



REPUBLIC OF KENYA



Ajuoga v Kenya Revenue Authority (Employment and Labour Relations Cause E047 of 2021) [2024] KEELRC 322 (KLR) (22 February 2024) (Judgment)

Neutral citation: [2024] KEELRC 322 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
EMPLOYMENT AND LABOUR RELATIONS CAUSE E047 OF 2021
CN BAARI, J
FEBRUARY 22, 2024**

BETWEEN

ELKANA OKOTH AJUOGA CLAIMANT

AND

KENYA REVENUE AUTHORITY RESPONDENT

JUDGMENT

1. Vide a Statement of Claim dated 24th June, 2021, and filed on 25th June, 2021, the Claimant seeks the following reliefs: -
 - a. A declaration that his summary dismissal was unfair.
 - b. Payment of 12 months' salary as compensation for unfair dismissal.
 - c. Payment of 1-month salary in lieu of notice.
 - d. An award of gratuity and
 - e. Costs of the suit and interest.
2. The Respondent entered appearance on 28th July, 2021, and subsequently filed a statement of response on 2nd November, 2021. The Respondent denied the averments in the Claimant's claim and countered that the Claimant was rightfully dismissed on account of absenteeism and intoxication.
3. The suit was dismissed for non-attendance of both the Claimant and his Advocate on 7th February, 2023, when the suit had been listed for hearing. The case was however reinstated upon application by the Claimant on 26th June, 2023, paving way for the full hearing.
4. Both the Claimant's and the Respondent's cases were heard on 10th July 2023. The Claimant testified on his own behalf, adopted his witness statement and produced documents filed in support of his case.



The Respondent presented three witnesses, who testified in support of the Respondent's case. They likewise adopted their witness statements and produced documents filed as exhibits in the matter.

5. Submissions were filed for both parties.

The Claimant's case

6. The Claimant states that he was transferred to the Respondent on 30th June, 1996, having been initially employed as a clerical officer in the Ministry of Finance on 3rd October, 1990.
7. He avers that on 5th June, 2018, the Respondent invited him to show cause why he should not be interdicted for reporting to work intoxicated on 2nd June, 2018, and for absenteeism on 4th and 5th June, 2018.
8. It is his further case that despite providing evidence that he was suffering from Bipolar 1 Mood Disorder at the disciplinary hearing, the Respondent still went ahead and dismissed him on 27th June, 2018.
9. The Claimant states that he was diagnosed with bipolar in the year 2004, while he was an Assistant Revenue Officer in Busia, and that the Respondent was mistaken in dismissing him without finding out whether he was unwell on 4th and 5th of June, 2018.
10. It is the Claimant's case that the Respondent erred in disregarding his medical history which had a direct causal link to his intoxication and absenteeism.
11. It is his contention that despite exercising his right of appeal, the Respondent dismissed his appeal for lacking in merit on 10th December, 2018.
12. In examination in chief, the Claimant confirmed that he was issued a show cause letter which he did respond to, and further received an invitation for hearing before the Respondent's disciplinary committee.
13. On cross examination, the Claimant told court that he supplied his medical records to the Respondent, but which records were not placed before court.
14. It is his evidence that he suffered from alcoholism and that he informed his supervisor, and further requested that he be rehabilitated. He further states that the Respondent admitted him at Asumbi rehabilitation centre where he stayed between December, 2017 and March, 2018, when he was discharged. The Claimant states that the rehabilitation was beneficial to him and he resumed duty in April, 2018.
15. He confirmed that he was aware that he needed to inform his supervisor when he needed to be away from work. He further stated that he has not led evidence to show that he was at work on 3rd, 4th and 5th June, 2018.
16. On further cross-examination, the claimant told court that he was absent from duty on 2nd and 3rd June, 2018, and that he reported that he was unwell, but did not produce the letter he wrote in court.
17. It is the Claimant's further evidence, that a Dr. Owiti treated him for bipolar disorder, but that he did not call him to testify, nor did he produce evidence that he suffered from bipolar during the disciplinary hearing.
18. The Claimant states that the Respondent was not justified to dismiss him and pray that his claim be allowed.



The Respondent's case

19. The Respondent states that the Claimant flouted clause 5.6.19 of their code of conduct on entry to the workplace while intoxicated, and clause 5.1.1 on absenteeism without reason and notification.
20. It is the Respondent's contention that on the night of 2nd June, 2018, the Claimant arrived at work intoxicated and blacked out at the counter. It is the Respondent's further case that on 4th and 5th June, 2018, the Claimant was absent from duty without informing his immediate supervisor or giving sufficient reason for his absence.
21. It is the Respondence further case that it was well aware of the Claimant's problem with alcohol and had even paid for his rehabilitation at Asumbi in the year 2017.
22. The Respondent avers that the Claimant's dismissal was unimpeachable as the Claimant was issued with a show cause letter on 5th June, 2018, which he responded to on 7th June, 2018, and thereafter invited to a disciplinary hearing on 14th June, 2018, which he attended and made representations.
23. The Respondent states that thought the Claimant was advised to appear with a representative, he opted not to be accompanied by anyone. It states that the Claimant's representations having been found unsatisfactory, he was dismissed on 27th June, 2018.
24. The Respondent further states that the Claimant appealed the dismissal, and which appeal was heard and the decision of the Respondent dismissing the Claimant upheld.
25. Mr. Martin Kelly Otieno (RW1), testifying for the Respondent, told court on cross examination that the Claimant was absent from duty on 3rd and 4th June, 2018, and being his immediate supervisor, his calls to him went unanswered. He states further that he could not establish what was wrong with him as he did not pick his calls.
26. It is RW1's further testimony that the Claimant to his knowledge, was suffering from alcoholism and that he was not aware of any other medical condition the Claimant was struggling with. He states that he learnt of the issue of bipolar from a letter the Claimant wrote on 6th February, 2017, in response to a warning letter.
27. RW1 further states that the Claimant did not produce any medical records to support the allegations of bipolar.
28. Mr. Robert Mose (RW2) told court that the Claimant admitted facing challenges with alcohol and that he did not personally witness him drunk.
29. RW3, a Mr. Frankline Kiogora told court that the Claimant was aware and had in fact signed the Respondent's Code of conduct confirming that he will obey the same.
30. RW3 confirmed that the dates relevant to the disciplinary action and subsequent dismissal are 3rd and 4th June, 2018, and not 4th and 5th June, 2018. He further confirmed that the show cause was corrected to reflect the correct dates.
31. It is RW3's testimony that being the Manager Human Resource, he does not have any record indicating that the Claimant suffered from bipolar disorder. It is his assertion that it is the responsibility of an employee to notify the employer of any medical condition to enable them get assistance.



The Claimant's submissions

32. The Claimant submits that by failing to investigate whether he had fallen ill due to working day and night, and failing to interview Dr Owiti on his condition, the Respondent had failed to discharge its burden of proof under Section 43 of the *Employment Act*.
33. It is the Claimant's Submission that the Respondent had not provided any evidence of intoxication thereby falling afoul of Section 45 (2) (a) of the *Employment Act*.
34. The Claimant in the premise urges this court to allow the claim a prayed.

The Respondent's submissions

35. It is the Respondent's submission that given its critical function of revenue collection, alcoholism and absenteeism would lead to delayed revenue collection and backlogs.
36. It is the Respondent's further submission that it tried its best to accommodate the Claimant by sending him to rehabilitation for three months, but the Claimant did not change his ways. In support of the reasons for dismissal reliance was placed on Section 43 of the *Employment Act* and the case of *Kenya Revenue Authority v Reuel Waitbaka Gitabi & 2 other* [2019] eKLR for the holding that:

“All the employer is required to prove are the reasons that it “genuinely believed to exist,” causing it to terminate the employee's services.”
37. The Respondent further submits that the Claimant failed to prove sickness on the days he was absent. It avers that the Claimant was obligated to relay information on his sickness and not the other way around. It sought to rely in *Kipkebe Limited v Peterson Ondieki Tai* [2016] eKLR to buttress this position.
38. The Respondent submits that it has met the three procedural conditions for dismissal as enunciated in the case of *Anthony Mkala Chitavi vs Malindi Water & Sewerage Co. Ltd*, Industrial Court Cause No. 64 of 2012. It submits that the chronology of events leading up to the Claimant's dismissal, do satisfy that indeed, the correct procedure was followed.
39. It is the Respondent's submission that the Claimant is not entitled to the reliefs sought as his dismissal was fair.

Analysis and Determination

40. I have considered the pleadings herein, the witnesses' oral testimonies and the rival submissions. The issues that arise for my determination are:
 - i. Whether the Claimant's termination was unfair.
 - ii. Whether the Claimant is entitled to the remedies sought.

Whether the Termination of the Claimant was Unfair

41. On 5th June 2018, the Claimant was served with a show cause/interdiction letter demanding that he shows cause why he should not be dismissed from the service of the Respondent. The letter further required him to give a written reply within 7 days on the allegations levelled against him.



42. On the same day, the Claimant was issued an invitation letter similarly dated, to appear before the disciplinary committee on the 14th June, 2018. The invitation letter informed him of his entitlement to be accompanied by a fellow employee of his choice.
43. On 7th of June, 2018, the Claimant duly responded to the show cause/interdiction letter, and subsequently on 27th of June, 2018, the Claimant was summarily dismissed. The Claimant lodged an appeal which was dismissed on 10th December, 2018, on account of the absence of new grounds warranting a review.
44. In *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR, the Court of Appeal set out four elements that have now been generally accepted as the minimum standards of a fair procedure as follows:
- “.....that four elements must be discernable for the procedure to pass the fairness test:
- a. an explanation of the grounds of termination in a language understood by the employee;
 - b. the reason for which the employer is considering termination;
 - c. entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made
 - d. hearing and considering any representation by the employee and the person chosen by the employee.”
45. Further in *Hosea Akunga Ombwori v Bidco Oil Refineries Limited* (2017) eKLR the court expounded on the provisions of Section 41 as follows: -
- “To satisfy the requirements of Section 41 of the *Employment Act*, 2007, an employer issues what is called in ordinary parlance a show cause notice/letter. Such a letter or notice should outline the allegations or charges against the employee and also request him to respond within a reasonable time.
27. The notice also ought to inform the employee that disciplinary action which might lead to termination of employment is under consideration.”
46. It is not disputed that the Claimant was issued with a show cause letter, he responded to the show cause and was invited to appear before the disciplinary committee of the Respondent for a hearing accompanied by a representative of his choice. Indeed, the Claimant appeared before the committee, though unaccompanied and which is out of his own choice.
47. Although the Respondent did not produce minutes of the disciplinary hearing, it is apparent from the evidence on record that the hearing took place. Further, the Claimant did not deny that the meeting took place, and which he confirmed having attended and ventilated his case.
48. In light of the foregoing, it is clear as day that the Respondent adhered to the requirements of the law on fair process in dismissing the Claimant, and so I hold.
49. On the question of substantive justification, the reasons for the Claimant’s dismissal are absenteeism and alcoholism. Section 44 (3) of the *Employment Act* provides for summary dismissal upon proof of fundamental breach of a contract of service. Section 44 (4) then goes ahead to enumerate the justifications for summary dismissal, which include absenteeism and intoxication at the workplace.



50. Section 47 (5) of the *Employment Act*, 2007 provides the procedure to be followed in matters of complaints of unfair termination as follows:
- (5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds of the termination of employment or wrongful dismissal shall rest on the employer.”
51. The Court of Appeal in *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR stated:
- “That, the appellant in this case had the burden to prove, not only that his services were terminated, but also that the termination was unfair or wrongful. Only when this foundation has been laid will the employer be called upon under section 43 (1): "to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.”
52. In support of the assertion that the Claimant was intoxicated at work, RW1 testified that the Claimant’s immediate supervisor had shared a photo of the Claimant sprawled on the office floor, and which photo was produced as evidence before court.
53. It was his further testimony that though no tests were carried out to ascertain the Claimant’s problem, they reached the conclusion that he was drunk based on his previous conduct, his admission that he suffered from alcoholism and the admission at Asumbi rehabilitation centre, which was facilitated by the Respondent.
54. The Claimant on cross-examination told court that he was not under the influence of alcohol on the material day, but that he was overwhelmed by medication. It is not clear what the nature of medication the Claimant was taking as no medical record was produced in evidence.
55. For a charge of intoxication to meet the parameters for summary dismissal, it must be proven that it rendered the person incapable of performing his duties. In *John Rioba Maugo v Riley Falcon Security Services Limited* [2016] eKLR, it was held that the employer must demonstrate that the alcohol consumed has rendered the employee incapable of performing his duties properly.
56. The Respondent tendered a picture of the Claimant sprawled on the floor seemingly unresponsive. I have no doubt in my mind that in the state demonstrated in the picture, the Claimant was in no state of mind to carry out his duties.
57. The Respondent/employer took the Claimant for rehabilitation based on his own admission that he was battling alcoholism. The Claimant did not lead evidence to show that he notified the employer that he suffered from bipolar disorder, so as to enable the employer provide him with the necessary assistance.
58. In the case of *Kenya Plantations & Agricultural Workers Union v. Rea Vipingo Plantations & Another* (2015) eKLR, it was held that where an employee is injured or taken ill during employment, the employer has the obligation to reasonably accommodate the employee.
59. The Respondent in my view, made reasonable effort to accommodate the Claimant by helping him go through rehabilitation for alcoholism. It would in my view, be too much to ask of an employer, to require that it accommodates an employee on an illness that the employer has no knowledge about. The employer would simply have no way to help.



60. Further, in *Kennedy Nyaguncha Omanga v Bob Morgan Services Limited* (2013) eKLR, the court held that while employers are entitled to terminate employment on the ground that an employee was too ill to work, they are required to exercise due care and show support to the employee to recover and resume duty, and where termination is inevitable, the employer must give the employee specific notice of the impending termination.
61. The Claimant was taken through fair process and the Respondent has proved the validity and fairness of the reasons for the dismissal and, which render the dismissal lawful and fair. It is so held.

Whether the Claimant is Entitled to the Remedies Sought.

Compensation

62. Having found that the Claimant's dismissal was substantively and procedurally fair, he is not entitled to any award under this head.

Salary In Lieu of Notice

63. The Claimant sought 1 month's pay in lieu of notice. Given that the Claimant was summarily dismissed, there was no requirement for notice. This head of the claim is thus equally dismissed.

Gratuity

64. The Claimant did not provide any evidentiary basis for an award under this head. No details of his terms of service or contract were availed to indicate that he was entitled to gratuity. In *John Karanja Mbogo v Leah Wangui t/a Gilgil Distributors Limited* [2020] eKLR the court in dismissing a prayer for gratuity stated that: -

“The claim for gratuity is not due. The Claimant had no written contract giving him such benefit.....”

Disposition

65. In conclusion, the Claimant's claim is dismissed with no orders on costs.
66. Judgment of the court.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 22ND DAY OF FEBRUARY, 2024.

CHRISTINE N. BAARI

JUDGE

Appearance:

The Claimant present in person

Mr. Juma h/b for Ms. Asega for the Respondent

Erwin Ongor - C/A

