



REPUBLIC OF KENYA



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**Kamendi v Kenya Breweries Limited (Civil Appeal 129 of 2018)
[2023] KECA 1210 (KLR) (6 October 2023) (Judgment)**

Neutral citation: [2023] KECA 1210 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 129 OF 2018
DK MUSINGA, KI LAIBUTA & GWN MACHARIA, JJA
OCTOBER 6, 2023**

BETWEEN

FRANCIS KAMENDI APPELLANT

AND

KENYA BREWERIES LIMITED RESPONDENT

(Being an appeal from the Judgment of the Employment and Labour Relations Court at Nairobi (Ndolo, J.) dated 10th November 2017 in ELRC Cause No. 2292 of 2015)

JUDGMENT

1. Before this Court is an appeal from the judgment of the Employment and Labour Relations Court at Nairobi (Ndolo, J.) dated November 10, 2017 in ELRC Cause No. 2292 of 2015.
2. The appellant and the respondent enjoyed an employee- employer relationship spanning about 9 years. The appellant was employed by the respondent on September 5, 2005 as a Technical Operator, earning a monthly gross salary of Kshs.47,714.00. Over the years, he served in different capacities and, as of July 23, 2014 when his employment was terminated, he was working as a Beer Planner earning a monthly gross salary of Kshs. 218,735.24.
3. The contention by the appellant was that his employment was terminated by the respondent after the latter undertook a restructuring exercise, which resulted in new roles being created and some roles declared redundant. The appellant contended that he was appointed to the position of Beer Planner with effect from April 14, 2014 after the restructuring exercise had taken place. However, on July 22, 2014, his Line Manager informed him that he would be retrenched, and that he would be paid his severance package in line with the respondent's policy. The respondent thereafter served him with a termination notice which was to take effect on July 23, 2014.
4. His argument was that he had been in continuous employment of the respondent for a period of approximately 9 years before the date of termination; and that the respondent acted contrary to, and



in breach of, the terms of the Employment Act, in that the grounds relied upon to terminate his services were of such a nature that would lead one to believe that he had been declared redundant, and yet the respondent had not satisfied the prerequisites set out under the Employment Act before declaring him redundant.

5. The appellant contended that the reasons leading to the termination of his employment were not valid. He thus instituted suit against the respondent at the Employment and Labour Relations Court (ELRC), to wit, ELRC Cause No. 2292 of 2015 wherein he sought several orders, including a declaration that the termination of his employment was unlawful and unfair; severance pay as per the respondent's policy at 2 & ½ months' pay per year amounting to Kshs.4,921,542.10; 12 months' salary for wrongful dismissal amounting to Kshs.2,624,822.88; one month's salary in lieu of notice amounting to Kshs.218,735.24; and Certificate of Service.
6. Through a Memorandum of Defence dated April 1, 2016, the respondent admitted having employed the appellant, and having terminated his services on July 23, 2014, but denied the reasons for his termination as alleged. According to the respondent, prior to his appointment as a Beer Planner, the appellant was serving in the role of a Fleet Administrator for the respondent's sales function. His duties as a Fleet Administrator were to, inter alia, ensure safe movement and custody of the respondent's motor vehicles attached to the respondent's sales function. In the period between 10th and March 15, 2014, and during his tenure as the Fleet Administrator, an unauthorized person known as Jasper Nduko used the respondent's motor vehicle registration number KBJ 979Q to travel from Nairobi to Kisii and back. The respondent contended that the termination of the appellant's employment was not as a result of being declared redundant, but was due to gross misconduct, viz, the irregular management of the respondent's motor vehicle registration number KBJ 979Q, and for failing to ensure safe custody thereof.
7. The respondent contended that, at all times, the appellant's termination of employment was justified and that, according to Clause 7 of his appointment letter, the respondent would be entitled to terminate his services if it was shown to its satisfaction that the appellant had behaved dishonestly or recklessly in relation to the respondent's assets, premises, staff or reputation.
8. As regards the procedure taken before terminating the appellant's employment, the respondents stated that investigations were carried out which revealed that motor vehicle registration number KBJ 979Q was used by an unauthorized person to travel to Kisii between 10th to March 15, 2014. It is after investigations had been carried out that the appellant was issued with a show cause letter dated May 26, 2014 detailing his acts of gross misconduct, and requiring him to make a response within 4 days of receipt. The respondent contended that the appellant, in his response to the show cause letter, admitted that the motor vehicle registration number KBJ 979Q was in possession of an unauthorized person known as Jasper Nduko during the period complained of. He was invited to a disciplinary hearing which took place on June 5, 2014 after which further investigations related to the said motor vehicle's movement were carried out. A further disciplinary hearing was held on June 10, 2014 wherein the appellant requested for time to carry out his own investigations, but later on that day, he wrote an email asking the panel to make a decision based on the material already on record. According to the respondent, the appellant had not, after the two disciplinary hearings, exonerated himself from the allegations against him and, as result, the respondent took the decision to terminate his employment, which was communicated to him through a letter dated July 22, 2014.
9. The respondent's position was that it followed due procedure before terminating the appellant's employment. It stated that it issued the appellant with a Certificate of Service, and that he was not entitled to any of the reliefs sought in his Memorandum of Claim.



10. The suit was heard by way of written submissions, culminating in the impugned judgment. The trial court identified two issues for determination, namely, whether the termination of the appellant's employment was lawful and fair; and whether the appellant was entitled to the remedies sought. The trial court's findings on the two issues were as follows:
 20. What is clear from this correspondence is that the termination of the Claimant's employment was triggered by an unauthorized use of the Respondent's motor vehicle registration number KBJ 979Q. The Court did not find any evidence that the termination was on account of redundancy. The Claimant chose not to testify and the Court was therefore unable to establish the basis of his averment that he was declared redundant.
 21. Further, from the documentary evidence placed before the Court, it is evident that the unauthorized motor vehicle use complained of took place when the Claimant was the Fleet Manager for the sales function. In my view, this would constitute a valid reason for the termination as contemplated under Section 43 of the *Employment Act*, 2007. Additionally, the Court found that prior to the termination, the Claimant was subjected to the mandatory disciplinary procedure set out under Section 41 of the Act."
11. The trial court found the appellant's claim to be without merit, and accordingly dismissed it with costs to the respondent.
12. Dissatisfied with the decision of the trial court, the appellant has lodged the instant appeal. Through his Memorandum of Appeal dated April 16, 2018, he contends that the learned judge erred in law and in fact by, inter alia, finding that his claim was without basis despite the evidence presented before her; failing to make a finding that the appellant was terminated unfairly; finding that the appellant was satisfactorily subjected to mandatory disciplinary procedure set out under section 41 of the *Employment Act*; finding that the respondent satisfactorily proved the reason for the termination of his employment as provided for under section 43 of the *Employment Act*; failing to consider the evidence in record and the written submissions of the appellant; delivering a judgment that was lopsided and biased in favour of the respondent; and in failing to address her mind to the provisions of section 45 (5) of the *Employment Act* in arriving at her decision.
13. At the hearing of this appeal, there was no appearance for either of the parties despite service of the hearing notice. However, both parties had filed their respective written submissions.
14. The appellant, through his written submissions dated 29th September 2018, contends that termination of his services was unfair; and that he was not given reasons for his termination, nor was due procedure as envisaged under section 45(2) of the *Employment Act* followed. He further stated that the respondent's letter notifying him of the termination of his services did not state the reasons for termination. Reliance was placed on the case of *Justus Wambua Kavyu v Kenya Commercial Bank Limited* [2013] eKLR where the Court held, inter alia, that:

"Failure to state the termination reason or reasons denies the employee and this court the opportunity to apply the soundness or the legitimacy and justification of the termination and therefore a fundamental flaw in the procedure applied by the employer."
15. It was further contended that, contrary to the allegations that the appellant had admitted to an unauthorized person using the respondent's motor vehicle, the appellant's evidence in the form of emails which were produced at the disciplinary hearing showed the contrary. According to the



- appellant, the Movement Report for motor vehicle KBJ 979Q was sufficient proof that he had conducted himself with utmost professionalism and transparency in his role as a Master Data Maintainer/Fleet Administrator, and that the alleged unauthorized use of motor vehicle KBJ 797Q occurred at a time when he was transitioning from the role of Fleet Administrator to Beer Planner.
16. It was further submitted that the grounds of gross misconduct relied on by the respondent to terminate the appellant's services were not proved, contrary to the requirements of section 43(1) of the *Employment Act*, which places the burden on the employer to prove the reason or reasons for termination of an employee's employment. Reliance was placed on the case of *Nicholas Otinyu Muruka v Equity Bank Limited* [2013] eKLR where the Court was said to have held that, under section 43 of the Act, it was the obligation of the respondent to prove that the reasons for terminating the employment of the claimant amounted to gross misconduct, and that, if the respondent failed to discharge that obligation, then the court will make a finding that the termination was unfair.
 17. The appellant contended that he was not accorded a fair hearing as contemplated under section 41 of the *Employment Act* as he was not accorded the right to have another employee or a shop floor union representative of his choice at the hearing. He stated that this was a breach of statute law. According to the appellant, where there is a reason for terminating an employee's service but the employer does it in a procedure that does not conform with the provisions of a statute, that amounts to unfair termination. See *Mary Chemwono v Kenya Pipeline Limited* [2014] eKLR.
 18. Lastly, it was submitted that the respondent had custody of certain crucial evidence, such as the Movement Report of the subject motor vehicle which it failed to present before the trial court. According to the appellant, where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that, if such evidence was produced, it would be adverse to the party. See *Kimotho v KCB* [2003] 1 EA 108.
 19. On its part, the respondent, through its written submissions dated January 30, 2023, contended that the appellant did not produce evidence in support of the allegation that his services were terminated on account of redundancy. It argued that a valid reason which is the irregular management of the respondent's motor vehicle was given to the appellant before termination of his services, and that the procedure contemplated under section 45 of the *Employment Act* was duly followed before termination of his services. The appellant was given an opportunity to defend himself and, therefore, substantive and procedural fairness was accorded to him. The respondent submitted that the learned judge made correct findings on the two issues identified for determination and urged us to dismiss this appeal with costs.
 20. We have considered the appeal, the submissions and the applicable law. Our mandate on a first appeal as set out in rule 31(1) (a) of the Rules of this Court is to reappraise the evidence and to draw our own conclusions. In *Peters v Sunday Post Limited* [1958] EA 424, the predecessor of this Court, the Court of Appeal for Eastern Africa, stated that:

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide.”
 21. The following three issues commend themselves to us for determination:
 - i. whether the trial court erred on its findings related to the reason for the appellant's termination of employment and whether the said reason was valid;



- ii. whether the trial court made erroneous findings that due procedure was followed before the appellant’s termination from employment; and
 - iii. whether the appellant was entitled to any of the reliefs sought.
22. It is trite law that an employer must give an employee a valid reason before terminating his employment. Section 43 of the *Employment Act* is explicit that:
- (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
 - (2) The reason or reasons 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.”
23. It follows therefore that, where the employer is unable to prove a valid reason for terminating the services of an employee, such termination will undoubtedly amount to an unfair termination as stipulated in section 45 of the Act,.
24. The respondent, in its show cause letter dated May 26, 2014 whose subject was “Irregular Management of Company Vehicle”, invited the appellant to provide an explanation as to why its motor vehicle registration number KBJ 979Q was used by an unauthorized person to travel from Nairobi to Kisii. The response by the appellant to the show cause letter was on the same subject, the irregular management of the respondent’s motor vehicle by an unauthorized person. The purpose of the disciplinary hearing that took place on June 5, 2014 was described as follows:
- “The purpose of the meeting was a follow up of a show cause memorandum dated 26th April to Francis Kamendi relating to irregular management of motor vehicle.” [Emphasis added].
25. It is clear from the correspondence noted above that the reason for which the appellant was to show cause, and which led to the two disciplinary hearings, was the irregular management of the respondent’s motor vehicle, which took place when he served in the position of Fleet Administrator. The allegation by the appellant that he was terminated on redundancy basis was not supported by any evidence.
26. The irregular management of the respondent’s motor vehicle was said to amount to gross misconduct as provided for under Clause 7 of the appellant’s appointment letter, which reads in part (I have no problem with the cancelled words):
- 7. Misconduct
- The Company may summarily terminate your employment if:
- (a)
 - (b)
 - (c) it is shown to the satisfaction of the company that you have behaved dishonestly, or recklessly in relation to the Company’s assets, premises, staff or reputation.”



27. In our view, the respondent provided a valid reason for the termination of the appellant's employment. We are therefore not satisfied that the termination of the appellant's services was unfair. Section 47(5) of the *Employment Act* provides that:
- “For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.” [Emphasis added]
28. We fully agree with the trial court's findings that the termination of the appellant's employment was for a valid reason, which was the unauthorized use of the respondent's motor vehicle registration number KBJ 979Q. In the circumstances, this ground of appeal is without merit and accordingly fails.
29. On the second issue relating to the procedure followed before termination of the appellant's employment, we note that the respondent conducted its own investigations, which revealed the irregular use of its motor vehicle registration number KBJ 979Q. A show cause letter was issued to the appellant detailing the acts of gross misconduct against him, and requiring him to provide a written explanation. Two disciplinary hearings were conducted on June 5, 2014 and June 10, 2014, which were attended by the appellant. At the end of the disciplinary hearings, the appellant was found not to have exonerated himself, and his services were accordingly terminated.
30. The provisions of section 41 of the *Employment Act* are couched in mandatory terms as hereunder:
- (1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
 - (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or
 - (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”
31. Where reasons for an intended termination are not given to an employee, or if he is not given an opportunity to be heard, then such termination will amount to unfair termination as per the provisions of section 45 of the *Employment Act*. The reasons for which the respondent was considering termination of the appellant's employment were expressed in the show cause letter dated May 26, 2014. The appellant was given an opportunity to respond to the show cause letter and was afforded a physical hearing on two occasions, viz, June 5, 2014 and June 10, 2014. The appellant was, in our view, accorded an opportunity to defend himself and make representations of his own. We are therefore satisfied that the appellant was accorded a fair hearing, and that his termination followed due procedure. The issue of having another employee or a shop floor union representative of his choice present at the disciplinary hearing was never raised at the two hearings. Neither did the appellant elect to call such a representative to attend at or make representations at the two disciplinary hearings. In any event, want of such representation cannot vitiate the termination process which was, in our considered view, procedurally fair. Accordingly, this ground of appeal also fails.
32. Turning to the issue of reliefs sought by the appellant, we are in full agreement with the findings of the trial court that he was not entitled to any of the reliefs sought. The appellant's employment



was terminated on grounds of gross misconduct. Pursuant to the provisions of section 44(c) of the Employment Act, one of the justifiable grounds for the dismissal of an employee from employment is where he willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which, from its nature, it was his duty under his contract to have performed carefully and properly. The respondent was justified in terminating the services of the appellant. A valid reason was given and due procedure followed before terminating his services. He was paid one month's salary in lieu of notice and issued with a Certificate of Service. We are therefore unable to agree with the appellant's arguments that the termination of his employment was unfair so as to warrant him the reliefs sought.

33. The long and short of it is that the appeal herein fails in its entirety, and is accordingly dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OCTOBER, 2023.

D. K. MUSINGA, (P.)

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

G. W. NGENYE-MCHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

