



Nunda v Keroche Breweries Limited (Employment and Labour Relations Cause 42 of 2022) [2024] KEELRC 368 (KLR) (27 February 2024) (Judgment)

Neutral citation: [2024] KEELRC 368 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS CAUSE 42 OF 2022
HS WASILWA, J
FEBRUARY 27, 2024**

BETWEEN

MATHEW OMONDI NUNDA CLAIMANT

AND

KEROCHE BREWERIES LIMITED RESPONDENT

JUDGMENT

1. The claimant instituted this suit by an Amended Memorandum of claim dated 7th September, 2023, alleging to have been unfairly terminated and seeking compensation for the unfair termination. The claimant prayed for the following reliefs; -
 - a. Declaration that the termination of the claimant was unfair, wrongful, unlawful and illegal.
 - b. A finding that the claimant is entitled to:-
 1. One-month salary in lieu of notice of Kshs 350,000.
 2. Unpaid salary for October 2021 of Kshs 350,000.
 3. Unpaid salary for November, 2021 of Kshs 350,000.
 4. 4 days worked in December, 2021 and not paid of Kshs 46,667.
 5. 20 days annual leave of Kshs 233,333.
 6. Unpaid salary during leave from April, 2020 to 16th December, 2020 for 8 ½ months of Kshs 2,975,000.
 7. Unpaid half salaries not paid during that period of recall to the time of termination January, 2021 to September, 2021 of Kshs 1,575,000.
 8. 12 months' compensation as per section 49(c) of the Employment Act.



9. Certificate of service.
10. Costs of the cause.
2. The claimant stated that he was first employed by the Respondent as the head of packaging, after two years he was promoted to be the head of Logistics and in July, 2021 he was further promoted to be the head of Operations earning a monthly salary of Kshs 350,000, a sum that he earned until his termination on 4th December, 2021.
3. It is averred that on 18th November, 2021, the claimant was suspended on allegations that he had dispatched beverages that did not align with the company's dispatch guidelines. Subsequently, he was served with a notice to show cause letter dated 1st December, 2021.
4. On 3rd December, 2021, he was hurriedly, invited for a disciplinary hearing without allowing him any representation or giving him notice to prepare for the same as such subjecting him to hearing that disregarded to due procedure. Further that the reason for termination was not made known to him.
5. After the disciplinary hearing, the claimant was not afforded any Appeal mechanism as such the decision ended at the disciplinary hearing stage.
6. It is averred that the claimant's terminal dues were calculated at Kshs 503,000 but, the same was never paid to him.
7. In totality, the claimant stated that the termination was unfair both procedurally and substantively.
8. The pleadings of this suit and the mention notice dated 21st September, 2022 for mention on 17th October, 2023 were all served upon the Respondent on the 12th September, 2022 and 27th September, 2023 as evidence by the affidavit of service sworn by Arasa Kinara, on the 13th September, 2022 and 28th September, 2023, respectively.
9. Despite service of pleadings and the mention notice, the Respondent did not enter appearance or filed a response to the claim, as such the claim proceeded as undefended.
10. During hearing, the claimant testified as CW-1 and adopted his witness statement dated 7th September, 2023 and produced all the documents as his exhibits. In addition, he stated that he was not called for any disciplinary process or allowed to be present with any witness. He testified that the meeting was like a fact finding missions by the Human Resource officer. He stated that after the alleged hearing, he was called to the CEO's Office and informed that his services were terminated and told the amount of terminal dues, he was entitled to. He urged this Court to allow the claim as prayed in his Amended Memorandum of claim.

Claimant's Submissions.

11. It was submitted that the claimant was invited for a disciplinary hearing by the letter dated 1st December, 2021, requiring him to appear for hearing on 3rd December, 2021. On the date for hearing, he appeared before only the Head of Human Resource and Administration, who asked him questions but never gave him a chance to give his side of the story. Further that he was not given any opportunity to give a written explanation, or even be accompanied by a representative to the Hearing. Therefore, that the procedure was not proper.
12. It was argued that the Respondent had indeed premeditated the termination of the claimant's services as evidence by the computation schedule for his terminal dues, which included 4 days worked and not paid for of Kshs 35,000, monthly pay of Kshs 262,500, leave pay of Kshs 175,000, Unpaid



salary for October and November, 2021 of Kshs 171,660 each and notice pay of Kshs 262,500. These calculations made regardless of the fact that the claimant was earning a salary of Kshs 350,000.

13. The claimant submitted also that he was not accorded fair hearing as is required under Sections 41, 43, 45, 46 and 47 of the *Employment Act* as read with Article 47 of the *Constitution* and Section 4 of the *Fair Demonstrative Actions Act*. To support this, he relied on the case of *Loice Otieno v Kenya Commercial Bank Limited* [2013] eKLR and the case of *Walter Ogal Anuro v Teachers Service Commission* [2012] eKLR where the Courts stated that the importance and mandatory requirement for both substantive and procedural fairness to be exhibited in disciplinary proceedings by an employer against an employee, So that when an employer fails to avail both to the employee, any disciplinary proceedings and resultant action, may be declared unlawful by the Court.
14. Accordingly, it was argued that the Respondent did not confront the claimant with the allegations facing him or allowed him to given his explanation, Making the termination unfair. He thus urged this Court to allow the claim as prayed.
15. I have examined all the evidence and submissions of the parties herein. As explained in this judgement, the respondent dispute service failed to enter appearance nor file the defence as expected.
16. The claimant has indicated that the Respondent suspended him on 18th November, 2021 on allegation of dispatching beverages that did not align to the companies guidelines. That he was then invited for a disciplinary hearing on 3rd December, 2021 on the same day without any notice and with total disregard to procedure.
17. There is no evidence to controvert the position stated by the claimant. No minutes of the disciplinary hearing are before court. It is clear he was served with a letter on 3rd December, 2021 to appears for disciplinary hearing on the same day at 11 o'clock. This did not accord the claimant any fair hearing. He was then dismissed on 9th December, 2021 vide the letter dated 4th December, 2021. Without any contrary evidence to that of the claimant, I find the Claimant was unfairly terminated for lack of due process and as provided for under section 45 (2) of the *Employment Act* 2007.
18. As concerned remedies, I find for the claimant and award him as follows
 1. 1 month salary in lieu of notice =350,000/=
 2. Unpaid salary for October and November 2021=700,000/=
 3. 4 days worked for and not paid for December, 2021 = $4/30 \times 350,000 = 46,667/=$
 4. Leave not taken of 20 days = $20/30 \times 350,000 = 233,333/=$
 5. Compensation equivalent to 6 months salary for unfair termination= $6 \times 350,000 = 2,100,000/=$Total awarded = 3,430,000
Less statutory deductions
 6. He should be issued with a certificate of service.
 7. The Respondent to pay costs of this suit plus interest at court rates with effect from the date of this judgment.

JUDGEMENT DELIVERED VIRTUALLY THIS 27TH DAY OF FEBRUARY, 2024.

HON LADY JUSTICE HELLEN WASILWA



JUDGE

In the presence of:-

Muthanwa for the Claimant

No appearance for Respondent.

