



**Nairobi Bottlers Limited v Imbuga (Civil Appeal E661 of 2022)
[2024] KECA 434 (KLR) (26 April 2024) (Judgment)**

Neutral citation: [2024] KECA 434 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL E661 OF 2022
S OLE KANTAI, JM MATIVO & PM GACHOKA, JJA
APRIL 26, 2024**

BETWEEN

NAIROBI BOTTLERS LIMITED APPELLANT

AND

ADRIAN IMBUGA RESPONDENT

(Being an appeal from the Judgment and Decree of the Employment and Labour Relations Court at Nairobi (Mbaru, J.) dated 30th June 2022 in ELRC Cause No. 267 of 2020)

JUDGMENT

JUDGMENT OF KANTAI, J.A.

1. This is a first appeal from the judgment of the Employment and Labour Relations Court (ELRC) at Nairobi (Mbaru, J.) delivered on 30th June, 2022 where the respondent’s (Adrian Imbuga) claim was allowed. Our mandate in a first appeal as donated by rule 31 of the Court of Appeal Rules, 2022 is to re-appraise the evidence and to draw inferences of fact; to retry the case. That mandate has been the subject of various judicial pronouncements in such cases as Nicholas Njeru vs. Attorney General & 8 Others [2013] eKLR where it was stated:

“[In] a first appeal, we are required to re-evaluate the evidence and arrive at our own independent findings and conclusions of the matter.”

2. The respondent was employed by the appellant’s predecessor Flamingo Bottlers Limited (now called Nairobi Bottlers Limited) vide a letter dated 22nd May, 1999 as a mechanic. He served in that and other positions rising to the position of Logistics Manager spanning a period of about 20 years. It was alleged by the appellant that he (the respondent) had engaged in various acts of negligence leading to loss of



money and by letter dated 6th April, 2020 titled “Show Cause” the appellant stated inter alia that it had come to its attention that:

“...your negligence in discharge of your duties has exposed the business to loss of stock between December 2019 and January 2020. In the month of December 2019 the company lost 7155 cases valued at Kshs.2,820,105/= and a further 4095 cases valued at Kshs.2139,069/= cannot be accounted for as at March 2020.”

3. It was alleged in the letter that the December 2019 loss depicted a hands-off leadership on the part of the respondent as stock management routines were not being adhered to and the stock management team was not following standard operating procedures and contravened key system policies. He was informed that as line manager he was expected that he would be at the forefront in ensuring that the business was cushioned from any malpractices and loss by providing line leadership. He was therefore required to show cause why disciplinary action should not be taken against him for negligence in discharging his duties.
4. In a response dated the next day 7th April, 2020 the respondent explained that during the period December, 2019 he was the Logistics Director for Kenya with 7 Managers reporting to him; he oversaw 6 plants and depots; he denied being a hands-off Manager stating that he engaged those under him on a daily basis.
5. That explanation was not found satisfactory and by a “Disciplinary Enquiry Notification Form” the respondent was notified of an enquiry to be held at the appellant’s boardroom on 16th April, 2020 and the charge he was to face was:

“Negligence in discharge of your duties that in turn exposed the business to loss of stocks of 7155 cases valued at Kshs.2,820,105/= between December 2019 and January 2020.”

6. It was stated in the document that the charge arose from his actions/performance/behaviour:
 - “1. Failure to enforce stock routines.
 2. Failure to enforce Standard Operating Procedures (SOPs).
 3. Failure to escalate risks of losses.”
7. He was informed that he had a right to interpretation and representation by a fellow employee of his choice and he was requested to bring to the enquiry any evidence or witnesses he may have in support of his case.
8. There are minutes of the disciplinary hearing meeting that took place on 16th April, 2020 attended by a chairperson, the Logistics Director, an independent panel member, a HR representative, the respondent and a “scribe”. Those minutes of that disciplinary hearing run to 32 pages of a rather small font and it comprised questions and answers.
9. By letter dated 30th April, 2020 the respondent was informed that following the disciplinary hearing and a review of his statements and witness statements presented it had been established that he had been negligent in performance of his duties and his services were terminated with immediate effect. He was informed that he had a right of appeal within 14 days and his dues were tabulated. He appealed the decision by his letter of 14th May, 2020 where he detailed reasons why the decision to terminate his services should be reviewed. By letter dated 18th May, 2020 the respondent was informed that his appeal had been received and an appeal hearing would be held on 20th May, 2020 and he was requested to take



- to the appeal hearing any new evidence or witnesses he may have to support his appeal. He was again informed that he had a right to interpretation and representation by a fellow employee of his choice.
10. There are on record minutes of the appeal hearing that was held on 20th May, 2020 attended by a different panel to the panel that had conducted the disciplinary hearing. Minutes of that appeal hearing are captured in 29 typed pages.
 11. By a letter dated 29th May, 2020 the respondent was informed that his appeal had failed and the decision to terminate his services had been upheld.
 12. That is the chronology of events that led to the statement of claim filed at the ELRC where it was averred that the respondent had worked for the appellant rising to the position of Operations Director earning a monthly salary of Kshs.977,500 and a car allowance of Kshs.293,250; that he had served diligently and honestly but that his services had been unlawfully terminated contrary to sections 41, 43, 45 and 46 of the *Employment Act*. It was stated that the said termination had been effected maliciously, capriciously, arbitrarily, irregularly, unlawfully and without due regard to his welfare and rights accruing to his employment and various particulars of malice, irregularity and illegality were set out. It was also alleged that the respondent had been discriminated against and particulars of discrimination were set out. It was claimed that the respondent had suffered "...great injury to his reputation, financial loss and damage...".
 13. Particulars of special loss and damage were set out as:
 - d) Service pay for constructive redundancy Ksh.32,114,990;
 - e) Car allowance for 4 months (January to April, 2020) Ksh.1,173,000;
 - f) Phone payment for 4 months (January to April 2020) Ksh.40,000;
 - g. Club membership (annual) Ksh.150,000;
 - h. Gym for 4 months Ksh.200,000; Total: Ksh.38,019,456
 14. The respondent prayed for a declaration that termination of his employment was unfair, unjustified, illegal, null and void; he should be reinstated to employment without loss of benefits; salary and allowances for the period he was out of employment; damages for wrongful and/or unlawful termination of employment/redundancy; damages for frustrations and mental torture; damages for discrimination, and costs and interest.
 15. The appellant delivered a response where the claim was denied it being stated that the respondent was employed by the appellant in 2018 as Operations Director; it was denied that the respondent had performed his duties diligently it being stated that he had performed duties negligently exposing the appellant's business to loss of stock which led to a disciplinary hearing; it was stated that the respondent had been given adequate notice before termination; the appellant stated at paragraphs 8 and 9 of the response:
 - “8. The Respondent further states that the Claimant was summoned to a disciplinary hearing where he was accorded an opportunity to defend himself in good faith and in pursuance of the *Employment Act*. Subsequently, an appeal to the hearing was conducted which upheld the decision by the disciplinary hearing to terminate the Claimant.
 9. Contrary to the claim in paragraph 5, the Respondent avers that the termination was conducted in accordance with and subject to all procedures required under the law.”



16. Allegations and particulars of discrimination were denied as were those of special loss and damage the appellant stating that it had terminated the respondent's employment lawfully.
17. A hearing took place where the respondent testified and the appellant called its Human Resources Director.
18. The trial Judge considered the case and found in favour of the respondent entering judgment for him where the Judge found and declared that the respondent's employment termination was unfair and unlawful; it was found and declared that the respondent had been discriminated against by the appellant; it was ordered that the respondent be reinstated to employment without loss of rank/position, benefits and back salaries from 1st May, 2020 to date of judgment; the respondent was ordered to report to the appellant's Managing Director at his last place of work on 4th July, 2022 at 8.30 a.m. for allocation of duties; dues found in favour of the respondent be paid within 30 days after which the same were to attract interest until full payment; the respondent was awarded damages for discrimination at Kshs.5,865,000 and costs of the suit.
19. Those are the findings that provoked this appeal premised on Memorandum of Appeal drawn by the appellants lawyers M/S Kiragu Wathuta & Company Advocates where 12 grounds of appeal are set out. The appellant says that the Judge erred in law and fact by making a finding that the termination of employment was unlawful and unfair; that the Judge erred by finding that the respondent was discriminated against by the appellant; that the award of damages for discrimination was manifestly unreasonable and excessive; that the Judge was wrong for ordering reinstatement of the respondent to his previous position with the appellant; that the Judge erred by not finding that the respondent performed his duties with negligence; that the Judge erred by dealing with issues not before her thereby arriving at wrong findings; that the Judge was wrong to make awards not prayed for. We are therefore asked to allow the appeal, set aside the judgment of ELRC, dismiss the claim at ELRC and award costs to the appellant.
20. When the appeal came up for hearing before us on 30th January, 2024 the appellant was represented by learned counsel Mr. Celil Kuyo who appeared with Miss Okuta. The respondent was represented by learned counsel Mrs. Judith Guserwa. Both sides had filed written submissions and in a highlight of the same Mr. Kuyo submitted that the termination of the respondent's employment was lawful. He thought that the findings of the Judge on discrimination of the respondent were wrong and he submitted that reinstatement of the respondent to his previous position should not have been ordered. According to him, summary dismissal is justified for an employee who performs his duties with negligence. Counsel submitted that a Court should not substitute its views with those of an employer in an employer/employee situation and he submitted that the appellant considered the facts of the case where it had made losses and dismissed the respondent and other employees who were found to have negligently performed their duties. Counsel faulted the Judge for ordering reinstatement when, according to counsel, the position had been filled by another employee.
21. Counsel for the respondent did not agree. According to her, the Judge was right to find that termination was unlawful as there were no valid reasons for termination, the respondent having served the appellant diligently for 20 years. Counsel submitted that section 49 of the *Employment Act* allows the Court to order reinstatement of an employee who has been unfairly terminated by an employer and informed us that the respondent had reported back to work, was not assigned any duties but was being paid his salary and other dues.
22. In a rejoinder, Mr. Kuyo submitted that reinstatement should only be ordered if it is a suitable remedy. According to him, the appellant followed the process before terminating the respondent's employment and the appeal should be allowed.



23. I have considered the whole record, submissions made by the parties, and the law.
24. Sections 41 to 49 of the *Employment Act* cover areas relating, inter alia, to notification and hearing before termination on grounds of misconduct; reason for termination; summary dismissal; unfair termination; reasons for termination or discipline; complaint relating to summary dismissal or unfair termination; representation during disciplinary hearing and remedies for wrongful dismissal and unfair termination. An employee must be notified when they are being dismissed for gross misconduct, poor performance or incapacity in performance of duties why they are being dismissed. The communication must be in a language that the employee understands; the employer must hear and consider the explanation by the employee and the employee is entitled to appear at the hearing accompanied by another employee or by a representative who must also be heard.
25. The employer must prove the reasons for termination. Dismissal may be for instances of gross misconduct, absenteeism, refusal to work, carelessness in the performance of duties, intoxication, use of abusive language, or criminal conduct to the detriment of the employer. The employer must always prove that termination is for a valid reason which is fair and that due process has been followed for termination of an employee from employment. It is the duty of an employee to prove that termination from employment was unfair while it is the duty of an employer to prove that termination of an employee from employment was fair. Remedies under the said provisions of law include notice in lieu of termination, wages for time worked, compensation in form of salary for not more than 12 months; and, reinstatement if the period of 3 years has not elapsed the Court always to consider the wishes of the employee, the circumstances leading to termination, practicability of reinstatement, other opportunities available to the employee, the employee's conduct before termination of employment and mitigating factors available to the employee.
26. My understanding of the *Employment Act*, 2007 is that it places process as a central consideration where an employer is considering or has decided to terminate the services of an employee.
27. The facts of the case here as I have shown were that the respondent was at the material time the Logistics Manager or Director of the appellant. It was alleged that during his watch the appellant lost 7155 cases (of soda) valued at Kshs.2,820,105 in December, 2019 and 4095 cases valued at Kshs.2,139,069. He was asked to show cause why disciplinary action should not be taken against him; he responded but the response was not found unsatisfactorily and he was asked to attend a disciplinary hearing. He was informed of his right to attend the hearing accompanied by another employee or representative; he attended the meeting which is covered in the minutes of the meeting that was held on 16th April, 2020. Charges had been laid and had been served on him in the notification of the disciplinary hearing. The respondent's response to the charges laid against him were not found satisfactory and his services were terminated by the letter dated 30th April, 2020 where he was informed of a right to appeal. He appealed. He was informed of the date for the appeal hearing and he was informed of his right to attend and the right to be accompanied by another employee or representative. The appeal hearing took place conducted by a different panel and the appeal was found unsuccessful and was dismissed.
28. I have applied the facts of the case that was before the Judge to the provision of the *Employment Act* and *the Constitution* of Kenya, 2010. Unlike the Judge, I am of the respectful view that the appellant followed the law to the letter in the way it treated the disciplinary case facing the respondent. The respondent had been placed in a high position to manage logistics for the appellant. During his watch, substantial losses were made by the appellant which the respondent was unable to account for in a reasonable or satisfactory way. He was accorded all rights an employee should be accorded in such a situation. He was asked to show cause why disciplinary action should not be taken against him; his explanation was not accepted; he was summoned to a disciplinary hearing where charges against



him had been served; he was informed in a language he understood of the charges and the right to be accompanied by another employee or representative; he was heard; the charges were upheld; he was informed of his right to appeal; he appealed; he was again informed in a language which he understood of his rights including the right to be accompanied by another employee or representative. The appeal was heard by a different panel and dismissed.

29. I am of the considered opinion that the appellant applied the process as required in law and it was entitled to terminate the services of the respondent. The appellant did not breach the law in any way. The appeal has merit and I would allow it. As Mativo and Gachoka, JJA agree the final order of the court is that the appeal is allowed with costs to the appellant.

CONCURRING JUDGMENT OF MATIVO, JA.

1. I have had the benefit of reading the leading judgment of Kantai, JA. I concur with the findings.

JUDGMENT OF GACHOKA, JA.

1. I have had the advantage of reading my brother's (Kantai, JA.) draft judgment. The central issue in this appeal is whether the respondent was terminated fairly. In other words, did the appellant comply with the contractual terms of employment as well as the law in terminating the respondent? I wish to buttress and emphasize the importance of reason for and procedure in the manner of termination when an employer elects to terminate the services of an employee as to amount to fair and lawful termination. It is as of right, as espoused in the employment contract and section 35 of the *Employment Act* Cap 226 Laws of Kenya (the Act), that any party, may with good reason, terminate an employment contract.
2. Termination of employment is a process and not an event. Where an employer seeks to terminate the services of an employee, the employer must accord the process to a fair procedure. It begins with a notification to the employee that on account of gross misconduct, poor performance, physical incapacity, or any other ground and in a language that the employee understands, that a consideration is being made for termination of the employment.
3. The employer shall then give the employee an opportunity to explain, defend, countermand or in any way respond to the reasons for termination of the contract through a disciplinary hearing. In this hearing, the employee is entitled to be accompanied by another employee or a shop union representative of his choice.
4. The culmination of the process after hearing the employee leads to the communication of the decision by the employer. If the employer is unsatisfied with the explanation preferred at the hearing, the employer shall terminate the contract with reason.
5. Section 43 (2) of the Act is emphatic that the reason(s) for termination of a contract are the matters that 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. The reason for termination of the contract must be valid and fair in accordance with section 45 (2) of the *Employment Act*. Indispensably, the termination notice shall be explained orally, in a language of the employee's choosing, in the event the employee is unable to understand the said notice.
6. In light of the above, it must be emphasized that the termination of a contract is a right that has been enshrined in the contract and law. However, for termination of an employee to be found fair, the reasons must be valid, fair, and lawful and the procedure for termination must follow due fair process in line with the provisions of the law. Bearing in mind that a court shall not rewrite a contract, it is



elementary that where such elements as highlighted above herein are followed, a court will eschew from interference with an employer’s procedure.

7. In *Samuel Kalomit Murkomen vs. Telkom Kenya Limited* [2017] eKLR, this court held as follows regarding the validity for reasons of terminating an employee thus:

“In determining whether termination of an employee was fair, a court ought not to substitute its decision for that of an employer. Its duty is to determine whether the decision to dismiss was valid and fair within the circumstances of the employer. See *Alfred Mutuku Muindi -vs- Rift Valley Railways (limited)* [2015] eKLR.”

8. In England, Master of the Rolls Lord Denning in the case of *British Leyland UK Ltd vs. Swift* [1981] IRLR 91 CA stated as follows:

“The correct test is: Was it reasonable for the employers to dismiss him?” If no reasonable employer would have dismissed him, then the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which an employer might reasonably take one view: another quite reasonably takes a different view. One would quite reasonably dismiss the man. The other quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him.”

9. Finally, in *Foley vs. Post Office HSBC Bank plc (formerly Midland Bank plc)* 2000 ICR 1283, CA the court held that the proper method was to determine if the dismissal was within a “band or range of reasonable responses.”

10. In the present dispute, I note the following: the respondent was issued with a notice to show cause, which he responded to; the respondent attended the disciplinary hearing and was accorded a right of appeal, before a different panel, which he invoked unsuccessfully; the minutes of the disciplinary hearing were produced before the trial court; and the reasons for termination of his employment were valid, fair and lawful having met the reasonableness test. I am satisfied that the termination of the respondent met the threshold set out above and hold that the appeal is merited. In addition to what I have said, I agree with the judgment of Kantai, JA and the orders proposed by him.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF APRIL, 2024.

S. ole KANTAI

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

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JUDGE OF APPEAL

I certify that this is a True copy of the original



Signed

DEPUTY REGISTRAR

