



Wachira v East African Portland Cement Company (Employment and Labour Relations Cause 339 of 2019) [2024] KEELRC 352 (KLR) (23 February 2024) (Judgment)

Neutral citation: [2024] KEELRC 352 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 339 OF 2019
AN MWAURE, J
FEBRUARY 23, 2024**

BETWEEN

PETER WAIGWA WACHIRA CLAIMANT

AND

THE EAST AFRICAN PORTLAND CEMENT COMPANY RESPONDENT

JUDGMENT

Introduction

1. By a memorandum of claim dated 22nd February 2019 the claimant sued the respondent for unfair and illegal and unlawful termination and seeks compensation for the same.

Claimants Case

2. The claimant states he was employed by the respondent in 2005 and continued working as a store expeditor grade 7 until 9/11/2017 when he was terminated unprocedularly and his dues remain unpaid.
3. He says he was unlawfully and unprocedularly terminated as he was not given notice for his termination and was not given fair hearing and generally failure to be guided by rules of natural justice.
4. He claims for compensation to a total of kshs 5,390,740/-

Respondent's Case

5. The respondent's response dated 24th October 2022 they aver the claimant's termination was lawful, fair and in accordance with the law.
6. The respondent affirmed the claimant was issued with notice to show cause why disciplinary action should to be taken against him and was informed of the offence against him.



7. The respondent says the claimant was given opportunity to attend the disciplinary hearing on 17th October 2017. He had received the letter of invitation on 11th October 2017.
8. He says the claimant's case should be dismissed in its entirety and costs be awarded to the respondent.

Claimant's /Evidence

9. The claimant tendered his evidence in court on 30th October 2023 and says he was unfairly dismissed from his employment because he was not even availed the documents he requested from the respondent to prepare for his hearing including the gate pass he was told he signed to authorise the truck to leave with batteries which were not authorised.
10. He says the minutes of the disciplinary hearing were not presented to him and neither was he represented by a fellow worker during his explanation.
11. He further says that the respondent claims the lorry he authorised to leave had batteries but no evidence was produced to show the same. He agreed he signed the gate pass with conveyor belts as he was authorised to sign the gate pass if the store manager or his assistant were absent as in this case.
12. The claimant says he had no job description but was described as a store expeditor.
13. He also says he appealed to the managing director against the summary dismissal.

Respondent's evidence

14. Harun Kisemei gave evidence the same day 3rd October 2023 on behalf of the respondent. He is the employee relations manager of the respondent. The witness testified that the claimant was in charge of the loading as a store expeditor. He says claimant was indicted for neglecting to perform his duties contrary to company's policy even though he did not avail the company policy to court. Neither did he produce claimant's job description to demonstrate he was not to issue gate pass.
15. He also says he was not aware if the store manager and the assistant were present when the lorry was being loaded.

Submissions

16. The court considered both the claimant's submission dated 25th October 2023 and the respondents submissions dated 27th November 2023.

Analysis and determination

17. The highlights of the main issues for determination are whether the claimant's termination was fair and if not so what remedies is he entitled.
18. Section 45(1) of termination of employment defines the role of an employer in termination of an employee. The same provides as hereunder:
 - 41(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.



Equally section 42(2) provides as follows:

A probationary period shall not be more than six months but it may be extended for a further period of not more than six months with the agreement of the employee.

19. The present case the claimant according to his dismissal letter dated 10th November 2017 the letter stated claimant was dismissed for

“wilfully neglecting to perform your duty carefully and properly against the company employment contract.”
20. The court is not seized of the company’s policy alluded to and the claimant did request for documents to assist him prepare for the hearing by his letter dated 12th October 2017. He says he was not provided with the same. Nevertheless he appeared for the hearing on 17th October 2017 and it is evident was evidence he did not have a fellow worker representative of his choice present during his explanation. This is a mandatory proviso under section 41 of employment act. His letter inviting him to appear for the disciplinary hearing dated 11th October 2017 did not inform him that he was entitled to have a fellow worker of his choice present or a floor union representative as already referred in the provision of section 41 of the employment act.
21. The question then is whether the respondent had a genuine reason to warrant the claimant’s employment dismissal. Did the respondent employ fair procedure. In the case of Walter Ogal Onuro v Teachers Service Commission Cause No 955 of 2011 the court held that:

“for termination to pass the fairness test, it must be shown that there was not only substantive justification for termination but also procedural fairness.
22. In the instant case, there is no concrete evidence that the claimant did not have authority to sign for the gate pass. The respondent states that the claimant breached the company policy and his employment contract. The two documents have not been produced in court and neither is it pointed out what particular clauses of the same he breached.
23. Similarly there is no clarity of how many batteries were found in the referred truck and what happened to them. There is a lot of unsubstantiated allegations with no concrete evidence.
24. The respondent did not adduce evidence that the claimant was the only person who could have loaded those batteries between the loading yard and the gate. In all fairness there are many gaps that are not explained by respondent. And as per the respondents submissions that the burden of proof is on balance of probability not beyond reasonable doubt nevertheless having considered the evidence adduced by the respondent the court finds it falls short of the expectation to establish a valid reason as to the reasons for considering the claimant’s summary dismissal.
25. As far as the process of disciplinary procedure is concerned the claimant was invited for a disciplinary hearing but the reasons for the same were not clarified. This was on 11th October 2017. When he asked to be provided with the documents to assist him prepare the hearing there is no evidence that the same were provided to him.
26. He attended the meeting but was not given an opportunity to have a witness present on his side. Even after the meeting he says he was not supplied with the minutes of the meeting. He then was served a summary dismissal letter on 10th November 2017.



27. He wrote an appeal to the head of Human resource dated 16th November 2017 but there is no evidence to what became of the appeal.
28. All in conclusion the court having considered the process through which the claimant was terminated the court finds the reasons given by the respondent were not convincing and is not proved. The procedure followed also falls short of the mandated provisions of section 41 of the employment act.
29. The court finds therefore claimant's termination was unfair and unprocedural and so judgment is entered in his favour and respondent is called to compensate him as follows.
 1. One month salary in lieu of notice kshs 193,200/-
 2. Compensation for unfair and unlawful termination to 10 months 1,932,000
 3. Salary arrears is not proved and is declined and money erroneously deducted is also declined as is also not proved.
 4. The effect of the total award is therefore kshs 2,125,200 plus costs of the suit and interest at court rates from date of judgment till full payment.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 23RD DAY OF FEBRUARY, 2024.

ANNA NGIBUINI MWAURE

JUDGE

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 has 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 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

