Omuko v Unilever Kenya Limited (Cause 781 of 2018)
[2025] KEELRC 275 (KLR) (6 February 2025) (Judgment)

Neutral citation: [2025] KEELRC 275 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 781 OF 2018

L NDOLO, J

FEBRUARY 6, 2025

BETWEEN

JIMMY KIMANGA OMUKO ..... CLAIMANT

AND

UNILEVER KENYA LIMITED ..... RESPONDENT

JUDGMENT

Introduction

1. The Claimant commenced his claim against the Respondent by a Memorandum of Claim dated May 23, 2018, and filed in court on even date. The Respondent filed a Memorandum of Defence dated 25th July 2018, to which the Claimant responded on 27th August 2018.

2. When the matter came up for trial, the Claimant testified on his own behalf and the Respondent called its Human Resources Business Partner, Anneliese Kinanu. The parties also filed written submissions.

The Claimant's Case

3. The Claimant was employed by the Respondent on 9th March 1989, at an entry level of Junior Stores Clerk. He rose through the ranks to the position of Clerk IV as at the time of leaving employment on 6th April 2017. At the time of separation, the Claimant earned a monthly salary of Kshs. 140,782.72.

4. The Claimant states that in the month of February 2017, the Respondent held a meeting with its employees, at which the need to downsize was communicated. The Respondent is said to have given a proposal for Voluntary Early Retirement (VER).

5. On 13th February 2017, the Claimant wrote to the Respondent, opting to leave employment under the VER program. He states that his terminal dues under the VER program would be Kshs. 10,034,947.16.

6. As the Claimant was awaiting response to his VER application, he was issued with a show cause letter dated 7th March 2017. He responded to the show cause letter by his letter dated 9th March 2017 and on 13th March 2017, he was issued with summons to attend a disciplinary hearing, which he attended on 16th March 2017.

7. The Claimant was subsequently issued with a summary dismissal letter dated 5th April 2017. His application for review was declined.

8. The Claimant's case is that the Respondent's decision to subject him to disciplinary proceedings, culminating with termination of his employment, was a decoy to avoid paying him his dues under the VER program. He therefore claims the following:

    a. General damages;

    b. Kshs. 10,034,947.16 being dues under the VER program;

    c. Costs plus interest.

The Respondent's Case

9. In its Memorandum of Defence dated 25th July 2018, the Respondent denies the Claimant's claim and states that the Claimant was dismissed on grounds of misconduct, arising from his fraudulent conduct. The Respondent maintains that the dismissal was justifiable, fair and procedural.

10. The Respondent states that the Claimant worked as a Clerk at the Central Stores of the Commercial Street Factory. The Respondent claims to have incurred a loss approximating Kshs. 120,000,000, through payment for heavy fuel oil that was neither received nor consumed by the Respondent.

11. The Respondent commissioned PriceWaterhouseCoopers to investigate the loss, which was as a result of variances between stocks recorded in the SAP management system and actual physical stocks of heavy fuel oil.

12. According to the Respondent, the investigations revealed the following anomalies in handling of heavy fuel oil:

    a. Heavy fuel oil was received physically but was not posted in the SAP management system;

    b. Payment for heavy fuel oil deliveries was made without sufficient supporting documentation;

    c. Presentation of falsified documentation to support deliveries that were not made;

    d. Posting of heavy fuel oil issuances in the SAP system without requisition or physical issuance at the cost centres;

    e. Creation of fictitious weighbridge tickets;

    f. Acknowledging receipt of heavy fuel oil stocks based on fictitious and/or questionable documentation.

13. Based on the above findings, the Claimant was issued with a notice to show cause dated 7th March 2017, citing the following particulars:

    a. On 11th December 2015, the Claimant generated a duplicate ticket based on a delivery that had been done on 2nd December 2015;

b. He then handed over the duplicate to the Engineering stores to use as evidence of delivery for a truck that the Respondent had reasonable cause to believe was diverted;

c. He failed to maintain the required levels of integrity in handling heavy fuel oil and/or failed to report any irregularities in its handling.

14. The Claimant is said to have failed to satisfactorily address the allegations made against him. By a letter dated 13th March 2017, he was invited to attend a disciplinary hearing on 16th March 2017, which he attended in the company of three shop stewards.

15. The Respondent states that upon considering the Claimant's responses, a conclusion was reached that there was sufficient reason to believe that the Claimant had neglected to perform his duties as required, causing material financial losses to the Respondent. Consequently, the Claimant was issued with a termination letter on 5th April 2017.

16. The Claimant's appeal dated 10th April 2017 was disallowed and communication to that effect was made by letter dated 25th May 2017.

17. The Respondent asserts that the decision to dismiss the Claimant arose purely from his fraudulent conduct and was not related to the VER program.

Findings and Determination

18. There are two (2) issues for determination in this case:

a. Whether the Claimant's dismissal was lawful and fair;

b. Whether the Claimant is entitled to the remedies sought.

The Dismissal

19. The Claimant was dismissed by letter dated 5th April 2017 stating as follows:

> " Dear Jimmy,
>
> Re: Summary Dismissal
>
> We refer to the show cause letter of 7th March 2017, and your response to the same, which was received on 10th March 2017. We also refer to the disciplinary hearing that was held on 16th March 2017 which you attended together with 3 Shopstewards to represent you.
>
> The Company's contention was that:
>
> i. You created fictitious weighbridge tickets aimed at concealing diversion of Heavy Fuel Oil (HFO) that was meant to be delivered to the Company.
>
> ii. You failed to maintain the required levels of integrity in handling HFO and/ or failed to report any irregularities in the handling of HFO.
>
> The Company has fully considered the representations you and your representatives made at the hearing in your defence and has made the following findings:
>
> i. The weighbridge ticket that you generated was fraudulent, and was used to support payment for a purported delivery of HFO which was not delivered to the Company.

ii. You exhibited an excellent knowledge of and confidence in the way the weighbridge system operated and the Company has reasonable cause to believe that the submission that this was a system generated error from picking details of trucks stored in memory was only an excuse;

iii. The 2 delivery notes for sugar which you presented at the hearing in support of your case had weighbridge tickets that were similar in every aspect (except the serial number of the stationery they are printed on), which was further proof of fraudulent activity happening at the weighbridge with your knowledge.

The Company therefore, finds you culpable for:

i. Generating fictitious and fraudulent documents to support payment for supplies that were never delivered to the Company.

ii. Gross recklessness, carelessness and/or negligence in the performance of your work, thereby occasioning material financial losses to the Company.

The violations set out above amount to gross misconduct and render you liable for summary dismissal as envisaged in the Collective bargaining Agreement (CBA) and the Employment Act 2007 and Section 13.6 of the East Africa Human Resources Policy Manual.

In view of the above, you are hereby summarily dismissed with effect from 6th April 2017.

1. Your salary up to the termination date.

2. Prorated leave days, as accrued to the date of termination, if any.

The above payments will be made net of all statutory deductions and any monies owed by yourself to the Company.

Please note that you will be required to liaise with Alexander Forbes to process your pension dues from the Pension Fund. The Human Resources Department will provided (sic) with the relevant form for completion.

On your part, you are required to immediately:

1. Return all Company property in your possession;

2. Undergo the exit clearance process.

A clearance form will be provided by the Human Resources Department to facilitate your clearance. You will also be issued with a Certificate of Service.

Please note that you have a right of appeal against this disciplinary action by writing to Salome Nderitu- East Africa Human Resources Director (email: Salome.Nderitu@unilever.com) within 5 working days of the date of this letter.

We wish you well in your future endeavours.

Yours sincerely,

Unilever Kenya Limited

(signed)

Orvando Ferreira

Manufacturing Director."

20. This letter states that the Claimant had been found culpable for:

    a. Generating fictitious and fraudulent documents to support payment for supplies that were never delivered to the Company;

    b. Gross recklessness, carelessness and/or negligence in the performance of his work, thereby occasioning material financial losses to the Company.

21. The dismissal letter was preceded by a show cause notice dated 7th March 2017, by which the Claimant was accused of creating fictitious weighbridge tickets and failing to maintain the required levels of integrity in handling heavy fuel oil and/or failing to report any irregularities in its handling.

22. In his response dated 9th March 2017, the Claimant denied both charges, stating that his duties did not include receiving heavy fuel oil either physically or in the SAP system. He further stated that he did not participate in payment and he did not handle any documentation relating to heavy fuel oil.

23. The Claimant explained that in his position as a Clerk, the only role he played at the weighbridge was to key in the motor vehicle registration number and select the supplier, with the rest of the information, including date and time, being system generated.

24. In determining a claim for wrongful dismissal such as the one before me, the Court is required to determine two things; first, whether a valid reason for the dismissal has been established and second, whether in executing the dismissal, the employer has observed due process.

25. The standard for establishing a valid reason for termination of employment is set by Section 43 of the *Employment Act*, which provides as follows:

> 43.
>
> (1) In any claim arising out of termination of 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 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.

26. This provision codifies what is commonly referred to as the 'reasonable responses test' whose silhouettes were established by Lord Denning in *British Leyland v Swift* (1981) IRLR 91 as follows:

> "The correct test is; was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered in all these cases that 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 keeps him on. Both views may be quite reasonable. If it was reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employer may not have dismissed him."

27. The 'reasonable responses test' is recapitulated in the Halsbury's Laws of England, 4th Edition, Vol. 16(1B) para 642 in the following terms:

> "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 falls outside the band, it is unfair."

28. In its final submissions dated 18th December 2024, the Respondent referred to the South African decision in *Nampak Corrugated Wadeville v Khoza* (JA 14/98) [1998] ZALAC 24 where it was held that:

> "The determination of an appropriate sanction is a matter which is largely within the discretion of the employer. However, this discretion must be exercised fairly. A court should therefore, not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether it could have imposed the sanction imposed by the employer, but whether in the circumstances of the case the sanction was reasonable."

29. The question before me at this stage is whether the twin allegations levelled against the Claimant, right from the show cause notice, through the disciplinary hearing, and culminating with the dismissal letter, were proved at the shop floor, to the standard required by both statute and case law.

30. From the evidence on record, the Respondent was jolted to action after experiencing losses approximating Kshs. 120,000,000 over the period between January and September 2016. There was suspicion that these losses were occasioned by system manipulation in the supply of heavy fuel oil. The Respondent therefore commissioned PriceWaterhouseCoopers to conduct an investigation.

31. The Respondent claims that the report by PriceWaterhouseCoopers revealed that a group of employees, including the Claimant, had conspired to defraud the Company, on account of fictitious supplies of heavy fuel oil.

32. Significantly, the Respondent chose to keep away the investigation report from inquiry by the Court. What is more, the Claimant, whose employment is said to have been terminated on account of findings in the report, was not allowed to see it.

33. In his response to the show cause notice, the Claimant was categorical that he did not play any role in the process leading to the alleged loss. This assertion is supported by the general nature of the allegations made against the Claimant.

34. It was not lost on the Court that there was no specific loss assigned to the Claimant nor was there mention of any specific duty he failed to perform in order to prevent the loss.

35. What emerges is that the Respondent, having experienced loss, decided to do a swoop on every employee who appeared to have been involved. Such omnibus like action cannot pass the 'reasonable responses test' and I have no difficulty in reaching the conclusion that the Respondent has failed to establish a valid reason for dismissing the Claimant.

36. The next question is whether in executing the dismissal, the Claimant followed due process. Section 41 of the *Employment Act* provides the following mandatory disciplinary procedure for employees facing the prospect of termination of employment:

> 41.
>
> (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 the 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.

37. In addressing the ingredients of procedural fairness as set out in the foregoing provision, the Court in *Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd* [2013] eKLR stated as follows:

> " The ingredients of procedural fairness...within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee. Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible. Thirdly, if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction."

38. In its decision in *Rebecca Ann Maina & 2 others v Jomo Kenyatta University of Agriculture and Technology* [2014] eKLR this Court stated as follows:

> " ...in order for an employee to respond to allegations made against them, the charges must be clear and the employee must be afforded sufficient time to prepare their defence. The employee is also entitled to documents in the possession of the employer which would assist them in preparing their defence. The employee is further entitled to call witnesses to buttress their defence."

39. I have scrutinised the steps taken by the Respondent in dealing with the Claimant's case. The Claimant received a notice to show cause dated 7th March 2017, on 8th March 2017 and he was required to respond

by the following day being, 9th March 2017. He received summons dated 13th March 2017 on 15th March 2017, instructing him to attend to attend a disciplinary hearing the following day on 16th March 2017.

40. The Court was unable to understand the rationale behind the supersonic speed with which the Respondent handled the disciplinary proceedings against the Claimant. In its defence, the Respondent appeared to suggest that because the Claimant did not complain, then the process was without fault. Far from it, an employer who violates the right of an employee to fair hearing cannot plead immunity from an alleged acquiescence by the employee.

41. On the whole, I have reached the conclusion that by failing to avail the investigation report to the Claimant, while giving unreasonable timelines to him, the Respondent violated the procedural fairness requirements set by Section 41 of the *Employment Act*.

Remedies

42. Flowing from the foregoing, I award the Claimant twelve (12) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's long service, the finding that he did not contribute to the dismissal and the slim chances of him finding alternative employment of equal stature. I have further considered the Respondent's mishandling of the Claimant's case.

43. There was no evidence that the Claimant was part of any VER program implemented by the Respondent. The claim for dues under VER is therefore without basis and is disallowed.

44. The Court did not find any basis for the claims under the head of general damages. These claims therefore fail and are dismissed.

45. Finally, I enter judgment in favour of the Claimant in the sum of Kshs. 1,689,393 being 12 months' salary in compensation for unlawful and unfair termination of employment.

46. This amount is subject to statutory deductions and will attract interest at court rates from the date of judgment until payment in full.

47. The Claimant will have the costs of the case.

48. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 6TH DAY OF FEBRUARY 2025

LINNET NDOLO

JUDGE

Appearance:

Mr. Ochako for the Claimant

Ms. Onyango for the Respondent