



Indulah v Platinum Outsourcing & Logistics (EA) Limited (Cause 154 of 2017) [2024] KEELRC 81 (KLR) (31 January 2024) (Judgment)

Neutral citation: [2024] KEELRC 81 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 154 OF 2017
J RIKA, J
JANUARY 31, 2024**

BETWEEN

JONATHAN INDULAH CLAIMANT

AND

PLATINUM OUTSOURCING & LOGISTICS (EA) LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed his Statement of Claim on 30th January 2017.
2. The Respondent filed its Statement of Response on 11th March 2019.
3. Both Pleadings have factual inaccuracies. The Claimant pleads at paragraph 2 of the Statement of Claim that he was falsely accused of theft by the Respondent, on 13th October 2013. Paragraph 15 of the Statement of Response is that the Respondent issued the Claimant a letter to show cause, dated 21st October 2018. It is further pleaded at paragraph 21, that the Respondent issued the Claimant with 1-month notice of termination, dated 1st November 2017.
4. While the Claimant corrected his error, upon giving of his evidence before the Court on 7th October 2022, to read 13th October 2016 in place of 13th October 2013, there is nothing on record to indicate that the Respondent amended its Pleadings.
5. The documents exhibited by the Parties show that the Claimant was employed by the Respondent in the position of Warehouse Checker, on 1st September 2016.
6. He was not employed as a Loader, as pleaded in his Statement of Claim.
7. He was stationed at the Respondent's client's [Kenya Breweries] premises. His consolidated salary was Kshs. 18,000 monthly.
8. His contract provided for 1-month of probation.



9. He was issued 1-month notice of termination dated 1st November 2016, which became effective on 30th November 2016.
10. He therefore worked for a total of 3 months, September to November 2016. 1 month was probationary.
11. His claim is that on 13th October 2016, he was off-duty when the Respondent fabricated allegations of theft against him. He was arrested by Police Officers from Pangani Police Station, and kept in custody illegally.
12. He states at paragraph 7 of his Statement of Claim that the Respondent, “ never gave them, an opportunity to be heard, contrary to Section 40 of the Employment Act.”
13. It is not clear from the Statement of Claim why the Claimant, who brings the Claim alone, pleads using the plural ‘them.’ It is less clear why he pleads Section 40 of the Employment Act, which regulates termination on redundancy, not termination for acts of gross misconduct such as theft, which the Claimant states was alleged by the Respondent against him.
14. At paragraph 10, he compounds this confusion, pleading that “ the Respondent has failed and adamantly neglected to pay to the Claimant his legal terminal benefits and severance pay merited upon termination of their services.” The suggestion that there is more than 1 Claimant, and that his contract was terminated on account of redundancy, is repeated.
15. At paragraph [b] of the Main Submissions contained in the Statement of Claim, the Claimant refers to the Respondent as “they,” while paragraph [d], states that the Claimant “ have suffered.”
16. He prays for: -
 - a. The Courts [which Courts?] do find that the reasons and procedure for rendering the Claimant redundant was wrongful.
 - b. The Court do find that the Respondent’s action of continued withholding and failing refusal and or neglecting to pay the Claimant his rightful terminal benefits and other unpaid dues unlawful and untenable.
 - c. The Court do order the Respondent to pay the Claimant all his terminal benefits and other unpaid dues computed as hereunder [repetitious] –
 - I. 12 months’ salary in compensation for unfair termination.
 - II. 1-month salary in lieu of notice at Kshs. 18,000.
 - III. Damages for unlawful detention.
 - IV. Damages for breach of contract.
 - V. Costs.
 - VI. Any other suitable relief.
17. The Respondent states that it was appointed by Bollore Transport and Logistics Limited, as a subcontractor, for supply of labour at Kenya Breweries Limited, Ruaraka, Nairobi.
18. It appointed the Claimant as a Warehouse Checker, not a loader. Other Parties at the site included Kenya Breweries Limited [owner]; KK Security Services Limited [security service provider procured by Kenya Breweries Limited] for the main gate; Bollore Transport and Logistics Limited [main



- contractor]; Riley Security Services [procured by Bollore for security at the warehouses]; the Respondent, [subcontracted for supply of labour by Bollore]; and, Distributors and Transporters.
19. On the night of 13th October 2016, and 14th October 2016, the Claimant was on duty, contrary to his assertion that he was off-duty. He was offered a bribe of Kshs. 250,000 by a driver, to allow a truck, with deficit barrels to be offloaded. He allegedly refused the bribe. He did not inform anyone about the incident, until it was discovered that a loss of 180 cases worth Kshs. 6,315,501 had taken place.
 20. The incident was reported by Bollore Security Team, to Pangani Police Station. The Claimant, the driver and supervisor were arrested by the Police. The Respondent did not direct the criminal justice system on this arrest.
 21. The Respondent suspended the Claimant. He was issued a letter to show cause on 21st October 2016. He was restricted from accessing Kenya Breweries' premises, pending full investigations.
 22. He was offered an opportunity to explain himself. He admitted that he was offered a bribe in the amount of Kshs. 250,000 by a driver. He did not report bribery to the Respondent for necessary action. His silence on bribery was contrary to Kenya Breweries policy on whistle blowing, known as "speak up." His conduct raised questions about his integrity, and adversely affected the Respondent's relationship with its client Bollore, and business owner Kenya Breweries.
 23. Bollore Transport conducted investigations and established that theft took place over time. The Claimant illegally generated receipts and payment documents against the empty barrels, which to his knowledge, he had not received. He signed the documents unprocedurally and also made the security guard sign and stamp the documents unprocedurally. Bollore recommended that the Respondent takes action against the Claimant. He was heard on 1st November 2017 by the Respondent, and issued 1-month notice of termination. He was paid his terminal dues. The Respondent prays the Court to dismiss the Claim.
 24. The Claimant gave evidence and rested his case on 7th October 2022. Respondent's Project Manager at Kenya Breweries, David Musundi gave evidence for the Respondent on the same date, 7th October 2022. Bollore Security Controller, Collins Ojowi, gave evidence on 7th July 2023, closing the hearing. The Claim was last mentioned before the Court on 20th September 2023, when the Parties confirmed filing and exchange of their final submissions.
 25. The Claimant relied on his Witness Statement and 4 Documents [exhibits 1-4] in his evidence-in-chief. He restated the contents of his Statement of Claim, as summarized above. Contrary to paragraph 2 of his Statement of Claim which states that the Claimant was off-duty on 13th October 2016, he testified that he was on duty on 13th October 2016. He reported at 7.00 a.m. At 2.00 a.m. a driver named Njoroge brought in a consignment. The consignment was not complete. Njoroge told the Claimant that he should record that the consignment was full. Njoroge attempted to bribe the Claimant with the sum of Kshs. 100,000 to Kshs. 250,000. He declined the bribe.
 26. The Claimant reported to work again on 14th October 2016 in the evening. He found there was no one to hand over to him. There were no checkers. He contacted his supervisor, who advised him to continue working. He saw Police Officers at around midnight who told him that he was under arrest. He recorded a statement at the Police Station where he was kept in custody for 3 days. He was not charged.
 27. He was issued letter of termination on 1st November 2016 upon return to work. He was not involved in offloading of Njoroge's truck. Offloading was done during the dayshift.



28. Cross-examined, the Claimant told the Court that he was employed as a loader and clerk. He used to verify offloading of consignments. He was offloading keg beer barrels, at Kenya Breweries. There were many subcontractors at the premises. He confirmed that he was on night shift duty on 13th October 2016. His Statement of Claim alleged he was off-duty. He was arrested on 14th October 2016 by Police Officers and KK Security Guards. He was not told who lodged the complaint. He was released on 18th October 2016. He recorded a statement internally. He explained bribery. He received letter to show cause. He was not heard after this. Redirected, he reiterated that he was not told who the complainant was. He explained the attempts by Njoroge to bribe him.
29. David Musundi adopted his Witness Statement and Documents filed by the Respondent, in his evidence-in-chief. He confirmed the presence of various companies at Kenya Breweries, and their work arrangement, as pleaded in the Statement of Response.
30. Employees were inducted, and operated under standard procedure. They were trained on CCTV security, whistleblower policy, and integrity. They were trained by the Respondent as well as by Bollore. They were well-versed with reporting incidences of lack of integrity. There was attempted bribery involving the Claimant, on the night of 13th October 2016. Musundi only received the report on 15th October 2016. The incident was not reported directly. Kenya Breweries control room informed security, who then informed Musundi. Musundi tried to contact the Claimant. The Claimant's phone was off. Musundi was told that the Claimant had been arrested. He contacted the Claimant after he was released. He took the Claimant's statement. He told Musundi that Njoroge attempted to bribe him. He declined the bribe. The Respondent charged the Claimant for failure to report the attempted bribe. The Claimant was referred to the Respondent's Human Resource Office, taken through a disciplinary process and dismissed.
31. Cross-examined, Musundi told the Court that there was no record of a disciplinary hearing. Employee training records were retained by Kenya Breweries and Bollore. They were not exhibited before the Court. The Claimant called Musundi way after he was released from custody. Redirected, Musundi told the Court that the incident was investigated by Kenya Breweries and Bollore. The Respondent undertook the disciplinary process.
32. Ojowi relied on his Witness Statement and Documents exhibited by the Respondent in his evidence-in-chief. He worked for Bollore as Security Controller.
33. He was called by Kenya Breweries Security Manager Kamau, to investigate a contracted truck at the premises. It was suspected that the truck picked barrels from Eldoret, which were not delivered at Kenya Breweries. The truck had 360 empty barrels. The barrels were not offloaded, but documents were prepared, to facilitate payment. The Claimant generated the documents. He signed and stamped them. He passed them on to the Security Guard, who signed and stamped. The Guard handed over the documents to the Supervisor Mwaura, who processed payment. Trucks are weighed after offloading and new weight recorded. In this case, the second weight remained the same. The clerk produced a backdated document on the same truck. It was recommended that the Claimant and his accomplices are handed over to the Police. The Claimant initially disappeared. Others were arrested. The Claimant confessed that he was engaged in the fraud.
34. Cross-examined, Ojowi told the Court that he worked for Bollore, not the Respondent. He did not exhibit the contract between the Respondent and Bollore. He did not have the receipt that the Claimant was said to have generated. The Claimant signed and stamped the empties form. Ojowi got this information from the loading audit. The loss was occasioned to Bollore, not the Respondent.



35. Was the Claimant's contract terminated for valid reason[s]; was termination executed fairly; and does he merit the prayers sought?

The Court Finds:

36. The Claimant was employed by the Respondent through a written contract dated 1st September 2016. The document is commonly exhibited. He was employed as a Warehouse Checker. His salary was Kshs. 18,000 monthly.
37. He was deployed at renowned beer-maker Kenya Breweries, at Ruaraka in Nairobi. His Employer, the Respondent herein, was sub-contracted by Bollore Transport and Logistics Limited, to provide labour. Bollore was contracted by Kenya Breweries, to provide transport and logistics.
38. The Claimant worked for a short period of 3 months, 1 which was under probation.
39. Unnecessary prayers. Some of the prayers pleaded by the Claimant are unnecessary, repeated and without foundation.
40. Prayer [1] is that the Courts do find that the reasons and procedure for rendering the Claimant redundant, was wrongful. The Claim is before the Court, not Courts, and there is no evidence that the Claimant's position was ever declared redundant. The prayer is declined.
41. Prayers [2] and [3] ought not to have been split. They plead the same thing, which is that the Court finds termination was unfair and unlawful, and awards the prayers specified from paragraph 3[a].
42. There is no evidence establishing that the Claimant was unlawfully detained. He was arrested for a cognisable offence, upon report made by the Security at Kenya Breweries, not by the Respondent.
43. He has pleaded compensation for unfair termination. The prayer for damages for breach of contract is unsustainable. There was one act of termination, compensable once. The prayer for damages for breach of contract is declined.
44. The remaining prayers are: declaration that termination was unfair and unlawful; notice; compensation; and costs.
45. Reasons. Sections 43 and 45 of the *Employment Act* require an Employer to establish valid and fair reasons, in justifying employment termination.
46. The Claimant was dismissed for failing to report attempted bribery on him, by a driver named Njoroge, on the night of 13th October 2016.
47. Njoroge had collected 360 empty barrels of keg beer from the city of Eldoret. They were to be offloaded at Kenya Breweries. The Claimant was the receiving clerk. He states that Njoroge attempted to bribe him, with a sum of Kshs. 100,000 to Kshs. 250,000 so that documents would be generated, to show that the empty barrels were offloaded, and payment made, while in truth the barrels had not been offloaded. The matter was investigated by the contractor Bollore. It was established that the Claimant generated the documents, signed and stamped them. He gave then them to the Guard, who similarly signed and stamped the documents. The barrels had not been offloaded, but the Claimant initiated the process of signing and stamping, indicating receipt of the empty barrels, and passed on the documents to the Guard and the Supervisor for payment.
48. The Claimant did not report attempted bribery to his seniors contrary to Kenya Breweries whistleblower policy, which the Claimant was acquainted with. He did not deny that there was



- attempted bribery, and that he failed to escalate the incident. The Claimant spoke only after he had been arrested, and locked up at Pangani Police Station.
49. Investigations revealed that the business had been defrauded gradually. It was realized that a loss of 180 cases worth Kshs. 6,315,501 had occurred. The fraud involved the driver, warehouse checker and supervisor.
 50. There were multiple companies working at Kenya Breweries. The conduct of the Claimant adversely affected the business relations amongst these companies. Kenya Breweries would feel that Bollore was not discharging its role of transport and logistic effectively, while Bollore would fault the Respondent for providing it with kleptomaniac labour. The Claimant's act of gross misconduct would not only erode trust and confidence between him and the Respondent, but also erode trust and confidence amongst the involved business partners at Kenya Breweries. It would have an adverse, domino effect.
 51. It is noted that the Claimant misled the Court in his Statement of Claim, alleging that he was off-duty on the night he was involved in the conspiracy to steal from his Employer, on 13th October 2016. In his evidence he conceded that his Statement of Claim was false, and he was actually on duty, on the night of 13th October 2013. The Claimant did not come out as a truthful witness.
 52. There were valid reasons to justify termination, under Sections 43 and 45 of the *Employment Act*.
 53. Procedure. The Respondent pleads that following the police investigations, where the Claimant was adversely mentioned, the Respondent issued the Claimant with a Notice to Show Cause dated 21st October 2016 [not 2018]. The Claimant was suspended the same day. He was restricted from accessing Kenya Breweries' premises. Although it is alleged that the Respondent accorded the Claimant an opportunity to be heard, where he admitted failure to report the bribery attempt, there is no record of any disciplinary hearing. Cross-examined, Musundi told the Court that there is no record of a disciplinary hearing.
 54. The Respondent does not seem to have distinguished the processes of its own investigations, the police investigations and statements made upon enquiry, from a disciplinary hearing. The Claimant was not presented with specific charges on allegations of bribery or fraud, and called to defend the allegations, at a properly convened disciplinary forum, in the company of a colleague of his choice, or a trade union representative, as contemplated by Section 41 of the *Employment Act*.
 55. Procedure was deficient and did not conform to the minimum statutory standards of fair termination, under Sections 41 and 45 of the *Employment Act*.
 56. Remedies. The Respondent alleges to have issued the Claimant notice, dated 1st November 2016, which became effective 30th November 2016. There is no evidence that the Claimant returned to work, after the Respondent suspended him on 21st October 2016. He did not serve out the given notice period.
 57. Although the Respondent would have been entitled to summarily dismiss the Claimant on account of gross misconduct, pursuant to Section 44[4] of the *Employment Act*, it offered him notice [which would only mean that summary dismissal was reduced to regular termination], but did not allow the Claimant to serve out the notice period, or pay his 1-month salary in lieu of notice. He is allowed the prayer for 1-month salary in lieu of notice at Kshs. 18,000.
 58. He worked for a brief period of 3 months. He served a significantly brief probationary period of 1 month. This month was part of the total 3 months worked. He caused, or contributed significantly, to the circumstances leading to termination. Termination was justified, but poorly executed. He is granted compensation equivalent of 15 days' salary at Kshs. 9,000.



59. No order on the costs.
60. Interest allowed at court rate from the date of Judgment till payment is made in full.

In Sum, It Is Ordered: -

- a. It is declared that termination was procedurally unfair.
- b. The Respondent shall pay to the Claimant notice at Kshs. 18,000 and compensation for unfair termination, equivalent of 15 days' salary at Kshs. 9,000 –total Kshs. 27,000.
- c. No order on the costs.
- d. Interest allowed at court rate from the date of Judgment, till payment is made in full.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 31ST DAY OF JANUARY 2024.

JAMES RIKA
JUDGE

