



**Odundo v Bidco Africa Limited (Cause E502 of 2022)
[2025] KEELRC 894 (KLR) (20 March 2025) (Judgment)**

Neutral citation: [2025] KEELRC 894 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E502 OF 2022
NZIOKI WA MAKAU, J
MARCH 20, 2025**

BETWEEN

EVANS ODUNDO CLAIMANT

AND

BIDCO AFRICA LIMITED RESPONDENT

JUDGMENT

1. Evans Odundo (the Claimant) initiated this suit against Bidco Africa Limited (the Respondent) through a Memorandum of Claim dated 14th July 2022. He alleged unfair termination and sought various reliefs, including a declaration that the Respondent's refusal to hear his appeal contravened fair labour practices. Additionally, the Claimant sought compensation of 12 months' salary being Kshs. 1,092,000/- for unfair termination, pay in lieu of notice, as well as costs of the suit and any other relief the court may deem just.
2. The Claimant averred that he was employed on 19th January 2003 as lead Marketer for events at a salary of Kshs. 84,000/-. He averred that he worked diligently for nearly two decades until his termination on 2nd February 2022, which he claimed was unlawful. The Claimant further averred that the disciplinary proceedings that led to his dismissal were a sham, as none of the allegations against him were substantiated, suggesting that the decision to terminate him was premeditated. He further argued that the Respondent's refusal to hear his appeal contravened its own Human Resource Policy, fair labour practices, and *the Constitution*. The Claimant averred that his termination was orchestrated and that the disciplinary hearing was merely a formality to create the illusion of due process. He averred that his arguments were disregarded, reinforcing his belief that the company had already decided to dismiss him regardless of the facts.
3. In response, Bidco Africa Limited filed a Memorandum of Reply dated 9th December 2022, averring that the termination was both procedurally and substantively fair. The Respondent averred that the incident that triggered disciplinary action occurred on 8th December 2021, when security guards



conducted a routine search of Evans' vehicle at the company's gate. It was averred that inside the vehicle, they discovered two sealed boxes without a gate pass and when questioned about their contents, Evans claimed the boxes contained t-shirts and, citing urgency, initially refused to open them. The Respondent avers that however, upon insistence by the security personnel, the boxes were eventually unsealed, revealing an assortment of the company's cooking oil products, including Bahari Fry, Golden Fry, Ufuta, Kimbo Premium, and Olive Gold in various quantities. The Respondent averred that faced with this discovery, Evans altered his explanation, stating that the boxes contained leftover merchandise from the Chanukah Festival and were being transported to a merchandiser. The Respondent averred that the Claimant assured the security team that supporting documentation was available in the office but upon review of the delivery note and invoice, it was discovered that two bottles of Olive Gold 2ltr were unaccounted for, raising further suspicion.

4. The Respondent averred that this discrepancy prompted a thorough internal investigation, which ultimately led to disciplinary action. Consequently, a notice to show cause was issued on 13th January 2022, to which Evans responded on 15th January 2022, a disciplinary hearing conducted on 26th January 2022, during which Evans was given an opportunity to defend himself and was accompanied by a colleague. The Respondent averred that following the hearing, the Claimant's employment was officially terminated on 2nd February 2022.
5. On the alleged refusal to hear the Claimant's appeal, the Respondent averred that the Claimant willingly chose not to pursue it and instead proceeded to clear, hand over company property, and collect his terminal dues. The Respondent further averred that the Claimant's final dues were computed and paid, a fact which he acknowledged by signing a letter dated 4th March 2022.
6. The case proceeded to a full hearing on 22nd April 2024. During the proceedings, the Claimant testified on his own behalf, while two witnesses gave testimony on behalf of Bidco Africa Limited. Following the hearing, both parties filed written submissions in support of their respective positions. The Claimant testified that he was jobless at present and that he had been terminated without cause. He testified that he was employed initially as a casual worker before landing the position of Lead Marketing Events earning a gross salary of Kshs. 84,000/-. He stated he was placed on suspension on allegations of theft of goods. He said he thereafter was issued with a show cause letter dated 13th January 2022 on theft allegations. He stated that he responded to the show cause letter through his response dated 15th January 2022 wherein he gave a written explanation of the issue and on 26th January 2022 he attended a disciplinary hearing. He said that at the hearing he adequately demonstrated that the allegations were untrue and also produced documentary evidence in his quest to absolve himself from blame. He testified that on 2nd February 2022 his services were terminated. He stated that the letter also informed him of a right to lodge an appeal. He said that he lodged an appeal on 15th February 2022 giving reasons for the appeal. He said the Respondent purposefully failed to hear the Appeal contrary to the Respondent's HR Policy. He stated there was information that there was a push to remove him from the employment of the Respondent. He stated that the company issued a letter of termination referencing a disciplinary hearing on 25th January 2022 yet the hearing was conducted on 26th January 2022. He testified that he had served the Respondent with diligence and discipline through the years thereby receiving several recognition awards and promotions over time and that until his termination he had never been reprimanded for any misconduct at work by way of being given a caution or warning letter whatsoever. He said that he had been paid his terminal dues and was seeking 12 month's salary compensation for the dismissal as well as one month's salary as notice.
7. He was cross examined and he testified that he was given a hearing and that he was paid his terminal dues. When asked about the items found in his car, he stated that he had shown clearly where the products were from. He stated the products were for merchandising and that the other goods were



for a cash on delivery per his explanation to the Respondent. He was re-examined by his lawyer but nothing new emerged from the re-examination.

8. The 1st Respondent's witness was Mr. Mutinda Mweu who testified that he was the Respondent's Head Internal Security. He stated that while he was undertaking his duties on 8th December 2021, an incident was brought to his attention at about 10.30a.m at the main gate. He stated that he went to the scene and was informed that the Respondent's car KBK 423B had been stopped at the gate and that the vehicle was being driven by a driver of the Respondent. He said that he learnt that the Claimant was also an occupant in the said motor vehicle and that the Claimant had informed the Respondent's security team that he was going on field duties and he was carrying some merchandise for that purpose. He testified that upon the security team searching the car as is the normal procedure at the time of exiting the Respondent's premises, it was discovered that there were two boxes of merchandise – one big box of t-shirts and spare parts and two boxes of products which were in sealed boxes in the car. He testified that two gate passes were handed to the Respondent's security team for the two boxes of merchandise, however the two sealed boxes did not have a gate pass and upon inquiry by the security team on the gate pass for the sealed boxes from the Claimant, the Claimant insisted that the boxes contained t-shirts and that he was in a hurry and could not open the boxes. He stated that he insisted that the Claimant opens the boxes and the Claimant unsealed the boxes and they discovered that the boxes contained the Respondent's cooking oil products – Bahari Fry 5ltrs (4 jerrycans), Golden fry 5ltrs (2 jerricans), Ufuta 5ltrs and 2ltrs (3 and 1 jerrican respectively), Kimbo Premium 2ltrs (2 bottles) and Olive Gold 2ltrs (2 bottles). He stated that the Claimant was unable to produce a gate pass for the said products and that upon the discovery, the Claimant changed his story and informed the security team that the products were balances from the event at Chanukah Festival Kasarani and that he was taking the same to a merchandiser. He stated that the Claimant was once again asked to provide a document evidencing that the products were balances and the Claimant advised the team that the document was in his office and the Claimant was given time to go and retrieve it. He stated that the Claimant later availed a Delivery Note No. 81393438 and Invoice No. 91397593, which documents did not contain the Olive Gold 2ltrs. He stated that upon conducting further investigations it was apparent the batch numbers on the products did not match the Claimant's explanation.
9. In cross examination he confirmed that he was employed in the Respondent as the head of internal security. He stated that he was not registered with the Private Security Authority. He indicated that the statement he had made was given during the time of his duty and that he had not filed any authority to make a statement. He indicated that the CCTV footage he had reviewed related to another employee and not the Claimant and that the employee in that case resigned. He stated that the employee would not be called as a witness. He testified that he was aware the Claimant appealed his dismissal but did not know if the appeal was heard.
10. In re-examination he testified that he had been authorised by the Respondent to come and testify on its behalf.
11. The 2nd witness for the Respondent was Mrs. Tecla Adika who stated that she was the Lead, Human Capital Excellence at the Respondent company. She testified that her review of the Claimant's file revealed that the Claimant was employed as a Lead Events in Marketing Department. She stated that by signing the letter of employment, the Claimant bound himself to abide by the Respondent's Rules and Regulations and further bound himself not to engage himself in acts amounting to gross misconduct. She testified that on the issue of appeal against termination, the Respondent received the Claimant's appeal against Termination of Contract dated 15th February 2022, but before the appeal could be heard, the Claimant signed for his terminal benefits and the Respondent deemed his appeal as spent.



12. In cross-examination she testified that she was duly qualified as a HR professional and was registered with IHRM. She stated she was authorized to make the statement on behalf of the Respondent. She testified that the authority had not been filed. She confirmed that she was not present when the Claimant went through the disciplinary process and that she was a witness because of her role at the Respondent. She indicated the vehicle registration was KBK 423B on the Claimant's bundle but was indicated on one exhibit as KBK 823B. She testified that the details were later corrected at the hearing and that the appeal was not heard albeit with a reason. She stated that if one successfully appeals the dismissal they could be reinstated. She denied that the Respondent had refused to accord the Claimant a hearing on his appeal. She stated the appeal was meant to be heard within 14 days but the one lodged by the Claimant was not heard.
13. In re-examination she testified that she had given evidence on behalf of the Respondent and that its officials were aware she was in court testifying on its behalf. She stated that the HR department was represented at the disciplinary hearing. On the appeal she testified that the Claimant had preferred an appeal but later signaled a desire to leave the Respondent by clearing with it and he never sought a hearing. She asserted the error in registration details of the vehicle were typos which were corrected. That marked the close of oral testimony and parties were to file written submissions.

Claimant's Submissions

14. The Claimant submits that the court should disregard the Respondent's memorandum of reply, witness statements, lists of documents and witness testimonies due to the absence of a company resolution authorizing the defence of the suit. He contends that although the Respondent's witnesses, Mr. Mutinda Mweu and Mrs. Tecla Adika, identified themselves as Head of Internal Security and Lead Human Capital Excellence, respectively, neither produced letters of authority permitting them to testify. To buttress this position the Claimant relies on Kenya Commercial Bank Limited v Stage Coach Management Ltd [2014] eKLR, which emphasizes the necessity of company resolutions before instituting suits on behalf of a company. Additionally, he submits that Mr. Mutinda Mweu, the Respondent's first witness, was not registered as a security services provider, making him ineligible to testify as Head of Internal Security. He cites sections 6 and 21 of the Private Security Regulations Act, which require any entity offering security services to be registered and prohibits unregistered individuals from engaging in the provision of security services.
15. Regarding his appeal, the Claimant submits that the Respondent failed or refused to hear the appeal. He refutes the argument that he failed to pursue the appeal by clearing, handing over, and collecting his terminal dues, by asserting that contrary to procedure it was in fact the Respondent opted to compute final dues five days after receipt of the appeal. The Claimant submitted that the requirement to appeal within 14 days and the Respondent's Human Resource Policy mandated that an appeal panel be constituted within 14 days of receiving an appeal and a decision be communicated within seven days of hearing the appeal. The Claimant submitted that it became evident the appeal would not be heard when, on 4th March 2022, the Respondent summoned him to confirm his final dues well after the appeal timelines set in the policy had lapsed. Furthermore, he submits that the Respondent did not refute its failure to hear the appeal as claimed in the demand letter.
16. The Claimant submits that the Respondent's failure to hear the appeal amounted to unfair termination. He emphasizes that the disciplinary process prescribed the appeal stage as its final step, meaning the process would only be complete once the appeal was determined. He further contends that the appeal was crucial in addressing the concerns he had raised during the disciplinary hearing, as such failure to hear the same effectively eliminated any possibility of reinstatement. To support this argument, the Claimant relies on the Respondent's HR Manual and sections 41(2) and 45 of the



Employment Act. He emphasizes that section 41(2) requires a hearing before termination, while section 45(1) and (2) prohibit unfair termination and mandate adherence to fair procedure. Additionally, he cites section 45(5)(a), which requires the court to consider the dismissal procedure, including the handling of an appeal, in determining whether a termination was lawful. The Claimant further submitted that that termination must meet both substantive and procedural fairness standards. He cited the case of *Janine Buss v Gems Cambridge International School Limited* [2016] eKLR, where it was held:

“These procedures are not at the whims of an employer were not adhered to by giving the employee a hearing in the presence of an employee of their choice, the resultant termination is procedurally unfair.

In this case, the termination of the Claimant was both substantively and procedurally unfair. She is entitled to compensation.”

17. With respect to adherence to the Human Resource Manual, the Claimant submits that the Respondent did not comply with its provisions, making the termination procedurally unfair. He cites the decision in the case of *Kennedy Mutuku Mwove v M-Kopa Kenya Limited* [2021] eKLR, where the court found that failure to adhere to an employer's policies and procedures rendered a summary dismissal wrongful and unfair. The Claimant further submitted to highlight the procedural flaws in his case, there were several irregularities, including: The absence of input from the Internal Audit department during the investigation. The preparation of an investigation report that failed to include key components such as an executive summary, sources of information, persons involved, scope, investigation details, and conclusions. The improper submission of the investigation report to the Human Resource Department instead of the Ethics & Compliance Department. The failure of the Ethics & Compliance Department to verify the report before recommending disciplinary action. The Respondent's failure to provide the Claimant with evidence against him before the hearing. The signing of minutes by only five out of the seven individuals present at the disciplinary hearing. The dismissal being based on a defective charge.
18. The Claimant submitted there was failure to provide evidence and he placed reliance on the case of *Ouma v Faulu Microfinance Bank Limited (Cause E015 OF 2022)* [2023] KEELRC 2809 (KLR) (9 November 2023) (Judgment), where the court held that withholding evidence from an employee rendered the disciplinary hearing procedurally unfair. As for the reliefs sought, the Claimant submits that he has discharged his burden of proof under section 47(5) of the Employment Act. He urges the court to apply the salary of Kshs. 107,519/-, as reflected in the "Settlement of Final Dues" letter, to determine compensation. He further asserts that he is entitled to the maximum 12 months' salary based on his 19 years of service, the distressing circumstances of his termination, and Section 49 of the Employment Act. He draws parallels with the *Janine Buss* case (supra), where the court awarded 12 months' salary as compensation for unfair termination. Finally, regarding payment in lieu of notice, the Claimant submits that he is entitled to this relief due to the unfair nature of his termination, citing section 49(1)(a) of the Employment Act.

Respondent's Submissions

19. The Respondent submits that any challenge to its witnesses' authority to testify should have been raised at the pre-trial stage rather than at the submission stage. It asserts that by raising this issue at the submission stage, the Claimant denied the Respondent the opportunity to counter the allegations through the provision of evidence. The Respondent further emphasizes that submissions do not constitute evidence and cannot serve as a forum for introducing new issues. In support of this position,



the Respondent cites the Court of Appeal decision in *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another* [2014] eKLR, in which it was held:

“So what we conclude is that the learned trial judge simply lifted the figure of Shs. 80,167,720/- from the 1st Respondent's submissions and awarded it against the appellant. This was wholly in error. Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.”

20. Additionally, the Respondent relied on the case of *Robert Ngande Kathathi v Francis Kivuva Kitonde* [2020]eKLR, where the court emphasized that parties cannot use written submissions to circumvent the place of evidence. Notwithstanding the foregoing, the Respondent asserts that the Claimant had access to the witness statements before trial but did not raise any objections. Furthermore, the Respondent argues that the authority relied upon by the Claimant, *Kenya Commercial Bank v Stage Coach Management Limited* [2014] eKLR, is distinguishable from the present case as it dealt with a company's capacity to institute a suit, the mandate of a person swearing affidavits, and the role of the law firm representing the Plaintiff. Regarding the appeal process, the Respondent submits that the Claimant demonstrated a lack of interest in pursuing the appeal. It asserts that the Claimant's action of immediately presenting himself for clearance and collection of dues and issuing a demand letter, painted a picture of disinterest in the appeal process.
21. On the issue of service of documents, the Respondent submits that the Claimant's allegations are baseless. It argues that it is inconceivable for the Claimant to file the same documents in court and later claim that he was not provided with the evidence. With respect to the discrepancies in the registration numbers of the Claimant's vehicle, the Respondent asserts that this was merely a typographical error, which was corrected on page 13 of the disciplinary hearing minutes. It maintains that the Claimant's termination was fair, as he was found in possession of the Respondent's products and insisted on leaving hurriedly without undergoing inspection. The Respondent relies on the case of *David Otieno Ogada v Bidco Africa Limited* [2020]eKLR, where it was held that termination was fair in instances of admitted misconduct. To support its position, the Respondent refers to the minutes of the disciplinary hearing, highlighting key admissions made by the Claimant. Specifically, at page 3, where he stated he was in a hurry and would provide the gate pass later; page 4, in which he acknowledged that Olive Gold was not in the catalogue; page 11, in which he was unable to provide the name of the customer he was allegedly supplying with oil; and page 13, in which he admitted not following company procedures. Based on the foregoing, the Respondent submits that the Claimant acted negligently, contrary to the expectations of an employee with 19 years experience. It relies on the case of *Renice Akinyi Dulo v Harambee Sacco Ltd (Cause E101 of 2019)* [2024] KEELRC 506 (KLR) (7 March 2024) (Judgment) where the court, relying on the disciplinary committee proceedings and the Claimant's failure to perform diligently, found the termination fair. With respect to the prayers sought, the Respondent submits that the discrepancies in the amounts claimed in the memorandum of claim and those in the submissions amount to an amendment of pleadings at the submission stage. The Respondent reiterates that parties are bound by their pleadings. Additionally, it asserts that the Claimant was paid his final dues, which he duly acknowledged. Regarding pay in lieu of notice, the Respondent affirms that the termination was lawful and that the Claimant was issued with notice. As for the 12



months' compensation, the Respondent asserts that it is not awardable, as the termination was lawful. In conclusion the Respondent urges the court to dismiss the Claimant's suit with costs.

22. The Court has considered the pleadings as well as the evidence adduced and the submissions of parties in coming to this decision. The Court discerns the issues for determination to be:
 - a. Whether the Respondent's witnesses were competent to testify on behalf of the Respondent
 - b. Whether the Claimant had proved an unfair termination
 - c. What remedies lie.
23. At the hearing, the Respondent was represented by Mr. Mutinda Mweu who testified he was the security manager at the Respondent and Mrs. Tecla Adika who stated she was employed by the Respondent in the HR department. A lot of hot air was blown over the failure by the 2 to avail authority from the Respondent to represent it in Court or the certificates of their registration with the Private Security Association and the Institute of Human Resource Management (IHRM) respectively. The Court returns that the 2 witnesses were competent to appear in the matter as Mr. Mweu was the one who searched the vehicle when the Claimant was alleged to have been ferrying products from the Respondent's premises without authority. Mrs. Adika was the successor to the occupant of the HR office who handled the dispute and indicated in her statement and testimony before the Court that she had familiarised herself with the matters as recorded in the files held by the Respondent. The Respondent had initially indicated that its second witness would be Ms. Serah Wangethi who was later substituted by Mrs. Adika. There is nothing to suggest that the case of Kenya Commercial Bank Limited v Stage Coach Management Ltd (supra) has any application in an employment dispute much less this case. I find and hold that decision is irrelevant and not applicable here.
24. The second and penultimate issue is whether the termination of the Claimant's services was unfair. The Claimant was Lead Marketing Events. In that position he could depart the Respondent's premises with the goods in question which were various brands of cooking oil manufactured and packaged by the Respondent. The Claimant however, would have to be in possession of valid documents to enable him leave with the items. The Claimant did not have authority to leave with a majority of the items he had in his possession. In as far as the Court can ascertain from the record of proceedings before the disciplinary panel, the Claimant was given ample time to avail documents to support his possession of the products. Twice he failed to avail a record permitting him to have the products and items found in his possession at the gate. He managed to retrieve some documents from his office but those documents only proved that the items listed were not the same as the ones he had been found with. The batch numbers did not correspond with the period he alleges he was involved in the promotion activities at Chanukah Festival Kasarani. He changed his story many times at one time indicating to the panel that he had not indicated whether the items were brought back to the factory in the truck or the small vehicle. Notably, he had not mentioned the conveyance used to return the items to the factory in his previous statements and when questioned further he insisted he had carried some items in the truck and others in the small car. He had resisted having the sealed boxes opened and even had a shift in the story as to why he could not permit the search. There also was no record of the precise items returned to the factory and the explanation he gave did not persuade the panel nor did it persuade this Court. He suggested that his dismissal was orchestrated by a member of the discipline panel but a reading of the minutes show the panel gave the Claimant sufficient latitude during the hearing even at the point of search. It was recorded that the Claimant was given time to look for documents which he claimed to have and when he would return with insufficient information he would be indulged and asked to give explanation. He even at a time claimed he had taken a photo of his statement but when asked whether he had a copy he said he had used a different phone than the one he had at the time of the



hearing. Even the guards at the gate led by Mr. Mweu gave the Claimant ample time to explain and even permitted him room to avail documentation only for the Claimant to fail to properly explain why he had some of the products. The inquiries at the gate were rational and not malicious. The Claimant could not explain why he had items which were for "cash on delivery" yet he had no document to show how the order was made. He could not demonstrate whether the products had been processed as per the prevailing purchase options including the online kiosk option.

25. The long and short of the foregoing is that the Claimant did not extricate himself from accusations of improper handling of company products which he attempted to steal and would have succeeded had the Respondent's security agents not been vigilant. In terms of section 41, 45 and 47 of the [Employment Act](#), the Claimant was accorded a chance to defend himself, was heard and when his explanation failed to exculpate him led to his termination. There is no basis for a finding in his favour as one cannot fault the procedure and process used to dismiss him from service. What remedies now lie? The Claimant received his terminal dues and therefore he has nothing else to recover. His suit being untenable and not proved, it is accordingly dismissed with costs to the Respondent.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 20TH DAY OF MARCH 2025

NZIOKI WA MAKAU, MCIARB.

JUDGE

