



REPUBLIC OF KENYA



KENYA LAW
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**Cheptanui v Rift Valley Bottlers Company Limited (Civil Appeal
49 of 2018) [2022] KECA 824 (KLR) (19 May 2022) (Judgment)**

Neutral citation: [2022] KECA 824 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL 49 OF 2018
RN NAMBUYE, F SICHALE & S OLE KANTAI, JJA
MAY 19, 2022**

BETWEEN

NANCY CHEPTANUI APPELLANT

AND

RIFT VALLEY BOTTLERS COMPANY LIMITED RESPONDENT

*(An appeal from the Judgment of the Employment and Labour Relations Court of
Kenya at Kericho (D.K. Njagi, J.) dated 26th April, 2017 in ELRC Cause No. 18 of 2016)*

JUDGMENT

1. This is a first appeal from the Judgment of the Employment and Labour Relations Court (ELRC) sitting at Kericho where Njagi Marete, J. dismissed the suit. Rule 29 of the rules of this Court requires that we reappraise and re-evaluate the evidence and come to our own conclusions of fact. It was held of that mandate in the case of *Peters v Sunday Post [1958] EA 424*:

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witness.”

2. The appellant, Nancy Cheptanui, claimed in the Memorandum of Claim that she was employed by the respondent Rift Valley Bottlers Limited on 2nd January, 1992 first as a junior administration clerk but rose through the ranks finally occupying the position of Stores Supervisor. According to her she served with diligence to the satisfaction of her employer but that her services were terminated on 22nd October, 2015 “... without any valid reasons whatsoever and without any due process being followed ...”. She termed the termination from employment unfair and unlawful; she saw it as harsh having served the respondent without blemish for 23 years; that there was breach of labour laws and principles of natural justice and that her constitutional rights were violated. She claimed terminal benefits including 1 month salary in lieu of notice; outstanding leave allowance; days worked up to



date of termination; loss of earnings from date of termination to date of retirement and 12 months compensation all amounting to Ksh.15,333,083.40. The claim was accompanied by the appellant's elaborate witness statement where the claimant stated her case; her employment record and the events leading to the termination of her employment which she considered unfair. There were also various annexures which we shall revert to in the course of this Judgment.

3. In a Statement of Defence delivered for the respondent by Federation of Kenya Employers the claim was denied and details of what the respondent considered breaches of employment terms by the appellant were set out. Facts leading to the termination of employment were stated to include failure on the part of the appellant to perform work; being absent from work; and insubordination. It was stated that the appellant had been invited to a disciplinary meeting which she attended; charges framed were read to her; she did not respond sufficiently to the accusations and a decision was reached to terminate her services.
4. The matter proceeded in ELRC through written submissions and upon considering the whole case the Judge found that the termination of employment was fair and the suit failed and she was dismissed.
5. The appellant challenges those findings in the Memorandum of Appeal drawn by her lawyers, M/S Wambua Kigamwa & Company Advocates where 7 grounds of appeal are set out to the effect that the Judge erred in law and fact by not finding the termination unfair and unlawful and not in compliance with Section 41(1) of the *Employment Act*; that the termination of employment was in breach of Sections 41(2), 44(3) or (4); 45(2) (c); 45(5) (b); 45(5) (c) and 5 of the said Act. The Judge is faulted in the final ground of appeal for failing to compute the award of compensation that would have been due to the appellant for unfair and unlawful termination "... while being guided by Section 49 of the *Employment Act* No. 11 of 2007". We are asked to allow the appeal and in the event grant the prayers in Statement of Claim filed at ELRC.
6. When the appeal came up for hearing before us on 2nd February, 2022 learned counsel Mr. Wambua Kigamwa appeared for the appellant while learned counsel Mr. Masese appeared for the respondent. Both counsel had filed written submissions and what remained was a highlight of the same. According to counsel for the appellant there was failure of procedural fairness because the letter inviting the appellant to the disciplinary hearing did not indicate that the appellant was entitled to attend the hearing accompanied by another employee. Further, that there was no performance indicator on what was required of the appellant and that the appellant was not told how to remedy her poor performance. Counsel concluded by submitting that the appellant was entitled to the remedies claimed and he faulted the Judge for dismissing the claim.
7. In opposing the appeal it was Mr. Masese's submission that the appellant had not, in ELRC, raised the issue of not being accompanied to the disciplinary hearing by a fellow employee. Counsel saw no prejudice suffered by the appellant in that regard. Counsel for the respondent enumerated various failures in performance of duty by the appellant and submitted that there was substantive justice and we should dismiss the appeal.
8. In a brief rejoinder counsel for the appellant submitted that lack of procedural fairness was prejudicial to the appellant.
9. We have considered the whole record, submissions of the rival parties herein both written and oral and the law and this is our determination of this appeal.
10. It is true, as contended by the appellant, and as set out in grounds of appeal, that *the Constitution* of Kenya, 2010 and the *Employment Act*, 2007, have created a work environment where the relationship between employer and employee is well regulated. Termination of employment can only take place



with procedural fairness – under Section 41 of the *Employment Act* for an employer to terminate the services of an employee on grounds of misconduct, poor performance or physical incapacity the employer must explain to the employee, in a language that the employee understands, the reason why termination is being considered and such employee is entitled to have another employee or representative present during the explanation. The employer must listen and consider the explanation by the employee. For termination of contract under Section 43 of the said Act the employer must prove the reason or reasons for termination and such termination shall be deemed unfair (Section 45 of the Act) if the employer fails to so prove. Section 44 of the Act then tabulates the matters that may amount to gross misconduct to justify summary dismissal of an employee and Section 45 gives power to a Labour Officer or the Industrial Court (ELRC) to investigate the procedure employed by an employer to terminate the services of an employee. What is the position in this appeal?

11. The trial court examined the case made by the appellant and that made by the respondent and found that termination of employment by the respondent was fair and lawful.
12. The appellant’s case was that she had rendered exemplary services to the respondent but that her services had been terminated unfairly. That is however not borne out by the record which is littered with such a poor disciplinary record that it is surprising that the appellant was able to keep her job for so long. A few instances will suffice.
13. By letter dated 16th June, 2015 the appellant was accused of engaging a transporter without following procurement procedures on authorization when it was her duty to ensure that proper procurement procedures were followed.
14. By letter dated 15th July, 2015 headed “FINAL WARNING” it was stated amongst other things that the appellant, who was Stores Supervisor, had engaged a transporter without due process of pre-authorization and she was told that the action amounted to dishonesty, questionable and doubtful integrity contrary to company rules and regulations, procurement policy and the *Employment Act*. She was told to change her attitude towards work and desist from such practice failure to which disciplinary action would be taken.
15. By letter dated 25th August, 2015 “Show cause letter on account of stock variances as at 30th July, 2015” it was stated that a stock take conducted in July, 2015 had revealed several gaps and variances had been detected upon reconciliation of physical and ledger balances. A loss of Ksh.2,188,495 had occurred during her watch as Stores Supervisor. It was further stated that the appellant had abandoned her duties without explanation. She was asked to show cause why disciplinary action should not be taken against her for negligence in performance of her duties.
16. In another show cause letter dated 5th October, 2015 the appellant was accused of various acts of underperformance in performance of her work.
17. Following those actions the appellant was invited by the respondent by letter dated 27th August, 2015 to attend a disciplinary committee hearing on 28th August, 2015 at 3.00 p.m. The meeting was attended by 3 Committee Members and the appellant and it is indicated in the report of the meeting that there was no witness in attendance. We are prepared in the circumstances of the case to presume and hold that the appellant chose not to have another employee or representation to be present at the meeting. The committee made various findings to the effect that stores had not been properly arranged in preparation for stock take; some items in the stores had not been posted to the system; the appellant had failed to report to work to respond to issues of variances which amounted to insubordination; the plant had experienced shortage of petrol for 3 days hence affecting efficiency without reasonable explanation by the appellant. It was recommended that the appellant had failed to own up to the fact that she was careless in her performance of her work as Stores Supervisor.



18. In the letter dated October 22, 2015 terminating her services it was stated that the appellant had failed to meet expectations of the respondent as Stores Supervisor. She was offered final dues which comprised days worked up to 22nd October, 2015, outstanding leave and 1 month salary in lieu of notice.
19. The thread running through the grounds of appeal is that the respondent failed to follow procedural fairness which is required of an employer before terminating the services of an employee. This is not true. As we have seen the respondent served the appellant with various letters where her lack of performance of duties as was required was pointed out. That performance did not improve despite the appellant being given many chances to improve her performance. That failure in performance of her duties led to financial loss suffered by the appellant and there is also the 3 day lapse when the plant could not operate as the appellant failed to provide fuel required for operation of trucks which were to deliver products to the respondent's outlets. The appellant was finally invited to a disciplinary hearing; she did not appoint fellow employee or other representative to accompany her during that hearings; the various accusations were made and the committee was not satisfied by the explanations offered by the appellant. This led to termination of employment. We find, like the trial Judge, that there was procedural fairness in the way the respondent dealt with the appellant's case and services were properly terminated.
20. The Judge is faulted in the last ground of appeal for failing to compute the award of compensation that would have been due to the appellant under Section 49 of the Employment Act.
21. The Judge found that the appellant was not entitled to the relief sought and having lost on that score – no unlawful termination – the appellant was not entitled to any relief. We agree with those findings. The appellant had prayed for "...loss of earning from the date of termination to retirement." The Employment Act does not envisage such a relief. A trial court finding unfair or unlawful termination may order reinstatement if a period of 3 years has not lapsed since termination or give compensation upto 12 months salary. The trial court in our case having found that termination of employment was lawful had no duty to navigate a speculative journey not contemplated by the Act. The appellant's complaint has no basis at all.
22. This appeal has no merit and we dismiss it with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MAY, 2022.

R.N. NAMBUYE

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed



DEPUTY REGISTRAR

