indeed, the statement in the dismissal letter referred to hereinabove speaks to this.
53. The Respondent's issue was that in the two occasions referred to hereinabove, the Claimant was supposed to communicate and seek authorization. That the Claimant in the circumstances of the matter he had the opportunity to, but didn't. I have carefully considered the Claimant's explanation for the failure to, and conclude the same wasn't plausible.
54. Clause 6.1 of the Claimant's contract of employment provided;
- “In the event of absence on account of sickness or injury you [or someone on your behalf] must inform the Federation of the reason for your absence as soon as possible and must do so no later than the end of the working day on which absence first occurs.”
55. In the instant matter, undeniably, the absence first occurred on the 13th December 2016. The Claimant was obligated by the term[s] of his contract to report of his illness and absence latest end of the day, 13th December 2016. He had the option of having someone to report on his behalf under the clause. It is clear and he admits that he didn't do it within the timelines. In my view, the Claimant didn't give any explanation for the failure to adhere to this requirement.
56. No doubt, the Claimant was summarily dismissed from employment. Section 44 of the Act governs summary dismissals as follows:
- “(1) Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.
- (2) Subject to the provisions of this section, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.
- (3) Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.
- (4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:—
- (a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;



- (b) during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly;
- (c) an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;
- (d) an employee uses abusive or insulting language, or behaves in a manner insulting to his employer or to a person placed in authority over him by his employer;
- (e) an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer;
- (f) in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or
- (g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.”

57. I am cognizant of the fact, and this Court has time and again stated, that the list of acts of omission and commission under Section 44[4], that will amount to gross misconduct to attract a sanction of summary dismissal is not a closed one. Any act can amount to a gross misconduct if it has the impact recognized under section 44 (3).

58. Clause 8 of the contract of employment provided for summary dismissal. Clause 8.1 gave one of the incidents that could lead to summary dismissal thus;

“..... Commit any serious or persistent breach of any of the provisions and material obligation of his agreement including violation of the Federation’s policies, rules and regulations.”

59. Considering the past infractions of the Claimant, and that being absent from duty without authority is a breach of a material obligation, the obligation of being on duty at all material times for the time stipulated in the contract, time of course for which he is paid for, I hold that the Respondent had the justification to dismiss the Claimant from employment.

60. However, I must point out that it is the persistence of the infraction[s] by the Claimant that makes this Court hold that the action by the Respondent was justifiable. Otherwise, in the circumstances of this matter, if the Claimant’s infraction was a one off, I could have concluded that the Respondent didn’t act with equity and that the action was not just as required under Section 45[7] of the Act, and therefore unfair.



61. In the upshot, I conclude that the summary dismissal of the Claimant from employment was both procedurally and substantively fair.
- b. Whether the Claimant should be awarded the terminal dues sought.
62. I have already held that the Claimant's summary dismissal was fair and lawful.
63. I also note that the Claimant received terminal benefits which included his earned leave days and one month's salary in lieu of notice. He was informed that his Provident Fund dues and Savings would be availed to him once he reached out to the respective parties handling both. While the Claimant submits that his contract provided for payment of 3 months' pay in lieu of notice, I am cognizant of the fact that the Claimant was summarily dismissed from employment. He was therefore not entitled to notice or payment in lieu thereof.
64. The Claimant also submits that the terminal dues he was paid were recalled, and produces his bank statements as evidence. I have seen the said bank statements which clearly indicate that the amount was recalled on 21st December 2016. However, the Final Dues Voucher was executed by the Claimant on 24th January 2017 implying that he was later paid.
65. In conclusion, the Claimant's claim is hereby dismissed with costs.

READ, DELIVERED AND SIGNED 26th DAY OF JULY, 2024.

OCHARO, KEBIRA

JUDGE

In the presence of:

Mr. Chadyianya for the Claimant

Mr. Kiarie for the for the Respondent

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.

OCHARO KEBIRA

JUDGE

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