



**Nyoike v Del Monte (K) Ltd (Cause E920 of 2023)
[2025] KEELRC 747 (KLR) (13 March 2025) (Judgment)**

Neutral citation: [2025] KEELRC 747 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E920 OF 2023
CN BAARI, J
MARCH 13, 2025**

BETWEEN

BERNARD NDUNGU NYOIKE CLAIMANT

AND

DEL MONTE (K) LTD RESPONDENT

JUDGMENT

Introduction

1. Before Court is the Claimant’s Memorandum of Claim dated 9th November, 2023, wherein, the Claimant seeks a declaration that he was unfairly terminated, salary in lieu of notice, salary arrears and compensation for the unfair termination amongst others.
2. The Respondent entered appearance on 13th December, 2023, and subsequently filed a Response to the Statement of Claim dated 20th December, 2023.
3. Both the Claimant’s and the Respondent’s cases were heard on 23rd October, 2024. The Claimant testified in support of his case, adopted his witness statement and produced a list and bundle of documents filed in support of his case.
4. The Respondent presented the evidence of one Jacob Lesirma-their Industrial Relations Officer to testify on its behalf. Mr. Lesirma similarly adopted his witness statement and produced the Respondent’s list and bundle of documents in support of the Respondent’s case.
5. Submissions were filed for both parties.

The Claimant’s Case

6. The Claimant’s case is that: -



- i. He was employed by the Respondent in the month of December 2008, and issued with an appointment letter as required by law.
- ii. That his salary was enhanced over time and by the year 2023, his salary was Kenya Shillings Eighty-Nine Thousand, Two Hundred and Eighty-One (Kshs.89,281/).
- iii. He served the Respondent with loyalty and diligence until 17th July 2023, when the Respondent without due regard to the process of law unfairly and unlawfully terminated his services without notice, and in contravention of Section 35 of the Employment Act 2007, which makes it mandatory for an employer to give notice in writing of intended termination of employment.
- iv. That the Respondent did not give the Claimant leave allowance for the year 2023.
- v. The Claimant states that the Respondent acted in contravention of Section 45 of the Employment Act, which provides that the employer shall give a valid and/or fair reason for the termination of the employment contract. He states further that the Respondent's actions are in contravention of Sections 35, 36, 45, 46 and 51 of the Employment Act 2007.
- vi. That despite demand being made to the Respondent to pay the Claimant terminal dues and salary arrears, the Respondent has failed and neglected to do so.
- vii. The claimant avers that he suffered consequences of someone else's wrong.
- viii. On cross-exam the Claimant told court that he was a supervisor in the service of the Respondent, and was assigned motor vehicle Reg. No. KDE 373P that was involved in an accident.
- ix. He confirmed that he assigned the vehicle that was assigned to him to another driver, who caused the accident. He further confirmed that the said driver was a class 'E' License holder, but that he drove both tractors and motor vehicles.
- x. It is his evidence that he was advised to appear with a witness at the hearing, but that it was his mistake that he appeared alone.
- xi. On re-examination, the Claimant confirmed that the driver who caused the accident was fully authorized to drive and that he had authority to assign the vehicle to any of the Respondent's drivers.
- xii. It is his prayer that his claim be allowed.

The Respondents' Case

7. The Respondent's case is as follows: -
 - i. That on 11th June 2023, the Claimant while in the course of his duty as a Supervisor, negligently performed his duty by allowing the driver to operate the company's equipment carelessly, thus was involved in an accident along 01 Donyo- Tala Road out of which the company's equipment was extensively damaged and several employees were seriously injured.
 - ii. That the Claimant was issued with a Show Cause Letter dated 22nd June 2023, to which he responded and a disciplinary hearing was conducted on 17th July 2023 out of which, he was found liable for the negligence and that there were sufficient and justifiable grounds to dismiss him.



- iii. That the claimant was served with a dismissal letter dated 17th July 2023 which he received on the same day, but did not appeal against the dismissal.
- iv. That the Claimant's dismissal was therefore fair as all procedures were followed, including a right to be heard and so this claim is an afterthought and should be dismissed with costs to the Respondent
- v. On cross-examination, RW1 told court that the investigation report on the accident was not filed in court. He further confirmed that the Claimant was being driven when the accident occurred as he called someone else to drive the vehicle which he was initially driving.
- vi. The court was told that the Claimant oversaw the overloading and over speeding of the motor vehicle that caused the accident, and that he allowed an incompetent driver to drive the vehicle.
- vii. RW1 further told court that he did not have Gerald the driver who caused the accident's driving license before court, and that no action was taken against the driver.
- viii. It is the Respondent's prayer that the Claimant's claim be dismissed with costs.

The Claimant's Submissions

8. The Claimant submits that he was dismissed for the mistakes of another employee. That he was wrongfully blamed for an accident that he did not cause nor contribute to.
9. It is the Claimant's submission that he was a passenger in the motor vehicle at the time of the accident and had no control over the vehicle as it was being driven by one Gerald Gathirimu, who was employed by the Respondent as a driver.
10. The Claimant submits that the investigations with regards to the accident that occurred on 11th June 2023, along Ol -Donyo - Tala road was never conducted by any law enforcement agency and no investigation report concerning the incident by the Respondent internal security agencies was availed in court for consideration and determination on liability.
11. It is submitted that the reason for the termination was not fair as the Claimant was not in control of the vehicle at the material time. That the Claimant was employed as a Supervisor, not as a Driver, and no job description was availed in court that stated the contrary, or demonstrated how the Claimant was responsible for the actions of another employee.
12. The Claimant finally submits that he is entitled to the reliefs sought.

The Respondents' Submissions

13. It is the Respondent's submission that the Claimant committed gross misconduct by breaching his employment obligation and contravening the Respondent's policies of non-assignment. It avers that the Claimant instructed a driver licensed to drive tractors and who was not qualified to drive the subject motor vehicle and hence acted beyond his power as he was not authorized by the company to re-assign.
14. The Respondent further submits that it conducted the disciplinary process fairly as the Claimant was given a fair chance to present his case. It sought to rely in the case of Juma v. United Millers Limited (2025) KEELRC 85 (KLR) to buttress this position.
15. The Respondent submits that the Claimant was fairly dismissed.
16. It is the Respondent's submission that the Claimant was not paid his terminal dues for reason that he did not clear with the Respondent, and that it is his fault that he never received his dues.



17. The Respondent prays that the claim be dismissed with costs.

Analysis and Determination

18. I have considered the pleadings herein, the witnesses' oral testimonies and the submissions by both parties. The issues that arise for determination are:-

- i. Whether the Claimant was unfairly dismissed; and if yes,
- ii. Whether he is entitled to the reliefs sought

Whether the Claimant was unfairly dismissed

19. Two issues determine whether or not an employee was fairly terminated/dismissed; adherence to fair procedure and the availability of fair reason(s) to dismiss/terminate.
20. Section 41 of the *Employment Act*, 2007, requires that an employer, before terminating/dismissing an employee on the ground of misconduct, poor performance or physical incapacity, explains to the employee in a language the employee understands, the reasons for which the employer is considering termination.
21. Although the Claimant told court that he was terminated unfairly for not being allowed to be represented at the disciplinary hearing, he admitted at cross-examination that he was advised to attend the hearing in the company of a witness, but that it was his fault that he did not appear with one.
22. The Claimant further confirmed that he was issued with a show cause letter which he responded to, and was allowed an opportunity to present his case at a physical hearing. In *Philip Kimosop v Kingdom Bank Limited* (2022) eKLR, the Court held that the Respondent's action of serving a show cause letter to the Claimant, inviting the Claimant to an oral hearing, giving the Claimant the right to call witnesses, produce documents and also be represented by another employee at the hearing constituted fair procedure. The Court emphasized that all these steps taken by the Respondent prior to terminating the Claimant's employment qualified as following due procedure as contemplated by Section 41 of the *Employment Act*.
23. Further, in *Anthony Mkala Chitavi v. Malindi Water & Sewerage Company Ltd* [2013] eKLR, the Court observed:-

“The ingredients of procedural fairness as I understand it 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.”

24. In light of the foregoing, I return that the Respondent adhered to the tenets of procedural fairness, and which renders the Claimant's dismissal procedurally fair, and so I hold.



25. On the issue of substantive justification for the dismissal, Section 47(5) of the *Employment Act*, provides that the burden of proving that an unfair termination/dismissal occurred rests with the employee, while the burden of justifying the grounds for the termination of employment rests with the employer (See Nyeri Civil Appeal No.97 of 2016: Reuben Ikatwa & 17 others v Commanding Officer British Army Training Unit Kenya & another). As it were, the Claimant has shown that a termination has occurred which shifts the burden to the employer/Respondent to prove that the dismissal was justified.
26. It is submitted that the reason for the termination was not fair as the Claimant was not in control of the vehicle at the material time. It is further submitted that the Claimant was employed as a Supervisor, not as a Driver, and no job description was availed in court that stated the contrary, or demonstrated how the Claimant was responsible for the actions of another employee.
27. Under Section 43 of the Act, the onus is on the employer to prove the reason or reasons for the termination, failing which the termination shall be deemed to be unfair. Reasons for termination have been described to be the reasons that the employer genuinely believed to exist, causing him to terminate the services of the employee. (See Kenya Power and Lighting Company Limited vs. Agrey Lukorito Wasike).
28. The Claimant's case is that he assigned the vehicle that was involved in the subject accident to one of the Respondent's drivers known as Gerald and that he had authority as a supervisor to so assign the vehicle.
29. The Claimant's assertion that he assigned the vehicle in his capacity as supervisor with authority so to do, was not controverted. Further the Respondent did not deny employing the said Gerald as a driver, other than that he was employed to drive tractors. Even so, being the employer, the Respondent did not produce Gerald's driver's license as prove that he was not licensed to drive motor vehicles.
30. The show cause letter written to the Claimant spelt out the charge against him as follows:-

“as supervisor in-charge of operations on 11th June, 2023, you allowed the driver to operate the equipment carelessly, over speed and carry excess passengers.”
31. Further, the letter dismissing the Claimant, listed the reasons for the dismissal as:-

“From the investigations report, your written reply and explanations during a disciplinary hearing convened on the 12th July 2023, to deliberate on the infraction, it was established that the cause of the accident was due to over speeding, careless driving, overloading and disregard for safety rules leading to extensive damage of equipment and serious injuries to employees ... ”
32. From the foregoing extracts, there was no mention that the driver who caused the accident did not qualify to do so, or that he was not employed to drive motor vehicles such as the one that was involved in the accident. There is also no mention that the Claimant re-assigned the ill-fated vehicle to the wrong driver as the Respondent now alleges.
33. In *British Leyland UK Ltd v Swift* (1981) I.R.L.R. 91 Lord Denning described the test of reasonableness in the following words:-

“The correct test is; was it reasonable for the employers 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 quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him.”

34. It is telling that even when the accident resulted in injuries to a number of the Respondent’s employees, no report of the accident was made to the police and no investigation on the cause of the accident was conducted, yet the dismissal letter refers to an investigation report when the court was told that no investigation was conducted in relation to the accident.
35. Indeed, as correctly submitted by the Claimant, the Respondent did not meet the conditions set out in Section 45 of the *Employment Act*, 2007, given that the cause of the accident - the very reason for the Claimants dismissal, was not established nor determined as the same was not investigated and no such report was placed before this court.
36. The court further notes that what the Respondent refers to as the policy of non-assignment that the Claimant is said to have breached, was not produced in evidence, and hence its existence and content cannot be verified.
37. In the end, I reach the conclusion that the Respondent has not proved fair and justified grounds to dismiss the Claimant. The Claimant’s dismissal is found unfair on this account.

Whether the Claimant is entitled to the reliefs sought

38. The Respondent’s submission is that the Claimant was not paid his terminal dues on the basis that he did not clear with the Respondent. That the Claimant is entitled to his terminal dues, is therefore not denied. The claims for salary for days worked in July, 2023, compensation in lieu of leave, issuance of a certificate of service, and one month’s salary in lieu of notice is allowed on this account.

Compensation for unfair dismissal

39. The Claimant was a passenger in the ill-fated motor vehicle that was involved in an accident. The court was told that the vehicle was overloaded and over-speeding at the time of the accident.
40. The Claimant did not deny any of these, save to say that he was not the one driving the vehicle at the time. Being a senior employee of the Respondent and a supervisor at that, and witnessing the overloading and the high speed and doing nothing about it, leads me to the conclusion that he contributed to his own fate and for this reason, I deem an award of 5 months’ salary sufficient compensation for the unfair dismissal, and which is hereby awarded.
41. The claim for general damages for discrimination fails on account that the Claimant did not prove a case of discrimination.
42. The Claimant’s pay slips produced in evidence, indicate that the Respondent made deductions on account of NSSF and contributions to a Provident Fund. The claim for payment of service pay therefore fails.
43. The claim succeeds and orders granted as follows: -
 - a. A declaration that the Claimant was wrongfully and unfairly dismissed.
 - b. One month salary in lieu of notice at Kshs. 89,281/-
 - c. Salary for 17 days worked in July, 2023 at Kshs. 50,600/-



- d. 5 months' salary as compensation for wrongful and unfair dismissal at Kshs. 446,405/-
- e. Pay in lieu of leave not taken at Kshs. 62,496/-
- f. That the Respondent issues the Claimant with a certificate of service within 14 days of this judgment.
- g. The Respondent shall bear the costs of the suit and interest at court rate from the date of this judgment until payment in full.

44. Judgment of the Court.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS
13TH DAY OF MARCH, 2025.**

C. N. BAARI

JUDGE

Appearance:

Ms. Muinde h/b for Ms. Kiogera for the Claimant

Ms. Onyango h/b for Mr. Magani for the Respondent

Esther S- C/A

