



**Ojanga v E.A. Cables Limited (Cause E474 of 2020)  
[2024] KEELRC 1933 (KLR) (9 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1933 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E474 OF 2020  
NZIOKI WA MAKAU, J  
JULY 9, 2024**

**BETWEEN**

**MOSHE MITCHEL OKOTH OJANGA ..... CLAIMANT**

**AND**

**E.A. CABLES LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant filed this suit through a Memorandum of Claim dated 31<sup>st</sup> August 2020 against the Respondent Company alleging unlawful, unfair and unprocedural summary dismissal and seeking reinstatement or alternatively, payment of terminal dues. The Claimant avers that he is a former employee of the Respondent who worked for the company for four (4) years before his employment was terminated by way of summary dismissal. The Claimant avers the Respondent is a limited company registered under the Companies Act and has two factories on Kitui Road and Addis Ababa road in Nairobi County. The Claimant averred that the Respondent engaged him on 8<sup>th</sup> February 2016 as an Electrical Engineer at a basic salary of Kshs. 250,000/- and house allowance of Kshs. 50,000/- per month. He asserted that he was threatened with summary dismissal for not signing a new policy with reduced phone allowances and that the Respondent Management issued him with show cause letters in January 2020. That on 30<sup>th</sup> June 2020, he was issued a show cause letter and asked to attend a disciplinary meeting on 6<sup>th</sup> July 2020, on which day he was not allowed representation. He further averred that he declined to sign the minutes of the alleged disciplinary hearing and on 4<sup>th</sup> July 2020, received a summary dismissal letter dated 24<sup>th</sup> June 2020. He noted that at the time of his summary dismissal, his basic salary was Kshs. 283,300/- and house allowance of Kshs. 50,000/- per month. In the upshot, the Claimant's case was that the Respondent's actions were a witch hunt, considering his over taxation, low insurance relief, reduction of his phone allowance, change of stations, the summary dismissal letter having been written prior to the disciplinary hearing, and the production manager taking the role of HR Manager by chairing the said disciplinary meeting.



2. In response, the Respondent filed a Memorandum of Defence dated 7<sup>th</sup> September 2021, wherein it averred that the Claimant's terms of service were guided by the Employment Contract dated 15<sup>th</sup> January 2016, Respondent's Service Rules and Regulations, Human Resource Policy and the [Employment Act](#). The Respondent's stance was that on 13<sup>th</sup> January 2020, a power and internet outage rendered its systems inaccessible and paralyzed all operations in its operation sites thereby crippling service delivery of the company. That whereas it was the Claimant's duty to solve any electrical issues promptly and efficiently, he disconnected calls from his superiors and ignored any communication from them on the said day. That when the Respondent's CEO contacted the Claimant's colleague to reach out to him, it was reported that the Claimant was found seated at his desk yet the outage was still ongoing and despite several attempts to reach him to attend to the outage. That it consequently issued a show cause to the Claimant as to why he did not make any effort to address the said outage and that his response only sought to cover up his negligence and unwillingness to perform his duties. The Respondent further averred that the Claimant refused to obey lawful instructions and continued to treat its officers with contempt as they attempted to accommodate him and ensure a conducive working environment for him and others. That the disciplinary panel reviewed the representations made by the Claimant and then reached the decision to summarily dismiss him for negligence of duty and failure to attend to operations in its Kitui Road offices from January 2020 to June 2020 without any lawful justification. The Respondent thus denied the Claimant's prayer for reinstatement, unpaid leave days, salary *in lieu* of notice, compensation for wrongful dismissal, phone allowance, service gratuity, interest and costs. It prayed that the Court finds that the summary dismissal of the Claimant's employment was lawful and in accordance with fair procedure and that the Court disallows the claim in its entirety with costs to the Respondent.
3. In a rejoinder through his Response dated 28<sup>th</sup> February 2024, the Claimant averred that after the Respondent negotiated for a Collective Bargaining Agreement that was later registered, service gratuity formed part of another scheme approved by the Respondent all unionisable employees and not only the unionised.
4. Claimant's Submissions  
The Claimant submitted that the issues arise for determination before this Honourable Court are whether the Claimant was a unionisable employee, whether the disciplinary hearing was fair, procedural and in accordance with the law and whether the prayers sought are grantable. It was the Claimant's submission that he was a unionisable employee, as supported by the provisions of Article 41 of the [Constitution of Kenya](#) that all workers are entitled to form or join a union of their own choice. That the Respondent's Bargaining Agreement had a right to invoke section 49 of the [Labour Relations Act](#) by way of deducting the agent fee from the Claimant. He asserted that the disciplinary hearing was not fair and lawful as the Respondent failed to follow the provisions of section 41 of the [Employment Act](#) when it decided to summarily dismiss him and did not allow him to be represented during the disciplinary proceedings. The Claimant cited the case of [Pius Machafu Isindu v Lavington Security Guards Limited](#) [2017] eKLR in which the Court of Appeal stated that in matters of summary dismissal for breach of employment contract and unfair termination of employment involving breach of statutory law, the employer must - prove the reasons for terminating the employment in terms of section 43; and prove that the grounds are justified per section 47(5) among other provisions. It was the Claimant's submission that on his part, he adhered to the service rules and regulations concerning hours of work and alternative duties and that he was never absent.
5. The Claimant further submitted that the Respondent not affording him a chance to appeal amounted to unfair labour practices and that section 45(2) of the [Employment Act](#) places a further burden on the employer to prove that the reasons for the termination were valid and fair. He argued that employers are



no longer free to dismiss with impunity those whom they judge worthy of dismissal and that the right to dismiss is tempered by the right of the individual not to be unfairly dismissed. It was the submission of the Claimant that his dismissal by the Respondent is substantively unfair and that the Respondent had not adduced in this Court any cogent reasons that warranted it to summarily dismiss him from employment. The Claimant concluded by maintaining he is entitled to the orders sought as per his letter of appointment and prayed that the Honourable Court finds that his summary dismissal from employment was unlawful, unfair and unprocedural.

6. Respondent's Submissions

The Respondent submitted that the Court ought to consider section 45(1) and (2) which sets out the requirements to be considered when determining whether a termination of employment was unfair. As to whether the termination of the Claimant's employment was justified, the Respondent submitted that the letter of offer and the Claimant's payslip evidence that he was not a unionised employee. The Respondent submitted that it was an express term of the Respondent's Service Rules and Regulations that breach of the terms of the regulations would warrant summary dismissal of the Claimant. The Respondent also noted that the minutes of the disciplinary hearing show that the Claimant admitted he was required to attend to both factories of the Respondent but had insisted that according to his Contract, he was to sit at the Kitui Road factory. It argued that it was only after being transferred to the Addis Ababa Road factory and on being reminded to attend to the Kitui Factory in 2019 that the Claimant alleged there was an increase in his scope of work and demanded for an increase in pay.

7. The Respondent cited the case of Nakuru ELRC No. 474 of 2017 - *Consolata Kemunto Aming'a v Milimani High School* (unreported) wherein the Court held that summary dismissal is allowed under the provisions of section 44(3) and (4) of the *Employment Act* for a fundamental breach of the employment contract and for gross misconduct. It posited that clause 11.6(c) of the Respondent's Human Resource Manual, which allows it to summarily dismiss an employee where an employee neglects to perform his duties or performs them carelessly and improperly. The Respondent argued that given the importance of the duties performed by the Claimant, his failure to attend to the Kitui Factory was a fundamental breach of his contract, with the effect of affecting the entire ecosystem of the Respondent's business. That evidently, the right to terminate the Claimant's employment was occasioned by his wilful negligence in performing his contractual duties at the Kitui Road Factory, despite several reminders. In the circumstances, the Claimant invited this Court to find that the Respondent had a valid reason to terminate his services in line with section 43 of the *Employment Act*.
8. Regarding procedural fairness as set out under section 41 of the *Employment Act*, the Respondent relied on the Court of Appeal case of *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR and Industrial Cause No. 64 of 2012 - *Anthony Mkala Chitavi v Malindi Water & Sewerage Company Limited* [2013] eKLR. It was submitted that the Claimant is not entitled to the reliefs sought in his Claim and concluded that the termination of his services was procedural and fair and undertaken in line with sections 41 and 43 of the *Act* and the Respondent's Human Resource Manual.
9. The Claimant was accused of misconduct leading to his termination. The facts of the case are that the Claimant was employed by the Respondent as an electrical engineer. The Respondent had 2 offices in Industrial Area being one at Addis Ababa Road and the other along Kitui Road. The Claimant asserts he was to sit at the Kitui Road office and was not facilitated to attend to the Addis Ababa Road office. It would seem that there was an outage on 13<sup>th</sup> January 2020 and the accusation levelled against the Claimant is that he was unbothered, declined to pick up calls from his bosses and was found sitting at his desk in the Kitui Road office. The Claimant was issued a show cause notice on 30<sup>th</sup> June 2020. He responded to the letter and was invited to a disciplinary meeting on 6<sup>th</sup> July 2020.



10. It is apparent the Claimant had declined to respond to an outage for which he was hauled to the disciplinary committee. Was the refusal to attend to the power and internet outage so egregious as to cause a summary dismissal? Certain acts of misconduct call for a summary dismissal as provided for in section 44 of the Employment Act. The Employment Act at section 41 makes provision that where an act of misconduct is alleged, an employee is entitled to hearing as stipulated therein. In this case the Claimant was asked to give an explanation and was even heard orally before his service was terminated. He had wilfully disobeyed the employer by ignoring the calls of the CEO and his supervisor. A colleague had to be sent to his desk to fetch him. He managed to resolve the issue but his conduct was one of complete disregard towards his employment. In his defence he says that there was a way to reach him through the office line in case his phone had issues. He seemed to blame his woes on his cellphone but it is apparent the calls came through and were roundly ignored leading to an emissary being sent to him. He was therefore properly dismissed after being accorded the safeguards in law. As a result, the suit herein is unmerited and misplaced, only fit for dismissal, albeit with no order as to costs.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF JULY 2024**

**NZIOKI WA MAKAU**

**JUDGE**

