



**Ochieng v Rhombus Concrete (Cause E057 of 2024)
[2025] KEELRC 1010 (KLR) (28 March 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1010 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E057 OF 2024
SC RUTTO, J
MARCH 28, 2025**

BETWEEN

FELIX ONYANGO OCHIENG CLAIMANT

AND

RHOMBUS CONCRETE RESPONDENT

JUDGMENT

1. The Claimant avers that he was employed by the Respondent as a Key Accounts Manager with effect from 28th May 2021. According to the Claimant, he performed his duties as per the terms of his contract and served the Respondent with diligence and dedication as expected of him.
2. It is the Claimant’s case that on 4th August 2024, the Respondent terminated his employment without any justifiable and/or merited cause in complete disregard to the *Employment Act*. In his view, the reason given by the Respondent for the termination of his employment was spurious and only used as a smoke screen to terminate his employment. His claim against the Respondent is for the sum of Kshs 1,105,000.00 being notice pay and maximum compensation for unfair termination. In addition, the Claimant has sought interest plus the costs of the suit.
3. The Claim did not go unopposed. Through a Response to the Memorandum of Claim dated 30th April 2024, the Respondent avers that the Claimant had numerous disciplinary matters due to his bad behaviour while at work. According to the Respondent, the Claimant’s case against it is falsified, exaggerated, misconceived, and deficient in material particulars necessary for the award of the orders sought. Consequently, the Respondent has asked the Court to dismiss the suit with costs.
4. During the hearing which took place on 5th December 2024, both parties called oral evidence.



Claimant's Case

5. The Claimant testified in support of his case, and at the outset, sought to adopt his witness statement and the list and bundle of documents filed alongside his Memorandum of Claim, to constitute his evidence in chief.
6. It was the Claimant's evidence that on or about 14th July 2023, he was told to go and pick up a company's cheque at Parklane. He requested for a taxi but as he was waiting for one, his manager kept calling him to hurry up and meet with her at some other place where he was to handle some work. He waited for a taxi but none was close by. Out of convenience and for purposes of saving time since his manager was waiting for him, he requested the company rider to drop him off at Parklane's site at ISK Kitisuru since he was heading in the same direction.
7. The Claimant averred that along the way, they were involved in a road accident with another motor vehicle, which was blamed by traffic police officers for causing the accident. They went to the hospital and were discharged since none of them was seriously injured.
8. Later on, he was summoned for a disciplinary hearing through a Notice to Show Cause dated 25th July 2023 for reasons that he had used the company motorcycle instead of a taxi.
9. He explained his reasons for using the company's motorcycle which were purely out of good faith/intention and with no malice at all. He further narrated the circumstances of the accident and how he was not in control of the motorcycle and that regardless of his presence on it, the accident would have still occurred since it was the driver of the motor vehicle who was to blame.
10. The Claimant averred that he apologized to his employer for using the company motorcycle instead of a taxi, but his apology was met with a summary dismissal letter.
11. That prior to the aforementioned incident, he had never been involved or found in any disciplinary issue.
12. According to the Claimant, he has always discharged his duties diligently, professionally and competently as a senior accountant.

Respondent's Case

13. The Respondent called oral evidence through Mr. Paul Mucheru who testified as RW1. He identified himself as the Respondent's Human Resource Manager. Equally, RW1 adopted his witness statement to constitute his evidence in chief. He further produced the initial list and bundle of documents, the further list and bundle of documents and the supplementary list and bundle of documents filed on behalf of the Respondent as exhibits before court. This was with the exception of the medical examination reports and the treatment notes which were marked for identification subject to the same being produced by their makers.
14. RW1 told the Court that on or about 14th July 2023, the Claimant was tasked to go and pick up a company's cheque at a construction site known as Parklane, where the Respondent had been contracted.
15. The Claimant decided to forcefully get a ride from the Respondent's rider (Mr. Gitau) despite having the Respondent's approval to hire a taxi.
16. That regardless of being aware that the motorbike is meant for the delivery of parcels and not ferrying passengers, the Claimant decided to unreasonably ignore that fact.



17. It was RW1's testimony that the Claimant jeopardized the safety of another employee, which was life-threatening, by squeezing himself forcefully onto the motorbike without wearing a helmet.
18. As a result, the motorbike was involved in an accident where the rider was seriously injured hence stayed away from work on medical grounds for more than one month.
19. RW1 added that prior to the accident, the Claimant was approved to use taxi services, but he decided otherwise thus causing a lot of inconveniences to the Respondent.
20. RW1 further stated that the Claimant was accorded a fair hearing before his termination, which included a Notice to Show Cause dated 25th July 2023, whereby he was asked to show cause in writing why disciplinary action up to and including termination or dismissal should not be taken against him.
21. The Claimant responded to the Notice to Show Cause on 26th July 2023, where he was then invited to a disciplinary committee hearing, which was held on 31st July 2023.
22. On 4th August 2023, the Respondent was constrained to dismiss the Claimant for gross misconduct.
23. RW1 further testified that the Respondent graciously paid the Claimant his terminal dues up to 4th August 2023.
24. That on 7th August 2023, the Claimant filled his clearance form and handed over his docket.
25. In RW1's view, the Respondent owes no liability to the Claimant.

Submissions

26. On the Claimant's part, it was submitted that the termination of his employment was not grounded on a fair or valid reason, nor was it undertaken in accordance with fair procedure. To this end, reliance was placed on *Naima Khamis v Oxford University Press (E.A) Ltd* [2017] KECA 480 (KLR) and *Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others* [2019] eKLR.
27. It was further submitted by the Claimant that the reason for termination advanced by the Respondent is not only insufficient, but does not pass the test of reasonable responses.
28. The Claimant further contended that the Respondent has not proven how his actions were in violation of the terms of his employment as stipulated in his employment contract or how it is that he failed to obey the command of his employer.
29. It was the Claimant's position that he did what any good and dedicated employee would do, faced with similar circumstances. According to the Claimant, his services were urgently needed and he made the decision to use the fastest way available of getting to the destination. In his view, this cannot possibly be considered an act of disobedience.
30. The Claimant further submitted that his employment was terminated for flimsy, unproven reasons. That further, there is no proof on record that he disregarded his manager's instructions as the manager was not called to testify on the same, both in the disciplinary hearing and in this Court.
31. According to the Claimant, a reasonable employer would not have dismissed him due to the events that occurred on 14th July 2023.
32. The Claimant further argued that it is not clear whether he was dismissed due to failure to adhere to his superior's instructions, whether it was due to his using the company's motorcycle contrary to company policy or whether it was due to the fact that his actions led to an accident and endangered a colleague's life.



33. Referencing the case of *Sani v JSC* [2022] KEELRC 4000 (KLR), it was the Claimant's submission that the decision to summarily dismiss him was grounded on the finding that he disregarded his line manager's instructions, an issue that was clearly not addressed in the disciplinary hearing.
34. The Claimant further submitted that the disciplinary process was rushed and to his prejudice.
35. Citing the case of *Bongo v United Kenya Club* [2023] KEELRC 1286 (KLR), the Claimant submitted that he was given an unreasonably short period to prepare his defence for the disciplinary hearing.
36. On the other hand, the Respondent submitted that the Claimant admitted during the hearing that his line manager had asked him to try and find an Uber taxi but he refused to be patient enough and decided to force himself onto the company's motorbike noting very well that the motorbike had a delivery box at the back.
37. That prior to the accident, the Respondent had approved the Claimant to use taxi services, but he decided otherwise thus his actions caused a lot of inconveniences and cost to the detriment of the company. That the Claimant endangered another employee's life.
38. In support of the Respondent's submissions, reliance was placed on *Kitsao Said Tuva v Al-Barakat Agency Limited* [2020] eKLR and *Rachael Wambere Mwangi v Teachers Service Commission* [2020] eKLR.
39. The Respondent further posited that the Claimant's responsibilities in the company were more senior to him as compared to Mr. Gitau and it was expected of him to be at least more reasonable and act lawfully and responsibly.
40. The Respondent further submitted that the Claimant was accorded a fair hearing before his termination, including a Notice to Show Cause dated 25th July 2023, whereby he was asked to show cause in writing why disciplinary action should not be taken against him.

Analysis and Determination

41. Flowing from the pleadings, the evidentiary material on record, and the rival submissions, it is apparent that the Court is being called to determine the following issues:
 - i. Whether the Respondent has proved that it had a valid and fair reason to terminate the employment of the Claimant.
 - ii. Whether the Claimant's termination from employment was in accordance with a fair process.
 - iii. Is the Claimant entitled to the reliefs sought?

Valid and fair reason?

42. As can be discerned from the record, the Claimant was terminated from employment pursuant to Section 44(4) (e) of the *Employment Act*. As per the letter of summary dismissal, the Claimant was notified that his actions were considered gross misconduct and grounds for summary dismissal.
43. In the Claimant's letter of summary dismissal dated 4th August 2023, it was alleged that he decided to get a ride from the company motorbike rider (Mr. Gitau) on his way to collect a cheque at Parklane. In this regard, The Claimant was accused of squeezing himself on the motorbike without wearing a helmet and against traffic rules.
44. It was further noted that the Claimant's line manager had approved his use of taxi services, but he (Claimant) decided otherwise.



45. In the end, the Respondent found that the Claimant disregarded the instructions of his line manager to use a cab to get to the site hence he was cited for insubordination under Section 44(4) (e) of the *Employment Act*.
46. Pursuant to Section 43(1) of the *Employment Act* the Respondent was required to prove the reasons for termination. In default, the termination of the Claimant's employment would be deemed to be unfair. Worthy to note is that under Section 45 (2) (a) and (b) of the *Employment Act*, the employer is bound to prove that the reasons for the termination of employment were valid, fair and related to the employee's conduct, capacity or compatibility; or based on its operational requirements.
47. The question this Court must therefore answer is whether the reason advanced for the termination of the Claimant from employment was valid and fair within the meaning of the aforementioned Section 45(2) (a) and (b) of the *Employment Act*.
48. As stated herein, the Claimant was terminated on grounds of insubordination in that he disregarded the instructions of his line manager to use a cab to get to the site at Parklane.
49. Insubordination is a ground for summary dismissal under Section 44(4) (e) of the *Employment Act*. The said statutory provision is couched as follows:
- [44](4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause.....
- (e)an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer;
50. The Black's Law Dictionary (10th Edition) defines insubordination as "A willful disregard of an employer's instructions, esp. behavior that gives the employer cause to terminate a worker's employment. 2. An act of disobedience to proper authority; esp., a refusal to obey an order that a superior officer is authorized to give."
51. The concept of insubordination was defined by the Court in *Dede Esi Annie Amanor-Wilks v Action Aid International* [2014] KEELRC 439 (KLR) to mean "Constant and intentional refusal to obey a direct or implied order, reasonable in nature, and given by and with proper authority, amounts to non-verbal insubordination."
52. Similarly, in *Abraham Gumba v Kenya Medical Supplies Authority* [2014] KEELRC 463 (KLR), the Court adopted the definition of insubordination as assigned by the Mississippi Supreme Court in the case of *Sims v the Board of Trustees Holly Springs Municipal Separate District School*, 414 SO. 2d 431 [Miss. 1982], as "a constant or continuing intentional refusal to obey direct or implied order reasonable in nature, and given by and with proper authority."
53. Back to the case herein, it is common cause that the Claimant was required to collect a cheque at the Respondent's site at Parklane. It is also not in contest that the Claimant used the Respondent's company's motorcycle to get to Parklane and on the way, the said motorcycle was involved in a road traffic accident, which resulted in the Claimant and the rider sustaining injuries.
54. According to the Respondent, the Claimant's line manager had given approval for him to use taxi services to get to Parklane, but he opted otherwise. It is notable that despite this assertion, there was no evidence, let alone a suggestion, that the Claimant was expressly prohibited from using any other means of transport to get to the site at Parklane besides taxi services.



55. Further to the foregoing, it is notable that the Respondent did not adduce evidence in the form of a Policy or such other document prescribing the suitable means of transport to be used for work-related engagements as the one being undertaken by the Claimant at the material time.
56. It is therefore apparent from the foregoing that the Respondent did not adduce evidence that the Claimant had defied an express directive from his line manager or a policy requirement.
57. According to the Claimant, he had requested for a taxi to get to the site at Parklane, and as he was waiting for one, his manager kept calling him to hurry up and meet her at another place where he was to handle some work. That out of convenience and to save time, he requested the company's rider to drop him at Parklane as he (rider) was heading in the same direction.
58. What is apparent to this Court is that the Claimant may have made a bad judgment call in electing to hitch a ride from the company's motorcycle as opposed to taking the taxi approved by his line manager. Be that as it may, this Court takes the view that the Claimant's decision would not under Section 44(4) (e) of the Employment Act, and the precedents cited herein, be termed as insubordination.
59. If anything, it is apparent from the record that the Respondent's case is not centered on the Claimant's alleged insubordination but rather on the fact that the Claimant got a ride from the motorcycle that was meant for parcel delivery and the fact that the said motorcycle was involved in an accident. The issue of insubordination appears to have taken a back seat.
60. In sum, the Court has not found any material to conclude that the Respondent has proved on a balance of probabilities that there was a valid and fair reason for its decision to summarily dismiss the Claimant from employment on grounds of insubordination.

Whether the Claimant's termination was in accordance with fair procedure

61. In terms of Section 45(2) (c) of the Employment Act, an employer is duty-bound to prove that it terminated an employee's employment in accordance with fair procedure. What entails fair procedure is to be found in Section 41 of the Employment Act. Specifically, an employer is required to notify the employee of the allegations he or she is required to respond to and thereafter grant him or her the opportunity to make representations in response to the said allegations, in the presence of a fellow employee or shop floor union representative of his own choice.
62. In the present case, the Claimant was issued with a show cause letter dated 25th July 2023, which set out in detail the allegations levelled against him. He was advised to forward his response in writing as soon as practicable.
63. Vide a letter dated 26th July 2023, the Claimant was invited to attend a disciplinary hearing scheduled for 31st July 2023. Through the same letter, he was advised of his right to be accompanied to the disciplinary hearing by a representative from any of the staff members.
64. The Claimant does not deny appearing before the disciplinary panel on 31st July 2023. The record of the disciplinary hearing bears that the Claimant was given an opportunity to articulate his case and give his side of the story.
65. In light of the foregoing, I am persuaded that the procedure applied by the Respondent prior to terminating the Claimant's employment met the minimum requirements of a fair hearing as envisaged under Section 41 of the Employment Act.



66. I say so bearing in mind that the Claimant was made aware of the reasons for which the Respondent was contemplating terminating his employment and was afforded an opportunity to appear before a disciplinary panel to render his explanation in answer to the allegations.

Reliefs?

67. As the Court has found that the Respondent has not proved to the required standard that there was a fair and valid reason to cause termination of the Claimant's employment on grounds of insubordination, he is awarded one (1) month's salary in lieu of notice and compensatory damages equivalent to five (5) months of his salary. This award has taken into account the length of the employment relationship and the circumstances related to the termination of the Claimant's employment.

68. In the course of the hearing, the Claimant, through his Advocate Mr. Wasike, sought to amend his Memorandum of Claim to include a for leave days in his prayers. However, the amount claimed as unpaid leave was not specified. From the record, the Claimant was notified in the letter of summary dismissal that he would be paid all leave days accrued and not utilized up to 4th August 2023. During the hearing, RW1 exhibited the Claimant's last pay slip and the final dues tabulation sheet, which indicates that the Claimant was paid Kshs 39,666.67 as earned leave amount. The Claimant did not dispute receiving this amount and, further, has not stated the amount he is now claiming in addition to the leave paid. For the foregoing reasons, the oral claim with respect to leave pay fails.

Orders

69. In the final analysis, Judgment is entered in favour of the Claimant, and he is awarded:
- a. One (1) month's salary in lieu of notice being the sum of Kshs 85,000/=.
 - b. Compensatory damages in the sum of Kshs 425,000.00, being equivalent to five (5) months of his gross salary.
 - c. The total award is Kshs 510,000.00.
 - d. Interest shall apply on the amount in (c) at court rates from the date of Judgment until payment in full.
 - e. The Claimant shall also have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF MARCH 2025.

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STELLA RUTTO

JUDGE

In the presence of:

For the Claimant Mr. Waita instructed by Mr. Wasike

For the Respondent Mr. Nganga

Court Assistant Millicent

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions



of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

