

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
NAIROBI

ELRC CAUSE NO E773 OF 2021

GEORGE KAMAU NGUGI.....
.....CLAIMANT

VERSUS

FREIGHT IN TIME
LTD.....RESPONDENT

JUDGMENT

Background

1. The Claimant avers that the Respondent hired his services as a Warehouse Manager from 10th October 2018. He contends that he served the Respondent diligently until 26th October 2020 when the latter unlawfully terminated his contract of service.
2. The Claimant contends that the Respondent made unsubstantiated accusations against him and did not accord him an opportunity to be heard before his contract was terminated. He further contends that the Respondent terminated his services arbitrarily without warning.
3. The Claimant avers that the Respondent did not adhere to the dictates of *the Constitution, the Employment Act* and the rules of natural justice whilst severing the employment relation between them. He contends that the Respondent did not pay him his exit dues on termination of the relation.

4. The Claimant avers that for the duration he served the Respondent, he was not allowed to utilize his annual leave days. As such, he claims for pay in lieu of the accrued leave days.
5. On the Respondent's part, it admits that it engaged the Claimant's services as a Warehouse Manager in October 2018. It further affirms that his services were terminated on 26th October 2020.
6. The Respondent contends that the Claimant was dismissed from employment when he breached the terms and conditions of his contract of service. It asserts that he mishandled its customers' goods causing loss of revenue. It further accuses him of failure to present the warehouse monthly billing data thus disrupting completion of records in the accounts department.
7. The Respondent accuses the Claimant of various other malpractices. These include: dispatch of customer orders to the wrong delivery points; delivery of merchandise without accompanying documentations; and double delivery of merchandise.
8. The Respondent asserts that it was the Claimant's duty to ensure flawless handling of deliveries. It avers that due to these malpractices, it suffered loss of revenue and clients were unhappy with its services.
9. The Respondent contends that the Claimant failed to heed various warnings which were issued to him on account of the aforesaid and other infractions. It avers that despite the

warnings, the Claimant continued to commit other infraction including delay in posting weekly cash flow projections thereby causing imbalance in its cash flow.

10. The Respondent avers that these lapses forced it to terminate the Claimant's services. It contends that it computed and paid his terminal benefits, including his outstanding leave dues, thus lawfully ending the employment relation between them.
11. The Respondent denies the Claimant's contention that it did not grant him an opportunity to be heard. It contends that contrary to the Claimant's assertion, it allowed him a chance to challenge his dismissal from employment through an appeal.

Issues for Determination

12. After evaluating the pleadings, evidence and submissions by the parties, the following issues arise for determination:-
 - a) Whether the Claimant's contract of service was terminated in accordance with the law.
 - b) Whether the Claimant is entitled to the reliefs which he seeks through this claim.

Analysis and Determination

13. The law which governs termination of contracts of service is encapsulated in *the Employment Act* as read with *the Constitution of Kenya 2010* and *the Fair Administrative Action Act*. The *Employment Act* provides that a contract of service can only be lawfully terminated if there is a valid reason to support the decision and if the process of

termination of the contract upholds the dictates of fair procedure.

14. On the other hand, *the Constitution of Kenya 2010* entitles an employee to the rights to fair labour practice and fair administrative action. These rights lie at the heart of fair release of an employee from employment.
15. The right to fair administrative action is operationalized through *the Fair Administrative Action Act*. This piece of legislation, inter alia, underscores the need for fair hearing before an administrative action or decision which impacts on an employee's contract of service is rendered.
16. In the instant case, the Claimant contends that the Respondent did not have justification to terminate his services. On the other hand, the Respondent has set out a plethora of complaints against the Claimant which it contends supported its decision to terminate his services.
17. During trial, the Claimant was questioned about an incident which involved double delivery of items to a customer. Whilst he admitted that the incident occurred, he denied responsibility for it. It was his case that the delivery was done by a member of staff in his department without his involvement.
18. The Claimant's attempts to avoid responsibility for the flawed delivery process cannot fly. The goods that were double delivered were under his control as the Warehouse Manager. As such, it was his responsibility to ensure that the

procedure for their release to customers did not provide room for double delivery.

19. The fact that there was double delivery is testimony of the fact that the Claimant had not put in place mechanisms to avoid the malpractice. As such and based on this evidence, the court is convinced that the Respondent had legitimate grounds to consider terminating his services.
20. Under section 43 (2) of *the Employment Act*, an employer is entitled to terminate an employee's services if he has genuine reasons to believe that a valid ground for termination of the contract exists (see ***Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others [2019] eKLR***). In the instant case, whilst the Claimant conceded that there was double delivery of goods to a customer, he did not provide a cogent explanation for the occurrence. Yet, the incident affected his department. In the premises, the court is satisfied that the Respondent had reasonable grounds to genuinely believe that the incident was occasioned by the Claimant's failure to properly oversee the running of the department.
21. Whilst the evidence on record demonstrates that the Respondent had valid reasons to terminate the contract of service between them, there is no evidence that it complied with the procedural requirements for fair release of the Claimant from employment. Section 41 of *the Employment Act* as read with section 4 of *the Fair Administrative Action Act* obligated the Respondent to inform the Claimant of the

charge against him before hand and accord him a hearing before the decision to terminate his services could be made. From the record, this was not done.

22. There is no evidence to demonstrate that before the Respondent issued the Claimant with the letter for summary dismissal from employment, it issued him with a notice to show cause letter setting out the charges against him. There is no evidence that the Respondent invited the Claimant to a hearing before his services were terminated.
23. The Respondent's failure to observe these procedural strictures vitiated the legitimacy of the decision to terminate the Claimant's services. As such, the court declares the decision as procedurally flawed and hence unlawful.
24. The Respondent asserts that it allowed the Claimant a chance to challenge the decision on appeal. As such, it contends that it accorded him an opportunity to be heard.
25. The law requires an employee to be heard before his contract of service is terminated (see sections 41, 43 and 45 of *the Employment Act*). Failure to accord the employee a disciplinary hearing before terminating his contract cannot be cured by purporting to hear him on appeal. This is, so to speak, putting the cart before the horse.
26. As a matter of law, the employee is entitled to utilize the right to be heard both during the disciplinary hearing and on appeal. As such, denial of the right at any of the two stages vitiates the disciplinary process.

27. In their submissions to court, the Respondent's lawyers assert that their client provided evidence to demonstrate that: it issued the Claimant with a notice to show cause letter setting out the particulars of the offense against him; that the Claimant offered a written response to the show cause letter; that the Respondent invited the Claimant to appear before a disciplinary panel for hearing of his case; that the invite informed the Claimant of the charges against him, the date of the hearing and the right to be accompanied; that the Claimant appeared before the disciplinary panel where he was heard; and that the disciplinary panel reviewed the evidence tendered before it before summarily dismissing the Claimant from employment.
28. The court has reviewed the record and has not seen evidence to support the contention by counsel. There is no evidence that the Respondent processed the Claimant's case as alleged by counsel before he was issued with the letter dated 26th October 2020 terminating his services.
29. The only evidence of an invite that was extended to the Claimant relates to his appeal: not the disciplinary hearing. However and as pointed out earlier, the disciplinary and appeal hearings are distinct processes and should not be conflated. And the failure to accord an employee a hearing at the disciplinary stage before terminating his services cannot be cured by a hearing at the appeal stage.
30. Having found that the decision to terminate the Claimant's services was procedurally flawed, it follows that he is

entitled to a declaration that his contract of service was unlawfully terminated. It is so declared.

31. An employee whose services are improperly terminated is entitled to compensation for unfair termination of his contract of service. However, under section 49 of *the Employment Act*, the court is required to take into account various factors in determining the quantum of compensation. These include whether the employee's conduct contributed to the decision to terminate his services.
32. In the instant case, the evidence on record shows that the Claimant's actions contributed to the decision to terminate his services. Having regard to this, the court awards him compensation for unfair termination of his contract which is equivalent to his salary for two (2) months.
33. According to the contract of service between the parties, the Claimant's gross monthly salary was Ksh. 130,000.00. As such, the court awards him Ksh. 260,000.00 as compensation for the unfair termination of his contract.
34. The Claimant prays for salary in lieu of notice. However, the court notes that his services were terminated for dereliction of duty which is a ground for gross misconduct under section 44 of *the Employment Act*. This ordinarily disentitles an employee to notice pay.
35. But for the procedural flaws in termination of the contract of service between the parties, the court notes that the Respondent had valid reasons to summarily dismiss the

Claimant from employment. For this reason, the court declines to grant the prayer for notice pay.

36. The Claimant has prayed for pay in lieu of accrued leave days. He contends that the Respondent did not allow him time to utilize his leave days.
37. The Respondent denied this assertion. It asserted that the Claimant utilized his leave days piecemeal and that he was paid for the balance.
38. Despite this contention, the Respondent did not provide evidence to demonstrate that the Claimant had utilized part of his leave days. The only information it provided on the matter was the bare entry in its computation of the Claimant's final dues dated 23rd November 2020 in which it indicated that the Claimant's leave balance was 5.5 days. However, it did not provide data to back this assertion.
39. Under sections 10 (6) and 74 (1) (f) of *the Employment Act*, the Respondent was duty bound to keep the Claimant's leave records. As such and by virtue of 112 of *the Evidence Act*, the burden lay on it as the party with special knowledge of the matter to prove that the Claimant had indeed utilized his leave days (see also ***Jackson Muiruri Wathigo t/a Murtown Supermarket v Lilian Mutune [2021] eKLR***).
40. The Respondent having failed to discharge this burden, the court finds that there is no cogent evidence to discount the Claimant's case that he was not allowed to utilize his accrued leave days. As such, he is entitled to be paid for the

accrued leave days less what was paid to him on this account as part of his exit dues.

41. Under section 28 of *the Employment Act*, the Claimant was entitled to a minimum of 21 annual leave days with full pay for each of the two years he worked for the Respondent. This, inclusive of rest days in a month, amounts 28 days in every year. Having regard to the foresaid, the court awards him leave pay which is equivalent to two months' salary, that is to say, Ksh. 260,000.00 less the sum of Ksh. 27,500.00 which was paid to him as part of his exit dues under this head.
42. The award to the Claimant is subject to the statutory deductions that were applicable at the time his contract was terminated.
43. The court awards the Claimant interest on the sum awarded at court rates from the date of the decision.
44. The Claimant has prayed for a Certificate of Service. On the other hand, the Respondent alleges that it has already issued him with this document.
45. Despite the position expressed by the defense on the matter, it is noteworthy that the Respondent tendered the certificate in evidence. How did it (the Respondent) tender in evidence the very same document it contends it had already furnished the Claimant? The fact that it (the Respondent) was able to do this can only mean that although the certificate was prepared, it was not handed to the Claimant. As such, the court orders the Respondent to provide the

Claimant with the requisite Certificate of Service in terms of section 51 *of the Employment Act*.

46. The court awards the Claimant costs of the case.

Summary of the Findings and Award

47. The court makes the following findings and attendant orders:-

a) The court declares that the Claimant's contract of service was terminated unlawfully for want of compliance with the dictates of fair procedure.

b) The Claimant is awarded compensation for unfair termination of his contract in the sum of Ksh. 260,000.00.

c) The court declines to award the Claimant pay in lieu of notice to terminate his contract of service.

d) The Claimant is awarded accrued leave pay of Ksh. 232,500.00.

e) The award is subject to the applicable statutory deductions at the time the contract of service between the parties was terminated.

f) The Claimant is awarded interest on the amount awarded at court rates from the date of this judgment.

g) The Respondent is ordered to provide the Claimant with the requisite Certificate of Service.

h) The Claimant is awarded costs of the case.

Dated, signed and delivered on the 26th day of February, 2026

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