



**Stati v KenafriC Industries Limited (Cause E037 of 2022)
[2024] KEELRC 2054 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2054 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E037 OF 2022
NZIOKI WA MAKAU, J
JULY 26, 2024**

BETWEEN

ALVEEN SITTI STATI CLAIMANT

AND

KENAFRIC INDUSTRIES LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed this suit against the Respondent through a Memorandum of Claim dated 20th January 2022, seeking the following prayers:
 - a. A declaration that the dismissal of the Claimant was unfair and unlawful.
 - b. An order for compensation of the Claimant of a sum amounting to an equivalent of the Claimant's 12 months' gross salary, that is, Kshs. 105,000/- x 12 = Kshs. 1,260,000/-
 - c. Costs of the Claim
 - d. Interest on (ii) and (iii) at court rates
 - e. Any other or further relief that the court may deem just and fair to grant.
2. The Claimant's case is that he was a senior and long serving employee of the Respondent having risen through the ranks on account of merit to his last position of Security Manager earning a gross monthly salary of Kshs. 105,000/-. That by a letter dated 23rd November 2021, the Respondent summarily dismissed him from employment without any or any valid reason. The Claimant averred that he was accused of failing to carry out investigations swiftly within reasonable time and securing CCTV footages, which affected the tracing 450kg of crystal menthol worth Kshs. 2 Million that had allegedly disappeared from the Respondent's premises. He asserted that the reason given for his summary dismissal was not valid because the crystal menthol went missing between 27th September 2021 and 23rd October 2021 but a report was made to him in that regard on 25th October 2021, by



which time all the relevant CCTV camera footages had been automatically deleted. He explained that the Respondent's CCTV cameras had a limited capacity and they deleted footages automatically at the end of each day and therefore the accusation that he did not secure the footages was invalid. The Claimant further averred that he nevertheless conducted speedy investigations into the missing goods, prepared and presented a detailed investigation report with his findings and recommendations but which the Respondent did not act upon.

3. The Claimant noted that the Respondent's CCTV cameras and system are monitored by CCTV operators and managed by the Respondent's Information and Communication Technology (ICT) specialists, who are the custodians of all access and systems passcodes and not the Claimant. That the Respondent never installed CCTV cameras in the area the crystal menthol was stored despite having previously advised it to. That he had also severally raised with the Respondent the issue of the limited capacity of the said cameras and advised it to install CCTV cameras with a bigger capacity to store data captured over many days rather than just one day. It was the Claimant's stance that he cannot therefore be used as a scapegoat for the negligence and failures of the Respondent.
4. In reply, the Respondent filed a Statement of Response dated 7th March 2022 stating that prior to the events leading to the termination of the Claimant's employment, he did not perform his duties as required under the contract. It averred that the Claimant did not have a clean record as alleged as he was issued with show cause letters for proceeding for his annual leave in possession of the Company laptop without authorization, and its eventual loss and for failing to report to work. It asserted that in the aforementioned instances, the Claimant was subsequently issued with warnings after being taken through disciplinary process.
5. The Respondent denied that the termination of the Claimant's contract was done unfairly, without lawful cause and or justification. It asserted that as of 2nd November 2021, which was seven (7) days after the 450kgs of crystal menthol were reported missing on 25th October 2021, the Claimant had neither secured the CCTV footages nor recorded any statement yet his core responsibility was to carry out investigations swiftly. According to the Respondent, the Claimant's actions amounted to negligence, carelessness and improper performance of work. It noted that the Claimant was invited to attend a disciplinary hearing scheduled for 11th November 2021 at 12:00pm and was informed of the right to be accompanied during the hearing by a fellow employee of his choice. That when the Claimant attended the disciplinary hearing, he admitted that there was lapse in him finalizing the matter at hand and that he had taken an unnecessary long time in investigating the matter. The Respondent averred that the senior management upheld the Panel's recommendations that the Claimant had misconducted himself and that he be summarily dismissed.
6. The Respondent's position is that after the Claimant's dismissal, he was paid all his dues and benefits via a Cheque dated 3rd December 2021 and issued with a certificate of service. It therefore denied that the Claimant is entitled to the reliefs set out in the statement of claim and stated that his termination from employment was proper and lawful. It further denied that costs should be borne by it and prays that the Claimant's claim be dismissed with costs to the Respondent.
7. The Claimant's Reply to the Statement of Response is dated 5th April 2022. He denied the assertion that he did not perform his duties as required under the contract and averred that it was because of his good performance and achieving set performance targets that the Respondent awarded him a salary increment only four (4) months to termination of his employment. He contended that the Respondent raised two new issues that were substantively dealt with and finalised with disciplinary action taken against him and which therefore do not form part of the reasons for the termination of his contract and thus asked the Court to disregard the same. The Claimant averred that the Respondent never bothered to investigate the staff who were involved and who ought to have known the loss of the



subject goods as soon as it happened and instead chose to target he who was not involved anywhere in the whole process. That the Respondent also declined the suggestion that the Company engages an external investigator with more resources and capacity to investigate the loss of the said goods. The Claimant further denied that he admitted the accusation levelled against him and prays that the Response be dismissed and the Claim allowed with costs to the Claimant.

8. Claimant's Submissions

The Claimant submitted that the reason given for his dismissal, that, "...you failed to carry out investigations swiftly and within reasonable time and securing CCTV footages", is false and invalid hence the dismissal was substantively unfair and unlawful within the meaning of section 45 of the Employment Act. He noted that the Respondent never denied that he had advised it for three years to install CCTV cameras with larger capacity. Moreover, the issues of performance and previous disciplinary proceedings were not stated in the letter of dismissal and as such, cannot be introduced in the pleading to justify a subsequent dismissal on different and unrelated allegations. It was the Claimant's submission that having raised the issue during the disciplinary process that it was untrue he had not started the investigation, it was the duty of the Respondent to call evidence to prove the contrary, but it did not. He cited section 43(2) of the Employment Act providing that the reason for termination of a contract are the matters the employer, at the time of termination of the contract, genuinely believed to exist, and which caused the employer to terminate the services of the employee. That in effect, the law does not allow an employer to raise purported reasons of termination for the first time in Court. The Claimant further submitted that his dismissal was also procedurally unfair as it was not in accordance with fair procedure within the meaning of section 45(1) and (2)(c) of the Employment Act. He argued that to the extent that his investigation report was not discussed or considered during the disciplinary hearing, he was not accorded a fair hearing contrary to Article 50 of the Constitution of Kenya, which entrenches the right to fair hearing for everyone.

9. It was submitted by the Claimant that having demonstrated that the summary dismissal was unfair and unlawful, he is therefore entitled to compensation equivalent to 12 months' of his gross salary pursuant to section 49 of the Employment Act, and to notice pay as under section 36 of the Act. In seeking the reliefs, the Claimant relied on the decision of the Supreme Court in Kenfreight (E.A) Limited v Benson K. Nguti [2019] eKLR agreeing with this Honourable Court that a successful claimant before the trial court can be entitled to various heads of compensation and remedies for unlawful or wrongful termination under section 49 and that it is the judge to exercise his discretion and determine whether to allow any or all of the remedies thereunder.

10. Respondent's Submissions

The Respondent submitted and highlighted the law on termination of contracts of service under sections 41, 43, 44, 45 and 47 of the Employment Act, also espoused by the Court of Appeal in the case of Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR. According to the Respondent, it terminated the services of the Claimant in accordance with the law and for good cause and the grounds for termination of employment were within the law. It invited the Court to consider that the Claimant was subjected to due process and disciplinary hearing before the decision to terminate his services was arrived at and that the Respondent upheld natural justice in processing the separation between it and the Claimant. Moreover, that the Claimant breached his contract of service through his acts of negligence.

11. It was the Respondent's submission that having demonstrated that the termination of the Claimant was lawful, he is not entitled to any remedies and he was already paid his terminal dues composed of all days worked and not paid as at 24th November 2021, any leave earned and not taken, less any advanced



loan, statutory deductions and leave taken and not earned. The Respondent fronted that the award of costs is not cast in stone but courts have ultimate discretion by looking at both the outcome of the suit and the circumstances of each case. That in this matter, the Respondent should therefore be awarded costs on account that the matter was defended and the Claimant had the benefit of Counsel who evaluated the material and advised him to file the matter.

12. The Claimant was dismissed after the Respondent lost some 450kgs of crystal menthol. When the issue of the loss arose, it was alleged the Claimant had failed to secure the CCTV footage. In his defence, the Claimant asserted the Respondent had repeatedly ignored his calls to have enhanced CCTV footage memory which was what led to there being no CCTV footage in respect of the theft. The Claimant asserted the CCTV footage was erased every 24 hours due to limited storage capacity.
13. The Claimant asserts that he conducted speedy investigations into the missing goods, prepared and presented a detailed investigation report with his findings and recommendations but which the Respondent did not act upon. The Claimant had stated that the Respondent's CCTV cameras and system are monitored by CCTV operators and managed by the Respondent's Information and Communication Technology (ICT) specialists, who are the custodians of all access and systems passcodes and not the Claimant. There was an assertion made without reply that the Respondent never installed CCTV cameras in the area the crystal menthol was stored despite having previously advised to do so. Despite the Respondent asserting that prior to the events leading to the termination of the Claimant's employment, he did not perform his duties as required under the contract, the Court finds that the termination of the Claimant's contract was done unfairly, without lawful cause and/or justification. It is the stance of the Court that the Claimant cannot be used as a scapegoat for the negligence and manifest failures of the Respondent to avert the loss. In my considered view, the Respondent must shoulder the burden of the loss since the dismissal was without justification in terms of the law.
14. In considering what to award the Claimant, the Court has considered that the Claimant is still able to secure alternative employment and as such a sum equivalent to 6 month's salary would be more than sufficient. In the final analysis I enter judgment for the Claimant against the Respondent for:-
 - a. A declaration that the dismissal of the Claimant was unfair and unlawful.
 - b. 6 months salary as compensation in terms of section 49 of the *Employment Act* Kshs. 630,000/-.
 - c. Costs of the suit limited to the sum in (b) above.
 - d. Interest at court rates on the sum in (b) above from the date of judgment till payment in full.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JULY 2024

NZIOKI WA MAKAU

JUDGE

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