



Nyakundi v House of Leather t/a Levs Trading Company Limited (Cause 722 of 2016) [2024] KEELRC 2167 (KLR) (30 August 2024) (Judgment)

Neutral citation: [2024] KEELRC 2167 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 722 OF 2016
J RIKA, J
AUGUST 30, 2024

BETWEEN

BENSON ONYONKA NYAKUNDI CLAIMANT

AND

HOUSE OF LEATHER T/A LEVS TRADING COMPANY LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed his Statement of Claim, on 3rd May 2016. He states that he was employed by the Respondent as a Sales Representative, on a monthly salary of Kshs 19,435, beginning December 2005.
2. He was awarded certificate of merit in 2014, with the Respondent recognizing him, as its best worker.
3. On 13th November 2013, a colleague of his, driver Moses Ng'ang'a, was entrusted by the Respondent 48 assorted flowers, to deliver within Nairobi, as shown in delivery note number 5374. Failure of delivery was blamed on the Claimant.
4. He was summarily dismissed on 1st December 2015, on three grounds: that he stole Respondent's products; he lied to the Director; and absconded duty on Saturday.
5. He states that he was not called to any meeting, before dismissal. He was not heard in accordance with Section 41 of the *Employment Act*. He was not given a valid reason, to justify termination.
6. He prays for: -
 - a. Compensation for unfair and unlawful termination equivalent of 12 months' salary at Kshs 233,220.
 - b. Payment of superior and favourable pension service at Kshs 106,893.



- c. Annual leave of 11 years at Kshs 172,673. [unspecified prayer under this item indicated as hs. at Kshs 171,426].
 - d. Withheld salary for the month of November 2015, at Kshs 19,435.
 - e. 12 months' salary in lieu of notice at Kshs 233,220.
 - f. Accumulated interests.
 - g. Costs.
 - h. Any other general damages.
 - i. Any other suitable order.
7. The Respondent filed its Statement of Response, on 31st May 2016. It is conceded that the Claimant was employed by the Respondent as a Sales Representative. He earned a gross monthly salary of Kshs 19,435. He was entrusted 48 assorted flowers by the Respondent, to be delivered to a customer. He was to oversee delivery. The driver's role was to drive the delivery van. The Claimant did not carry with him the delivery note, or invoice, and there was nothing to show delivery made.
 8. He had engaged in similar other criminal activities. He did not account for lost goods. He collected money from customers without remitting to the Respondent. When confronted by the Respondent's Director, the Claimant admitted he used the flowers for personal gain. On 28th November 2016, he absconded and fled from the workplace. The Respondent summarily dismissed him.
 9. Termination was fair and lawful. He did not have pending leave days, at the time he absconded. His salary for the month of November 2015 was retained, to enable the Respondent recover the loss of 48 flower pieces [bouquets?].
 10. The Respondent prays the Court to dismiss the Claim with costs.
 11. The Claimant gave evidence on 17th November 2021 and 8th March 2023, when he rested his case. General Manager, Samuel Karanja, gave evidence for the Respondent, closing the hearing, on 28th September 2023. The Claim was last mentioned before the Court on 12th July 2024. The record indicates there was various mentions after hearing concluded, during which none of the Parties attended Court.
 12. The Claimant relied on his witness statement dated 26th April 2016, in his evidence-in-chief. He restated his employment history, and the terms and conditions of service with the Respondent. It was not his duty to deliver flowers. The driver Moses Ng'ang'a was responsible.
 13. Cross-examined, he told the Court that he did not have evidence of racial discrimination against the Respondent. The reasons stated in the letter of termination, in justifying the decision, were not valid. The flowers were given to the driver for delivery, from Town branch to Adams Branch, Nairobi. The Claimant last worked on 25th November 2015. He was called to a consultative meeting by Rosemary his supervisor. The Branch Manager and business owner, were also present. He was shown a delivery note, alleging he did not deliver the flowers. He explained that it was the driver's role, to deliver the flowers. He was asked to leave, and would be recalled. He was not recalled. He did not abscond. He did not collect money from a customer, and fail to remit to the Respondent.
 14. Redirected, he told the Court that 48 pieces of assorted flowers were entrusted the driver. Delivery note states it was to be delivered by Moses Ng'ang'a, the driver. The Claimant was not involved. He was



- advised to leave after the meeting and would be recalled. He was not recalled. He forwarded all money received from customers, to the Respondent.
15. Samuel Karanja relied on his witness statement and documents filed by the Respondent, in his evidence-in-chief. The Claimant absconded while under investigation for theft of flowers. He conceded that he took the flowers, for his own use. He was grilled on 27th November 2015 by the Director, and made this concession. He disappeared on 28th November 2015. The Respondent learnt later that the Claimant was visiting its customers and collecting money, alleging it was on behalf of the Respondent. The Director gave orders for his summary dismissal, on 1st December 2015.
 16. Cross-examined, Karanja told the Court that the Claimant asked the driver to get the flowers from Town to Adams Arcade. The driver signed delivery note on the instructions of the Claimant. They proceeded to deliver to a customer at Mombasa Road, in Nairobi. There was no document to show delivery on the customer. The Respondent reported the matter to the Police. There was no criminal prosecution against the Claimant. There were various other complaints against the Claimant concerning money collected by the Claimant, but not remitted to the Respondent. The Respondent attempted to reach him, after he absconded. He had brothers who worked for the Respondent, who told the Respondent that he was out of Nairobi.
 17. The issues are whether the Claimant's contract was terminated by the Respondent fairly; and whether he merits the prayers sought.

The Court Finds: -

18. The Respondent issued the Claimant a letter of summary dismissal, dated 1st December 2015.
19. Preceding the letter, there is no record of a disciplinary hearing. The letter refers to a meeting where the Claimant was interrogated by the Director, regarding delivery of assorted flowers.
20. It was not a disciplinary hearing, but an interrogation, in which the Claimant was said to have lied to the Director. His alleged lies, on interrogation, were part of the reasons he was dismissed.
21. There is no record of a letter to show cause, or investigation, that took place before the disciplinary sanction.
22. The Claimant was merely told that he had been summarily dismissed, following the interrogation led by the Director.
23. There were no specified charges communicated to him. There was no invitation to a disciplinary hearing, presided over by a recognized disciplinary panel or committee, separate from the investigator, the Director and the Claimant's supervisor. He was not called to a properly convened disciplinary forum, and advised about his right to attend in the company of a colleague or trade union representative.
24. The Respondent alleged that the Claimant absconded on Saturday 28th November 2015, which was one of the busiest days, in the Respondent's business calendar.
25. According to the Claimant, he was instructed by the Director, upon interrogation to stay away, and would be recalled later, which never happened.
26. The Court is persuaded by the version of events given by the Claimant. It is not plausible as stated by the Respondent, that after interrogation, the Respondent expected the Claimant to report for duty the following day as usual.



27. He would have been expecting to hear from the Director, and the Respondent would have been expected to communicate its findings and next course of action to the Claimant, at the close of interrogation.
28. It is highly unlikely that he was expected to report to work 'as usual.' The most plausible explanation, is that he was advised to keep away, and would receive communication on the decision taken by the Respondent.
29. Unfortunately, the Respondent opted to terminate the Claimant's contract at will, foreclosing his procedural protections, given to him by Sections 41 and 45 of the *Employment Act*.
30. Even after he was said to have absconded on 28th November 2015, there was no effort made by the Respondent to call the Claimant to a disciplinary forum, and hear him on the charge of absconding, and the other charges of theft and lying.
31. The Respondent's witness testified that the Claimant had placed himself out of Nairobi. His brothers who worked for the Respondent, told this to the Respondent. If this is correct, why did the Respondent not seek the aid of the Claimant's brothers in reaching him, and subjecting him to disciplinary hearing? It is hard to accept the Respondent's suggestion, that the Claimant placed himself beyond the reach of the Respondent, thus making it impossible to subject him, to a structured disciplinary process.
32. Instead of calling the Claimant to order, the Respondent appears to have simply expanded its potpourri of accusations, against the Claimant. At paragraph 10 of the Statement of Response, the Respondent raises other grounds to justify termination, including soliciting of monies from customers. The particulars of breach, pleaded by the Respondent at paragraph 10, betray lack of specific reason by the Respondent, to justify termination. They include omnibus accusations such as, indiscipline, dishonesty, negligence, recklessness and breach of conduct. Such generic accusations cannot pass for valid reasons. The Respondent needed to charge the Claimant specifically, and give him the opportunity to defend himself.
33. The incident surrounding the delivery of flowers was not properly articulated by the Respondent. The delivery note on record was signed by the driver Moses Ng'ang'a. There was nothing to tie down the Claimant to any mischief, concerning the delivery of the flowers. The driver was recorded to have been entrusted delivery. He was not called by the Respondent to show that he was acting on the instructions of the Claimant, in furtherance of any mischief, surrounding the flowers. The delivery note was in the name of the driver, and there was nothing linking the Claimant to delivery of the flowers.
34. If there was any concession of wrongdoing on the part of the Claimant upon interrogation, it ought to have been captured through documentation. The Managing Director who allegedly was the recipient of the Claimant's confession, did not give evidence before the Court.
35. Termination of the Claimant's contract was procedurally flawed, and substantively unsound. It fell far short of the minimum standards of fairness, under Sections 41, 43 and 45 of the *Employment Act*.
36. The Claimant worked for the Respondent from December 2005 to December 2015, a period of 10 years, not 12 years as pleaded. He was diligent and rated the best Employee, in 2014. Although the Respondent made all manner of accusations against the Claimant, none was established against him, and his longevity in service, is testament enough, to his diligence and loyalty to the Respondent. He did not cause or contribute to the circumstances leading to termination of his contract. He did not inform the Court if he secured alternative employment. He earned a monthly salary of Kshs 19,435.
37. He is granted equivalent of 12 months' salary in compensation for unfair termination at Kshs 233, 220.



38. His prayer for notice pay equivalent of 12 months' salary has no foundation in law and fact. He is granted 1-month salary in lieu of notice at Kshs 19,435.
39. His prayer for annual leave is unclear. He prays for annual leave of 11 years at Kshs 172,673, and then includes under the same prayer, a mysterious item identified as hs. at Kshs 171,429. There is no clarity and evidence to support these prayers.
40. There is similarly no clarity and evidence to the prayer for superior pension. Superior to what? Under which law? The prayer is declined.
41. There was no justification in the Respondent's withholding of the Claimant's November 2015 salary. It is pleaded at paragraph 24 of the Statement of Response, that the salary was withheld, to recover the cost of the 48 flowers, said to have been stolen by the Claimant. The Court has found no evidence of theft of flowers by the Claimant, and withholding of the Claimant's salary, under Section 19[1] of the *Employment Act*, as cited by the Respondent, is not sustainable.
42. The Respondent shall pay to the Claimant his November 2015 salary at Kshs 19,435.
43. Costs to the Claimant.
44. Interest granted at court rate, from the date of Judgment, till payment is made in full.

In sum, it is ordered: -

- a. It is declared that termination of the Claimant's contract by the Respondent was unfair and unlawful.
- b. The Respondent shall pay to the Claimant equivalent of 12 months' salary in compensation for unfair termination at Kshs 233,220; notice at Kshs 19,435; and salary for the month of November 2015 at Kshs 19,435 – total Kshs 272,290.
- c. Costs to the Claimant.
- d. Interest granted at court rates, from the date of Judgment, till payment is made in full.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 30TH DAY OF AUGUST, 2024.

JAMES RIKA

JUDGE

