

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT  
NAIROBI**

**ELRC CAUSE NO E346 OF 2022**

**THEOPHILUS MUTHOKA**

**NZIOKA.....CLAIMANT**

**VERSUS**

**NORBROOK KENYA LIMITED.....**

**RESPONDENT**

**JUDGMENT**

**Background**

1. The parties to the dispute had an employment relationship which commenced sometime in October 1996. The Claimant was initially engaged as a production operative but was subsequently promoted to the position of supervisor.
2. The Claimant avers that throughout the relationship, he served the Respondent with diligence and dedication. However, he contends that on 18<sup>th</sup> March 2022, the Respondent served him with a notice to show cause letter through which it made outrageous accusations against him. He further avers that the letter invited him for a disciplinary hearing on 24<sup>th</sup> March 2022.
3. The Claimant avers that the allegations against him included the following: -
  - a) That he had failed to advise an employee who was found scrolling on her phone during work hours.

- b) That he had failed to advise an employee who was found asleep whilst on duty.
  - c) That he had failed to record and report the incident involving the employee who was found asleep on duty.
  - d) That he had failed to deduct lost man-hours from the employee who was found asleep at work.
4. The Claimant contends that he responded to the show cause letter. He avers that contrary to the Respondent's accusations, he had confronted and reported the employee who was found asleep at work. He asserts that the said employee had the habit of disregarding instructions from him despite the fact that he was her supervisor.
  5. The Claimant contends that when the employee was confronted about her misconduct, she resorted to the use of vulgar language and even falsely accused him of sexually harassing her. He contends that despite the employee's misconduct, he did not deduct lost man-hours from her immediately because she was still under investigation.
  6. The Claimant further avers that the Respondent accused him of sleeping on duty. However, he denies this accusation. He contends that the video clip which the Respondent relies on to anchor the accusation lasted for only a few seconds when he had briefly dozed off due to exhaustion.
  7. The Claimant avers that on the material date, he had pushed himself to clear his work without taking breaks. Hence, the exhaustion which resulted in him dozing off at work. He

contends that at the time of the incident, he had accomplished all his tasks for the shift.

8. The Claimant contends that notwithstanding this, the Respondent arbitrarily terminated his services on 25<sup>th</sup> March 2022. He contends that the Respondent did not take into account the fact that the video clip which was used as evidence of him sleeping on duty was recorded by an employee who had a bone to pick with him and was thus recorded with the ulterior intention of fixing him.
9. The Claimant contends that the Respondent's decision to terminate his contract was unlawful since: it was without basis; it was based on flimsy grounds; it was rendered without adherence to fair procedure; and it violated the tenets of justice and equity. Consequently, he prays for the various reliefs in the amended Statement of Claim.
10. The Respondent does not admit the claim. It contends that the Claimant's position of supervisor required him to adhere to various guidelines stipulated in his contract of service and other internal instruments whilst discharging this mandate.
11. The Respondent avers that the guidelines prohibited employees from accessing their workstations with their mobile phones because this posed a danger to the safety of the pharmaceutical products it manufactures. It further contends that allowing the employees to carry phones into the workplace risked exposure of its trade secrets since the employees could easily record and share the procedures for

processing its products. It contends that employees were supposed to store their phones in designated lockers before proceeding to their workstations.

12. The Respondent further contends that the guidelines also prohibited employees from sleeping on duty. It contends that sleeping whilst on duty posed a danger to the safety of the workers and affected production.
13. The Respondent contends that as a supervisor, the Claimant was required to enforce these guidelines but did not do so. It contends that the Claimant tolerated employees accessing their workstations with their phones and sleeping whilst on duty. Further, it accuses the Claimant of contravening the guidelines by sleeping on duty.
14. The Respondent avers that on 14<sup>th</sup> March 2022, the Operations Manager and the Administration and Human Resource Manager summoned the Claimant to a meeting during which he was notified of the aforesaid accusations against him. It further avers that on 18<sup>th</sup> March 2022, it issued the Claimant with a letter of show cause with respect to the charges.
15. The Respondent contends that it invited the Claimant for a disciplinary hearing on 24<sup>th</sup> March 2022. It avers that it notified him of the right to be accompanied by a representative.
16. The Respondent avers that the Claimant attended the disciplinary session without a representative and was given

amble time to ventilate his case. It contends that he denied having slept on duty and contended that he had only dozed off for a few seconds. Yet, it avers that the video clip which was played during the hearing showed him asleep.

17. The Respondent contends that the Claimant made several admissions during the disciplinary hearing. It avers that he admitted that he: was entrusted with the function of supervising co-employees; had tolerated some employees being away from the production area during work hours; had recorded some employees as having worked for extra hours thus entitling them to overtime pay when the said employees had been away from the production area during work hours; and had condoned some employees accessing the production area with their telephone gadgets.
18. The Respondent avers that the Disciplinary Committee was not satisfied with the Claimant's response. As such, it avers that a decision was taken to terminate his services for negligence in the discharge of his duties which constitutes gross misconduct.
19. The Respondent avers that it computed and paid the Claimant's terminal dues. As such, it contends that the contract between the parties was legitimately closed and this case is thus unmerited.

### **Issues for Determination**

20. After evaluating the pleadings, evidence and submissions by the parties, the following issues arise for determination:-

- a) Whether the contract of service between the parties was unlawfully terminated.
- b) Whether the Claimant is entitled to the reliefs which he seeks through this action.

### **Analysis**

21. According to the evidence on record, the Claimant was accused of: sleeping whilst on duty; failing to take action on employees who were found sleeping on duty; failing to report and record details of employees who were found using mobile phones in the production area; and failing to discount lost man hours from employees who were caught asleep and or using their phones during work hours.
22. The parties agree that the Claimant's role was to supervise the employees in order to ensure that they optimally utilized their time at work and did not carry phones to the production area. The evidence on record shows that three employees were found with their phones in the production area.
23. During the disciplinary hearing, the Claimant was accused of not reporting this incident to the management. In response, he asserted that he reported one of the employees to the management.
24. The evidence on record shows that on 11<sup>th</sup> March 2022, the Claimant indeed reported the phone incident involving one of the employees to his immediate supervisor. However, he did not report the incident which involved two other employees (Hudson and Ndungu). Although he contended

before court that the two were permitted to carry their phones, he did not offer this explanation to the Disciplinary Committee to justify his failure to report them.

25. Further, although the Claimant stated that he reported the employee who was found asleep at the workplace, he conceded during cross examination in court that he did not record the incident in the incident register and did not discount the lost man hours from the employee. During the disciplinary hearing, when the Claimant was interrogated about having failed to report the said employee's misconduct on the date of the incident, he stated as follows:-

*"I admit my mistake of not reporting on that day."*

26. The Respondent also accused the Claimant of sleeping at work. Although the Claimant denied this accusation, the Respondent presented a video clip and screenshots which showed him sleeping at the workplace.
27. During trial, the Claimant contended that the clip showed him asleep for only a few seconds. He contended that he had dozed off due to the workload he was handling. He further contended that the video was recorded by a co-employee who had personal scores to settle with him.
28. From the video clip, it impossible to tell the duration the Claimant had been asleep. However, the clip and screenshots affirm the Respondent's assertion that he was asleep at work. Having regard to this evidence, it is apparent that the Claimant was asleep whilst on duty.

29. Did the totality of the aforesaid evidence provide the Respondent justifiable grounds to believe that it had genuine grounds to terminate the Claimant's services? The answer to the question is in the affirmative.
30. It ought to be appreciated that under section 43(2) of *the Employment Act*, the employer need not have infallible evidence to prove commission of an infraction by an employee before he can terminate the employee's services. All that is required is for him (the employer) to have reasonable grounds to genuinely believe that the employee is guilty of the infraction in question (***Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others [2019] eKLR***).
31. The test for determining the validity of the employer's action is that of a reasonable employer. The court is supposed to ask itself whether another reasonable employer, faced with the same set of facts, would have probably arrived at the same or similar decision. If the answer to the question is in the affirmative, the court must uphold the decision irrespective of whether it (the decision) appears to have been harsh.
32. In applying the above test, the court is reminded that in any one scenario, individual employers may react differently. As such, what the court ought to bear in mind in determining the legitimacy of the employer's decision is whether it (the

decision) falls within the band of decisions which a reasonable employer would have made.

33. Speaking to this test, the Court of Appeal in the case of ***Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others*** (supra), stated as follows:-

*“...In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if the dismissal falls outside the band, it is unfair.”*

34. In the instant case, evidence was presented to the Disciplinary Committee which showed that the Claimant was

asleep at work. Further, there was evidence that he did not report two other employees for using their phones at work. Although the Claimant asserted in court that the two were permitted to carry their phones to the production floor, he did not give this explanation to the Disciplinary Committee. Further, the Claimant admitted before the Committee that he made a mistake in the way he handled the reporting of one of the cases under inquiry.

35. The totality of this evidence demonstrates that the Respondent had legitimate grounds to consider terminating the Claimant's employment on grounds of negligent performance of duty. The evidence provided the Respondent with reasonable grounds to genuinely believe that the Claimant had committed the various infractions under inquiry.
36. The Claimant describes the accusations as flimsy. It is true that one reasonable employer might have considered the infractions as insubstantial and excused him (the Claimant). Yet, it is also true that another employer would, quite reasonably, have terminated the Claimant's contract on the basis of the accusations.
37. Either of these reactions, in the court's view, falls within the band of reasonable reactions expected of a reasonable employer. As such, the court is not entitled to substitute the Respondent's decision with its (the court's) own decision merely because it considers that had it been in the

Respondent's shoes, it probably would have handled the matter differently.

38. The evidence on record shows that the Respondent issued the Claimant with a notice to show cause letter which set out the accusations against him. The Claimant responded to the accusations before he was called for a disciplinary hearing.
39. The minutes of the disciplinary hearing show that the Claimant was accorded a chance to be heard before a decision to terminate his services was rendered. In the letter communicating the decision, the Respondent gave the Claimant the right of appeal. This evidence confirms that the Claimant's case was processed in accordance with the dictates of fair procedure.
40. In their submissions, counsel for the Claimant contend that the decision to terminate the Claimant's services was flawed because the Respondent did not provide him with copies of the evidence (including the video clip and investigation report) which it relied on during the disciplinary hearing beforehand. Further, counsel contend that the individual who took the minutes of the disciplinary hearing ought not to have done so since she participated in investigating his case.
41. However, a perusal of the amended Statement of Claim and the Claimant's witness statement demonstrates that these were not part of his complaints to court. It is trite that parties are bound by their pleadings and are not entitled to re-characterize their case in a manner that does not accord

with their pleadings (***Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] KEHC 5465 (KLR)***).

42. Further, it is trite that parties cannot rely on their submission as evidence in respect of a matter which was neither pleaded nor addressed evidence. Submissions cannot be relied on as evidence (***County Government of Meru v Mukuchia & 11 others [2025] KECA 2289 (KLR)***). For this reason, the Claimant cannot introduce the aforesaid new matters through his submissions to anchor his case.
43. In the said submissions, counsel also attacks the veracity of the video clip on the ground that the Respondent did not disclose the source of the clip. Yet, in the amended Statement of Claim and the Claimant's witness statement which he adopted as his evidence in chief, he states that the clip was recorded by one Caroline, implying that he is aware of its source.
44. The Claimant's contract of service having been legitimately terminated, he is not entitled to the relief of compensation for unfair termination of the contract. As such, this prayer is declined.
45. The Claimant had prayed for service pay. However, during trial, he abandoned this prayer perhaps in view of the edict in section 35 (6) (d) of *the Employment Act* which excludes an employee who is a member of the National Social Security Fund from seeking service pay. As such, the claim is deemed as having been withdrawn.

46. The Claimant has prayed for compensation for 456 rest days. He contends that he worked for the Respondent continuously without taking a break to rest contrary to law. However, during cross examination, he conceded that he had utilized some rest days although he could not recall the number of days he had utilized.
47. The Claimant was also shown samples of his pay slips and extra time requisition forms which suggest that he used to be paid for the extra time he spent at work. When he was cross examined on the payments, he stated that he could not tell whether the extra time pay reflected in the pay slips covered pay for rest days.
48. The Claimant did not present cogent evidence to controvert the Respondent's contention that the payment of extra time included in the pay slips covered rest days. Having regard to this evidence, the court is convinced that the Claimant was paid for the extra time he spent at work including the rest days. As such, the claim for payment for rest days fails.

### **Determination**

49. The upshot is that the court finds that the instant claim is unmerited.
50. As such, it is dismissed.
51. Each party to bear own costs of the suit.

**Dated, signed and delivered on the 23<sup>rd</sup> 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 12<sup>th</sup> 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**