



Muthoga v Metro Logistics Limited (Employment and Labour Relations Cause 1235 of 2018) [2024] KEELRC 2273 (KLR) (24 September 2024) (Judgment)

Neutral citation: [2024] KEELRC 2273 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1235 OF 2018
K OCHARO, J
SEPTEMBER 24, 2024**

BETWEEN

JUDY WANGECI MUTHOGA CLAIMANT

AND

METRO LOGISTICS LIMITED RESPONDENT

JUDGMENT

Introduction

1. The Claimant instituted this suit vide a Memorandum of Claim dated 19th July 2018 seeking orders that: -
 - a. The termination of the Grievant/Claimant by the Respondent be declared unlawful and unfair.
 - b. Terminal dues as enumerated in 4(h) (a-d) above.
 - c. Interest on (b) above at commercial rates as published by the Central Bank of Kenya from when they became due.
 - d. The Respondent does issue the Claimant with a Certificate of Service.
 - e. The Respondent will pay this claim's costs with interest at court rates.
2. Alongside the Memorandum of Claim dated 19th July 2018, the Claimant filed a Verifying Affidavit sworn on the same day; the Claimant's List of Documents dated 19th July 2018; undated Witness Statement; and a List of Witnesses dated 19th July 2018.
3. In response to the Memorandum of Claim, the Respondent filed a Statement of Response dated 4th May 2022. They also filed a List of Witnesses dated 7th July 2022; Witness Statement of Vivienne Nelima Wafula dated 7th July 2022; and the Respondent's List of Documents dated 7th July 2022.



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

Claimant's case

5. The Claimant's case is that she was employed by the Respondent as a Cleaner on 12th June 2013 at a monthly salary of Kshs 15,000/-. On 1st April 2016, she was promoted to the position of Customer Relations Officer. The Claimant states that on reporting to work on 23rd October 2017, her colleagues informed her that a car pressure machine was missing from the Respondent's premises. She had been on duty the previous day, on 22nd October 2017 and handed over in the evening at around 5 p.m. without any issues.
6. The Claimant states that she informed her superiors of the incident through her email on 23rd October 2017 at around 9.00 am. Subsequently, she and her colleagues were summoned to a meeting at the security manager's office but the meeting did not take off as he was not in his office at the material time.

Many months later, on 16th January 2018, she was summoned by the Human Resource Manager, who accused her of mismanaging the Company's fuel K-Card. The Manager issued her a letter that placed her under an investigatory suspension. Subsequently, on 24th January 2018, she was issued with a dismissal letter dated the same day. The reason for dismissal was set out as her negligence resulting in the loss of a car pressure cleaner valued at Kshs 815,780/-.
7. The Claimant asserts that the Respondent decided to dismiss her from employment without first; carrying out any investigations; allowing her an opportunity to be heard before; and issuing her with a termination notice. She states further that the incident was never reported to any police station, despite the missing machine being quite valuable. Her dismissal from employment was without any justifiable cause.
8. The Respondent neglected and or refused to pay her terminal dues.
9. Cross-examined by Counsel for the Respondent, the Claimant stated that she first came into the employment of the Respondent as a cleaner in 2013, but was later promoted to the position of Customer Relations. In this position, she worked with various departments and could deal directly with the Respondent's Customers.
10. She further testified that by looking at her witness statement, one could rightly garner the impression that the Respondent had two issues against her, namely, the loss of the machine and the mismanagement of the K-cards.
11. Contrary to the Respondent's assertion she didn't embezzle any funds or mismanage the card. Further, no returned consignment was sold by her.
12. The Claimant admitted that the suspension letter mentions a disciplinary hearing, on 16th January 2018. According to her, she attended a meeting on the date. Two drivers were also in the meeting. She explained her side of the story.
13. At separation, she had 21 earned but unused leave days.



Respondent's case

14. The Respondent presented Ms. Vivianne Nelima, Its Human Resources Manager to testify on its behalf. The Witness urged the Court to adopt her witness statement as her evidence in chief and admit the documents filed herein by the Respondent as its documentary evidence.
15. From the Respondent's pleadings and its witness's evidence, the Respondent's case is not complex but straightforward. It first employed the Claimant as a cleaner and later as a customer care assistant. However, she was not a diligent and honest worker as she contends. There were several complaints about her conduct and performance which culminated in the issuance of several warning letters against her.
16. In particular, it is the Respondent's case that the Claimant's contract obligated the Claimant to dedicate all her time to the Respondent's business, however in contravention of the terms of her contract she was involved in other business than that of the Respondent. She embezzled company funds amounting to between Kshs 300,000/- and Kshs 600,000/- through the company's fuel K-Card; she dishonestly resold a returned consignment without the company's knowledge or consent thereby obtaining financial gain from the sale; she caused the loss of a company asset worth Kshs 615,780/-; she manipulated drivers into fueling less than the requested amounts and into giving her the balance in cash; and she conspired with her juniors to sell alcohol returned. Through her actions, she acted against company policies.
17. It is averred that a disciplinary hearing was held for the Claimant on 16th January 2018, Resultantly, she was found guilty of mismanaging the company fuel card, re-sale of the returned consignment, and being willfully negligent resulting in the loss of the company asset. She was dismissed from employment and all her terminal benefits were paid to her.
18. Cross-examined by Counsel for the Claimant, the witness testified that she came into the employment of the Respondent in 2019, after the Claimant had been dismissed. Though in her evidence in chief, she mentions that the Claimant was issued with warning letters, none of the letters have been presented to the Court as evidence.
19. Notwithstanding the allegation that the Claimant embezzled the Respondent's funds, the Respondent never laid a complaint against her before the police. She has never been charged with any criminal offence.
20. The witness asserted that there was a disciplinary hearing on the 16th of January 2018. However, the minutes thereof have not been tendered before the Court in evidence. The Claimant confirms that she attended a meeting on this said date. Before she was dismissed, she was given a chance to defend herself.
21. There were two dismissal letters, one dated 24th January 2018 and another, on 25th January 2018. The Claimant was paid her terminal dues. However, the Respondent has not presented any document to demonstrate the payment.
22. Upon the Court seeking clarification, the witness testified that the disciplinary hearing was conducted before the Claimant was placed under suspension. Further, the Claimant wasn't issued with a show-cause letter.
23. After investigations were concluded, the Respondent undertook a disciplinary hearing against the Claimant on the 24th of January 2018, the same day she was dismissed from employment. The dismissal letter doesn't mention that there was a disciplinary hearing conducted.



Submissions by the Parties.

24. In line with the Court's directions issued on 13th July 2023 that the parties file their respective written submissions, the Claimant filed a submission dated 14th August 2023 together with a List of Authorities dated the same day, and the Respondent theirs dated 1st November 2023, and a List and Bundle of Authorities.

Analysis and Determination

25. 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 Respondent unfairly terminated the Claimant's employment;
 - b. Whether the Claimant is entitled to the reliefs sought.

Whether the Respondent unfairly terminated the Claimant's employment

26. Called upon to consider and determine whether or not an employee's employment was fairly terminated or whether or not an employee was fairly summarily dismissed from his or her employment, the Court has to interrogate the presence or otherwise of two statutory aspects in the termination or dismissal, namely procedural and substantive fairness. See [Pius Machafu Isindu](#) [2017] eKLR, cited by Counsel for the Claimant.
27. Procedural fairness speaks to the process leading to the decision to terminate or dismiss. Section 41 of the [Employment Act](#) provides a mandatory procedure that any employer contemplating termination of an employee's employment or summarily dismissing an employee must conform with. It isn't difficult to conclude that the procedure given in this said provision of the law embodies the components, notification -the employer must notify the employee that it contemplates acting against him or her and the grounds spurring the intention; hearing- the employer must accord the employee affected an adequate opportunity to prepare and make representation[s] on the intention and grounds. Conjoined with this right to hearing is the right to accompaniment. The affected employee should be allowed to be accompanied by a colleague of his or her choice, or a trade union representative [where the employee is a member of a trade union]; and consideration- the employer must consider the representations made, before taking a final decision.
28. The Claimant asserted that she was summarily dismissed from her employment and that the dismissal was procedurally unfair. The Respondent on the other hand maintained that it adhered to the cannons of procedural fairness contemplated in the Section stated above, as the Claimant was given a chance to defend herself. Duty lay upon it to prove the adherence.
29. I have carefully considered the material placed before me by the Respondent in a bid to discharge the legal duty, I fear, it failed to prove that procedural fairness was present in the process that culminated in the dismissal of the Claimant from employment. The Respondent's witness's evidence on this issue was contradictory, unsure, and unpersuasive. When this Court sought clarification from her, the witness first stated that the disciplinary hearing was held before the suspension. Under the same breath, the witness testified that a disciplinary hearing was held on the 24th of January 2018, the same day she got summarily dismissed from employment.
30. The Claimant's position was that on 16th January 2018, she was called into the Human Resource Manager's office, where the matter was raised and she gave her side of the story. According to her, this meeting was not a disciplinary hearing. She had not been issued with a notice to show cause prior



to the meeting. In my view, a true construction of the provisions of Section 41 of the *Employment Act* reveals that it cannot be available to the employer to label any meeting “a disciplinary hearing”. A disciplinary hearing must be preceded by an invitation to the affected employee for the hearing. Under the invitation, the employer’s intention to act against the employee, the charges against him or her must be brought forth, and the date, time and place of the hearing, too. Undeniably, the Respondent didn’t demonstrate this.

31. The Respondent failed to place before this Court any minutes from which it can be deduced that, indeed there was a disciplinary hearing conducted either on the 16th of January or 24th of January 2024. Further, why two disciplinary hearings, the Respondent failed to explain.
32. I am of the view, that there was no disciplinary hearing held as alleged by the Respondent.
33. Considering the totality of the foregoing premises on procedural fairness, I conclude that the summary dismissal of the Claimant was procedurally unfair.
34. I now turn to consider the second aspect, substantive justification. Section 43 of the *Employment Act* places a duty upon the employer in a dispute regarding the termination of an employee’s employment, to prove the reason for the termination, otherwise, by dint of the stipulations of Section 45 of the Act, the termination shall be deemed unfair. It cannot suffice for the employer to just assert that the employee was terminated for this reason or the other, without evidence that, truly, the reason[s] genuinely existed.
35. Section 45 [2] places a further duty upon the employer to prove that the reason[s] was valid and fair.
36. In the summary dismissal letter dated 24th January 2018, the reason for termination is given as the Claimant’s willful negligence towards company assets as a supervisor. The summary dismissal letter reads in part:

“On 22nd October 2017, it was reported to the company that during the night shift of 22nd October 2017, a company asset namely; Car pressure cleaner HD1050 DE (Serial No. 010813) was stolen. This company asset is valued at Kshs 615,780.00

You were placed under investigation which has now been closed. The findings file has sighted (sic) your willful negligence towards company assets and as a supervisor, you are expected to have exerted extreme caution and care on such assets. This major financial loss cannot be recovered. For this reason, the company has terminated your contract with immediate effect.

The company has terminated your contract on willful negligence.”

37. Undoubtedly, the Claimant was suspended from employment on the 16th of January 2018, under a letter of the same date. The letter read in part;

“Following the disciplinary hearing held on 16th January 2018, in the HR office, you have been accused of having been involved in the mismanagement of the Company’s K-card and re-sale of returned consignment that belong to the company which is being handled as fraudulent activity under investigation. With immediate effect, you are now under investigation and on suspension without pay until the outcome of the security report.

.....”

38. It is clear that the Claimant was not suspended on an accusation of willful negligence in the discharge of her duties, causing the Respondent a loss. The Respondent’s witness’s evidence and its pleadings



didn't at all mention that the Claimant was charged with the misconduct of willful negligence hence it being the ground for her dismissal from employment.

39. It is confusing and incapable of being believed that an employer can conduct a disciplinary hearing, suspend the employee and set off to carry out investigations, not unless there is an express indication that the investigations are further in nature and aimed at unearthing or clarifying matters that have arisen during the hearing. In my view, the three events should ordinarily be sequential unless there is an exceptional circumstance. The sequence is, an investigatory suspension, followed by investigations then a disciplinary hearing. Where inexplicably this sequencing, or an exceptional circumstance, is absent, one cannot be off the mark to gather an impression that the action of dismissal of an employee from his employment was not valid and fair, but one predetermined.
40. The Respondent presented to this Court two termination letters, one dated 24th January 2018, and another dated 25th January 2018. Both letters had different accounts for the dismissal of the Claimant. The Respondent's witness indeed admitted when the Court sought clarification from her that there were two dismissal letters. It is puzzling, that an employee who was summarily dismissed on the 24th January 2016, could again be dismissed the following day on a different ground. For this puzzling circumstance, an elaborate and genuine explanation was expected of the Respondent, however, none was put forth.
41. The Claimant denied ever receiving the letter dated 25th January 2018. The Respondent didn't even prove that it was served on her. I am convinced that the letter dated 25th January 2018 was an afterthought, only calibrated after the Respondent had a second look at the suspension letter, its pleadings and its witness's statement. Put in another way, the letter was crafted only for this case.
42. The long and short of the forgoing, is that the Claimant did not act with equity. The summary dismissal was not substantively justified. The Respondent didn't act with the forthrightness and candidness expected of an employer.
43. In the upshot, I find that the summary dismissal of the Claimant from her employment was both procedurally and substantively unfair.

Whether the Claimant is entitled to the reliefs sought.

44. The Respondent's witness asserted that the Claimant was paid her terminal dues. However, pressed under cross-examination, she admitted that the Respondent didn't tender in evidence any document[s] to prove the payment. If indeed, there was any payment made, nothing could have been easier than the Respondent tendering in evidence documents in proof. Further, the Court notes that the witness's evidence was very sketchy regarding how much was paid and or the date of payment if at all there was a payment. As a result, I am persuaded that the dues were not paid.
45. In my view, the Claimant's employment was in nature terminable by a twenty-eight days' notice under the provisions of Section 35 of the *Employment Act*. No doubt, neither the notice was issued nor payment in lieu was made. Consequently, under Section 36 of the Act, the Claimant is entitled to notice pay.
46. Concerning leave pay, the Respondent did not controvert the Claimant's evidence that at her dismissal from employment, she had 21 days earned but unused leave days. As the keeper of employee records under section 74 of the Act, the Respondent was reasonably expected to demonstrate either that, the Claimant duly utilized her leave days or that she was compensated for the untaken leave days. Her claim under this head succeeds.



47. Section 49[1][c] of the *Employment Act* bestows authority on this Court to grant a compensatory award for an employee who has successfully challenged his or her employer's decision to terminate her or his employment. However, the grant is discretionarily made. It depends on the peculiar circumstances of each case. I have carefully considered; the Respondent's action[s] that I have hereinabove described as lacking forthrightness, candidness, and equity; that the Respondent inexplicably failed to adhere to the requirements of the law as regards procedural and substantive justification, and the length of time the claimant was in the employment of the Respondent, and hold that she is entitled to the compensatory relief in the sum equivalent to her six months' gross salary.
48. It is not in dispute that the Claimant was earning a gross salary of Kshs 50,000/- at the time of termination from employment as evidenced by her pay slip for December 2017, which is produced before the court.
49. It is trite law that per Section 51 of the *Employment Act* 2007, the Claimant should be issued with a Certificate of Service.
50. In the upshot, Judgment is hereby entered for the Claimant in the following terms: -
- a. A declaration that she was unfairly dismissed from her employment.
 - b. The Respondent to pay her: -
 - i. 1 month's salary in lieu of notice Kshs 50,000/-
 - ii. Compensation for earned but untaken leave days Kshs 35,000/-
 - iii. Compensation for unfair termination
(Kshs 50,000/- x 6 months) Kshs 300,000/-
Total Kshs 385,000/-
 - c. The Claimant be issued with a Certificate of Service within 30 days of this Judgment.
 - d. Interest on the sums awarded under (b) above at Court rates from the date of this Judgment until payment in full.
 - e. The Respondent shall bear the costs of this suit.

READ, DELIVERED AND SIGNED AT NAIROBI THIS 24TH DAY OF SEPTEMBER 2024

OCHARO KEBIRA

JUDGE

In the presence of:

No appearance for the Claimant

Ms Tuwei 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

