



**Omondi v Unilever Kenya Limited (Cause 794 of 2019)
[2024] KEELRC 2012 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2012 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 794 OF 2019
BOM MANANI, J
JULY 25, 2024**

BETWEEN

FREDRICK OKUKU OMONDI CLAIMANT

AND

UNILEVER KENYA LIMITED RESPONDENT

JUDGMENT

Background

1. The dispute before court questions the lawfulness of the Respondent's decision to terminate the Claimant's contract of service. Whilst the Claimant contends that the decision was unlawful, the Respondent holds a contrary view.

Claimant's Case

2. The Claimant avers that the Respondent initially engaged his services as a Shift Manager. Subsequently, he was promoted to the position of Production Manager – Home Care. He avers that his exit salary was Ksh. 279,848.35 per month.
3. The Claimant contends that on 17th May 2019, the Respondent alleged that he had authorized and or abetted the wrongful disposal of chemical waste into the environment in violation of its policy and the law on disposal of such waste. As such, it (the Respondent) issued him with a notice to show cause why disciplinary action should not be taken against him for the alleged infraction.
4. According to the Claimant, the events that informed the disciplinary process against him occurred on the afternoon of 14th May 2019. He says that he was informed that on this date, the Respondent's factory manager and other officials, whilst on factory inspection around 5.00 PM, stumbled on raw chemical waste which had been dumped in an open space within the factory. The Respondent accused him of having authorized the dumping in contravention of its policy.



5. The Claimant contests this accusation. It is his case that the accusation was not backed by evidence and neither were investigations conducted into the matter to fortify the Respondent's position.
6. The Claimant contends that on the material day, he had left the factory premises at 4.15 PM with the knowledge and permission of the factory manager. He contends that before leaving the premises, he inspected the factory grounds in the company of the factory manager and established that all was well. He avers that their inspection did not reveal the dumping of any form of waste within the premises.
7. The Claimant contends that the dumping in question happened after he had left the factory premises. To corroborate his contention, he points out that the photographs of the dumped waste suggest that they were taken around 5.00 PM after he had left the premises.
8. The Claimant contends that his inquiries revealed that the dumping was done by Martin Nzioka, Bernard Wairegi and Elijah Okello, all of whom were employees of the Respondent. According to him, these employees told him that they disposed of the waste on the instructions of the factory manager, one John Onguti.
9. The Claimant avers that the Respondent accused him of having reacted to the incident casually. However, it did not specify what was casual about his response.
10. The Claimant contends that he cogently explained the incident to the Respondent in his response to the notice to show cause. However, he was still subjected to a disciplinary hearing during which it became apparent that he had not sanctioned the irregular disposal. Despite this, his contract terminated.
11. The Claimant contends that the proceedings before the Disciplinary Committee fortify his belief that the Respondent did not investigate the incident before it accused him of having authorized the illegal disposal. He argues that no evidence or report was tabled before the Disciplinary Committee to justify the accusations leveled against him.
12. The Claimant contends that he challenged the findings of the Disciplinary Committee before the Appeals Committee. However, his appeal was rejected after the Respondent's Human Resource Director concluded that the Disciplinary Committee's decision was justified. According to him (the Claimant), the decision rejecting his appeal did not address any substantive issue that had arisen before the Disciplinary Committee.

Respondent's Case

13. In response, the Respondent maintains that it terminated the Claimant's contract for valid cause and in accordance with fair procedure. The Respondent avers that at around 5.00 PM on 14th May 2019, its officers discovered that there had been dumping of waste chemicals in open space within the factory premises. According to the Respondent, the raw waste was flowing into its drainage system.
14. The Respondent insists that it was part of the Claimant's job description to ensure compliance with safe environmental standards. This included ensuring that raw chemical waste was safely disposed of. The Respondent insists that the Claimant directed and or abetted the incident of 14th May 2019. Hence, the decision to terminate his services.
15. The Respondent contends that the Claimant's failure to prevent the offending disposal posed an environmental hazard and violated the law on environmental protection. Besides, the action exposed it (the Respondent) to serious legal threats for breach of environmental regulations.



16. The Respondent contends that it was not satisfied with the Claimant's response to the notice to show cause. Consequently, it invited him for a disciplinary hearing which resulted in the termination of his employment.
17. The Respondent avers that it accorded the Claimant all the procedural protections that are sanctioned by law during the disciplinary process. It allowed him to respond to the charges against him. It allowed him to appear before the Disciplinary Committee with a witness of his choice.
18. The Respondent accuses the Claimant of having lied to the Disciplinary Committee about the disposal of the waste. It contends that the Claimant lied that the waste was discharged whilst he was away from the workplace. It contends that it is the Claimant who made a phone call to one Mukiri asking him to release the pump which was used to pump out the waste water.
19. The Respondent contends that the Claimant's actions had caused loss of trust and confidence in his ability to execute his work. As such, he had to be relieved of his duties.
20. The Respondent contends that the Claimant was granted the opportunity to challenge the decision of the Disciplinary Committee on appeal. However, his appeal was rejected for lacking merit.
21. The Respondent contends that it computed and paid to the Claimant his terminal dues to wit: pay in lieu of notice; salary up to the date of termination of his contract; and accrued leave days. As such, the contract between the parties was legitimately closed.

Issues for Determination

22. After evaluating the pleadings and evidence on record, it is apparent that the following are the issues that fall for determination:-
 - a. Whether the Claimant's contract of service was lawfully terminated.
 - b. Whether the parties are entitled to the reliefs that they seek in their respective pleadings.

Analysis

23. The law that regulates termination of employment contracts is anchored in the *Employment Act* as read with *the Constitution* of Kenya, 2010 and the *Fair Administrative Action Act*. There are two ingredients which an employer must satisfy in order for his decision to relieve an employee of his contract of service to be deemed as fair and lawful. He must demonstrate the presence of substantive grounds to support his decision and must process the employee's release in accordance with fair procedure. These requirements are embedded in sections 41, 43, 44 and 45 of the *Employment Act* as read with articles 41 and 47 of *the Constitution* together with section 4 of the *Fair Administrative Action Act*.
24. Section 41 of the *Employment Act* requires an employer who proposes to terminate an employee's contract of service to: inform the employee of the infraction he is accused of in the presence of a co employee or shop floor representative if the employee elects; and allow the employee the opportunity to respond to the accusations.
25. The section identifies some of the substantive grounds which an employer may invoke to terminate an employee's contract. These include: misconduct; poor performance; and physical incapacity.
26. This section has lately been read together with section 4 of the *Fair Administrative Action Act* which guarantees any individual against whom a decision is to be made certain procedural protections including: the right to be notified of the reasons for the proposed decision beforehand; the right to be heard in the process; the right to challenge the administrative action or decision on appeal; the right



- to legal representation; the right to cross examine the accuser and his witnesses; and the right to be supplied with all relevant material to the process beforehand. All these rights are anchored on the rights to fair labour practice and fair administrative action enshrined in articles 41 and 47 of *the Constitution*.
27. Section 43 of the *Employment Act* obligates the employer to prove the reason for termination of an employee's contract of service. If the employer is unable to prove the reasons, the termination will be deemed as unfair in terms of section 45 of the Act.
 28. Section 45 of the Act prohibits an employer from unfairly terminating an employee's contract of service. The section goes further to elaborate what amounts to unfair termination of employment. Termination of employment is considered as unfair if the employer is not able to demonstrate that the reason for termination was valid and that the termination was processed in accordance with fair procedure.
 29. The section obligates the court to determine whether the employer's decision to terminate an employee's contract of service was just and equitable in the circumstances of the case. In making this determination, the court is required to consider several factors including: the procedure adopted by the employer in reaching the decision; the handling of any appeal against the decision; the conduct and capability of the employee up to the point of the decision to terminate his contract; the extent to which the employer has complied with the provisions of the law in processing the termination; and the existence of any previous warnings to the employee.
 30. Although sections 43 and 45 of the *Employment Act* place the burden of justifying the decision to terminate a contract of service on the employer, section 47 of the Act requires the employee to demonstrate that the employer's decision was unfair before the employer can justify his decision. Various judicial decisions suggest that the effect of section 47 of the Act is to merely require the employee to lay a basis for his claim by providing prima facie evidence to demonstrate that the employer's decision was unjustified (*Dungani v West Kenya Sugar Company Limited (Employment and Labour Relations Appeal 12 of 2023) [2024] KEELRC 172 (KLR) (8 February 2024) (Judgment)*, *Muthaiga Country Club v Kudheihia Workers [2017] eKLR* and *Milano Electronics Limited v Dickson Nyasi Muhaso [2021] eKLR*).
 31. Further, although section 43 of the *Employment Act* obligate the employer to prove the validity of the reasons to terminate a contract of service, all that the law requires in this respect is for the employer to demonstrate that he had genuine reasons to believe that the employee had committed the infraction in question. Put differently, the employer need not have infallible evidence regarding the infraction before he can render his decision. However, he must have reasonable grounds to justify the decision.
 32. The implications of section 43 of the *Employment Act* have been considered in a number of judicial pronouncements. In *Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others [2019] eKLR*, the Court of Appeal quoting Halsbury's Laws of England, 4th Edition, Vol. 16(1B) para 642, stated as follows:-

“...In adjudicating on the reasonableness of the 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.”

33. From the foregoing, it is apparent that the court reviewing an employer’s decision to terminate a contract of service is not entitled to substitute the employer’s decision with its own merely because the judge considers that if he had been in the employer’s shoes, he would have reached a different decision. However, the court is obligated to interfere with the decision if it falls outside the band of what would amount to a reasonable response by the employer. And a response is considered as reasonable if another reasonable employer, faced with the same set of facts, would have probably reached a similar decision.
34. The evidence on record shows that the reason why the Respondent terminated the Claimant’s contract was because the Claimant failed to prevent the discharge of waste into open space contrary to the law and applicable regulations. It is indicated that on the afternoon of 14th May 2019, a group of employees discharged chemical waste into an open area within the Respondent’s premises in contravention of the Respondent’s policies and the law on disposal of industrial chemical waste.
35. The evidence suggests that the disposal of the waste in dispute happened around 5.00 PM on the material date. Both parties agree that at the time of disposal of the waste, the Claimant was not at the workplace. This fact was confirmed by the Respondent’s witness during cross examination.
36. There is evidence that other employees and not the Claimant caused the disposal of the waste. This fact was confirmed by the Respondent’s witness during cross examination. There is also evidence that the disposal was done under the instructions of the Respondent’s factory manager, one John Onguti. This fact was confirmed by two of the three employees who undertook the actual disposal during their evidence before the Disciplinary Committee.
37. The question which the court has to grapple with is whether the Respondent’s decision to dismiss the Claimant’s contract for allegedly sanctioning the discharge on 14th May 2019 was reasonable in the face of evidence demonstrating that the disposal was sanctioned by the Claimant’s supervisor, one John Onguti. The fact that the Claimant was not on duty is admitted by the defense. This fact was also confirmed during the hearing before the Disciplinary Committee. The fact that it is not the Claimant who ordered the disposal of the waste into the Respondent’s drainage is admitted by the defense. This fact was also spoken to during the hearing before the Disciplinary Committee.
38. In the face of the foregoing, was it reasonable for the Respondent to have reached a contrary finding on the matter? What material did the Respondent rely on to reach a contrary finding? Would another reasonable employer faced with the same set of facts have reached the same finding as the Respondent? Did the facts before the Respondent’s Disciplinary Committee provide a justifiable basis for it to entertain a genuine belief that it was due to the Claimant’s inaction that the effluent was discharged into the Respondent’s drainage?
39. I am afraid that the answers to these questions are in the negative. With cogent evidence demonstrating that the release of the effluent into the Respondent’s drainage system was sanctioned by John Onguti, a reasonable employer would not have reached the conclusion that the Claimant was to blame for the incident. As such, I reject the Respondent’s argument that it had reasonable grounds to entertain a genuine belief that the Claimant sanctioned the discharge of the effluent.
40. From the evidence on record, it was clear to the Disciplinary Committee who the culprits in the entire episode were. As such, there was no justifiable basis to have burdened the Claimant with the offense. As such, I find that the Respondent has failed to demonstrate that it had valid reasons to terminate the Claimant’s employment on account of the incident of 14th May 2019.



41. According to the notice to show cause which was issued to the Claimant on 17th May 2019, it was indicated that the Respondent's management had on 14th May 2019 (sic 2018) stumbled upon raw chemical waste flowing into the Respondent's drainage system. The Respondent accused the Claimant of having authorized, directed and abetted the release of the effluent contrary to environmental laws and regulations. The Respondent averred that the Claimant's conduct amounted to gross misconduct. As a result, he was asked to show cause why disciplinary action should not be taken against him.
42. The record shows that the Claimant responded to the notice to show cause on 20th May 2019. In the response, the Claimant stated that he left the factory at 4.15 PM on the material date with the permission of the factory manager who was also his immediate supervisor. The Claimant stated that the effluent was released after he had left the work place a fact that the defense confirms.
43. It is apparent from the notice to show cause that the accusation against the Claimant related to the events that occurred on 14th May 2019. It is these events that the Claimant responded to.
44. However, during the disciplinary hearing, the Claimant was required to account for events that related back to March 2019. The Claimant was also confronted with other accusations relating to his alleged failure to meet his key performance indicators.
45. It is apparent from the record that the Claimant was confronted with more issues at the disciplinary hearing than had been drawn to his attention through the notice to show cause. There is no evidence that before the Respondent convened the disciplinary hearing, it notified the Claimant that he will be required to address broader issues that went beyond the incident of 14th May 2019. There is no evidence that the Claimant was supplied with information and material regarding these additional issues beforehand.
46. The Respondent's action in this respect was in contravention of section 4 of the *Fair Administrative Action Act*. It was also in contravention of the Claimant's rights to fair labour practice and fair administrative action as protected by *the Constitution*.
47. In the absence of notice to the Claimant beforehand that he will be interrogated on matters other than those which occurred on 14th May 2019, the Respondent deprived him of the opportunity to adequately prepare for his defense. As such and in line with section 45 of the *Employment Act*, I find the Respondent's action in this respect as having been contrary to the dictates of justice and equity.
48. In the proceedings before this court, the Respondent has argued that the Claimant was found guilty of failure to report the incident to the authorities and take steps to mitigate it. However, it is noteworthy that this issue was not flagged in the notice to show cause that was issued to him (the Claimant).
49. That said, the evidence on record shows that after the dumping incident was discovered on 14th May 2019, the Claimant's line manager drew it to his attention on the night of the same day. In response, the Claimant indicated that the issue was going to be addressed.
50. The Claimant's position is that because the incident was drawn to his attention at night, there was not much that he could have done at the time as he was away from duty. In his view, the only reasonable time that the matter could be fully addressed was the following day once he was back at work. Indeed, he testified that although the night shift employees begun working to clear the waste, most of the clearing was undertaken on the morning of the following day. I find this explanation reasonable.
51. Regarding the issue of reporting, the Claimant avers that he discussed the issue with Mr. John Onguti, the factory manager and his immediate supervisor the following day. He states that the Respondent's regulations provide for a reporting structure which requires employees to report incidents to their



- immediate supervisors. In his view, the fact that he took up the issue with Mr. Onguti the following day served as a report.
52. The Claimant further states that after some inquiries, he established that it was Mr. Onguti who had in fact sanctioned the disposal. As such, he made reference to this fact in his response to the notice to show cause which also served as another form of reporting of the incident.
53. The evidence on record shows that the Respondent's management became aware of the irregular disposal on 14th May 2019. That is why the matter was brought to the attention of John Onguti who in turn shared with the Claimant photographs of the incident on the night of the same day. The fact that the Respondent's management was aware of the incident as early as when it occurred is further fortified by the fact that by 17th May 2019, they had already issued the Claimant with a notice to show cause on the matter and suspended him from duty.
54. If the Respondent's management was already aware of the incident as early as 14th May 2019, what other report did they require from the Claimant on the matter? Of what worth was a second report by the Claimant?
55. Having regard to the foregoing, I arrive at the conclusion that the Claimant drew the attention of the Respondent to the incident through his initial discussions with John Onguti, his immediate supervisor on 15th May 2019. Further, the Claimant addressed the same issue when he delivered his response to the notice to show cause during his suspension from duty.
56. The Respondent has also accused the Claimant of having been casual in his response to the incident. However, there is no clear evidence to support this accusation. So far as the record demonstrates, the first official communication by the Respondent to the Claimant on the incident was the notice to show cause that was issued to him on 17th May 2019. The record shows that the Claimant did a formal response to the letter.
57. The only other time that the Claimant reacted to communication on the incident is when he responded to a text message from John Onguti on the night of 14th May 2019. From the record, Mr. Onguti's text to the Claimant was written with a measure of informality. In reaction, the Claimant responded using similar language. The texts read as follows:-
- "Onguti: Buda boss ametembea hapa. Kamenuka."
- "Fred: Pole buda boss. Tutasort kesho."
58. These were informal exchanges between the Claimant and his line manager on their private WhatsApp platform the night the incident happened. The informality was triggered by Mr. Onguti's initial text to the Claimant.
59. The communication was not addressed to the Respondent. It is therefore surprising that the Respondent would seek to punish the Claimant for what was essentially a private chat between two employees on what had happened.
60. During the disciplinary hearing, the Respondent expanded the accusations against the Claimant from releasing waste water laced with chemicals into its drainage to leaving pallets in a section of the factory which allegedly posed an environmental hazard. The evidence on record shows that the Claimant explained that the pallets were stored at what he described as the "staging area" pending further processing. He indicated that the storage of the pallets in the area was due to design challenges at the factory and that the Respondent had been advised to install a kink (barrier) plate to address the issue of possible spillage of chemical dust.



61. There is no evidence to suggest that the Respondent presented evidence before the Disciplinary Committee to controvert the Claimant's explanation on the matter. As such, there was no basis upon which the Disciplinary Committee could discount the Claimant's explanation on the issue.
62. There is also the issue relating to whether the Claimant had failed to perform his duties in line with his Job Description and thus failed to satisfy the Key Performance Indicators (KPIs) set for him. Although during cross examination, the Respondent's witness sought to down play the issue by stating the Claimant's KPIs were not an issue since his performance was not in contest, the proceedings before the Disciplinary Committee demonstrate otherwise. From the minutes of the disciplinary hearing, it is clear that the Disciplinary Committee was invited to terminate the Claimant's contract for failure to discharge his duties in line with his Job Description.
63. In response to this accusation, the Claimant is recorded as stating that he had not been given the Job Description that was tabled before the Disciplinary Committee. It was his case that he had seen the document for the first time during the disciplinary session.
64. The minutes show that the prosecutor at the disciplinary hearing specifically asked the Claimant's supervisor if he had held formal discussions with him regarding his specific roles and responsibilities at the workplace and whether he had shared with the Claimant his Job Description when he was promoted to the position of Production Manager. The record shows that the supervisor's response to the question was in the negative. According to the supervisor, although he had not held discussions with the Claimant regarding his role and responsibilities or shared with him his Job Description, he had nevertheless discussed with him the 3 + 1 goals and deliverables.
65. Before an employer can accuse an employee of failing to discharge a particular task in contravention of his Job Description, he (the employer) must have shared with him (the employee) his Job Description. Otherwise, it will be impossible for the employee to speculate on his responsibilities with exactitude. It was therefore inappropriate for the Disciplinary Committee to have come to the conclusion that the Claimant had failed to meet the KPIs on environmental safety without evidence that the Respondent had provided him with a Job Description demonstrating the exact tasks that he was expected to perform in this respect.
66. The next question for consideration is whether the parties are entitled to the reliefs that they seek through their respective pleadings. I have arrived at the conclusion that the Respondent's decision to terminate the Claimant's employment was unjustified. As such, the Respondent is not entitled to an order dismissing the instant claim.
67. On the other hand, it is apparent that the Respondent had no justification to terminate the Claimant's contract. As such, the decision by the Respondent in this respect is declared unlawful.
68. Section 49 of the *Employment Act* permits the court to award an employee whose contract has been unfairly terminated compensation. I have taken into account the fact that prior to the decision to terminate his contract, the Claimant had served the Respondent for approximately four (4) years. I have also taken into account the Claimant's evidence that as at the time of hearing the case, he was yet to secure alternative gainful employment. Having regard to these factors, I award him compensation for the unfair termination of his contract that is equivalent to his salary for six (6) months, that is to say Ksh.279,848.35 x 6 = Ksh. 1,679,090.10.
69. The award attracts interest at court rates from the date of this decision.
70. This award is subject to the applicable statutory deductions.
71. I award the Claimant costs of the case.



Summary of Award

72. In the final analysis, the court makes the following findings and orders:-

- a. The Claimant's contract of service was unfairly terminated.
- b. The Claimant is awarded compensation for unfair termination of his contract that is equivalent to his salary for six (6) months, that is to say, Ksh. 1,679,090.10.
- c. The amount is subject to the applicable statutory deductions.
- d. The Claimant is awarded interest on the amount at court rates from the date of this decision.
- e. The Claimant is awarded costs of the case.

DATED, SIGNED AND DELIVERED ON THE 25TH DAY OF JULY, 2024

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant

.....for the Respondent

ORDER

In light of the directions issued on 12th 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

JUDGE

