



**Odera v Nodor Kenya EPZ Limited (Employment and Labour Relations Cause 214 of 2018) [2024] KEELRC 303 (KLR) (16 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 303 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 214 OF 2018  
AN MWAURE, J  
FEBRUARY 16, 2024**

**BETWEEN**

**MOSES OWINO ODERA ..... CLAIMANT**

**AND**

**NODOR KENYA EPZ LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant filed a Memorandum of Claim dated 15<sup>th</sup> January 2018.

**Claimant’s Case**

2. The Claimant avers that he was employed by the Respondent as a General Labourer from 10<sup>th</sup> November 2013, earning a gross monthly salary Kshs. 16,150.
3. The Claimant avers that he reported to work as usual on 28<sup>th</sup> April 2017 and in the course of his duties, the Respondent’s manager, Mike Stephens, summoned him and summarily dismissed him without giving him an opportunity to be heard.
4. The Claimant avers that despite performing his duties excellently and his contract being renewed annually for 4 years continuously, the Respondent failed to accord him a chance to defend himself and before exhausting all levels of investigations before dismissing him.
5. The Claimant avers that he crashed biscuits used in producing dartboards which would be weighed by one, Naomi, a senior employee tasked in ensuring the biscuits had the required weight before being crushed.
6. The Claimant avers that the quality control officers were doing rounds every one hour in the production department and whose main purpose was to ascertain the dartboards produced were to the required standard and in the event they noted an anomaly they would recommend that it be rectified before the dartboards are dispatched for exportation.



7. The Claimant avers that in an attempt to question if all the senior officers were put to task whether they approved any substandard work and to be availed with a report on the investigations carried out if any, he was met with hostility by the manager who dismissed him without any plausible reasons.
8. The Claimant avers that the dismissal was discriminatory as the machine having produced substandard work was being operated by two employees, Jeremiah Nzivo and himself. Mr Nzivo retained his employment while he was taken as the sacrificial lamb.
9. The Claimant avers the summary dismissal was illegal, unlawful, unfair and contravened the basic tenets of good and fair labour practices, the principles of natural justice and provisions of the constitution and the Employment Act.

### **Respondent's Case**

10. In opposition, the Respondent filed a memorandum of response dated 16<sup>th</sup> April 2018.
11. The Respondent denied that the Claimant served diligently and aver that he was given a fair hearing.
12. The Respondent avers that the Claimant devised unscrupulous, careless and improper means of performing his duties to finish his work faster and earn higher bonuses by:
  - a. deliberately stacking less biscuits than the required 47 when making dartboard bases.
  - b. Making soft dartboards than the required standards.
  - c. Failing to follow proper procedure when cutting the dartboards.
13. The Respondent avers that due to the aforementioned careless means of the Claimant carrying out his duties, the Respondent lost time, money and reputation as there were constant complaints via emails by clients regarding the quality of its products, in particular:
  - a. The Respondent had to set up an emergency line to check over 10,000 dartboards that had been packed ready for shipment.
  - b. Further, 12,000 dartboards that had already been shipped to the UK had to be scrutinised to avoid further damage.
  - c. Replacing poor quality dartboards that had been purchased.
14. The Respondent avers that the Claimant's termination was done in accordance to Section 44(1), (3) and (4c) of the Employment Act and he was given all his due payments that had accrued as at the time of his termination.

### **Evidence in Court**

#### **Claimant**

15. The Claimant (CW1) testified and produced his memorandum of claim and witness statement dated 15.01.2018 and bundle of documents as his evidence in chief and exhibits respectively.
16. During cross examination, CW1 testified that he worked for the Respondent for 4 ½ years as a crusher in the base production unit. He was trained as a machine operator and the training was enough.
17. CW1 testified that he understood the products he was producing and is aware there were complaints on the day he was dismissed.



18. CW1 testified that he was not accorded a disciplinary hearing but it was a briefing that the customers were complaining, he was not called to defend himself.
19. CW1 testified that in the years worked for the Respondent, there were no complaints about his work.
20. CW1 testified he was summarily dismissed *vide* a letter dated 28.04.2017 but he went to the county labour office on 02.05.2017 and delivered *vide* a letter addressed to that office.
21. During re-examination, CW1 testified that before 28.04.2017, he had not been notified of any poor performance and was not served with a notice to show cause.
22. CW1 testified he was not shown any complaints raised against him and the briefing took around 10 minutes in which only the company director talked. He was then asked to go home and come back for clearing on Tuesday.
23. The Respondent closed its case, opting not to produce any witness before the court.

### **Claimant's Submissions**

24. It was submitted for the Claimant that the Respondent never gave any evidence to rebut his claim and evidence, In *Mursal & another v Manese (suing as the legal administrator of Dalphine Kanini Manesa)* (Civil Appeal E20 of 2021) [2022] KEHC 282 (KLR) (6 April 2022) (Judgment) where it was held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted.
25. The Claimant submitted that the ground of his termination that he had produced substandard dartboards was untrue. He was a junior employee deployed as a general labourer but assigned duties to crush dartboards and not a machine operator, quality control officer or manager. He therefore wonders how he could alone be singled out as one who manufactured substandard products.
26. The Claimant submitted that he was not served with any NTSC before dismissal, he was just called up by the Manager for interrogation before he was summarily dismissed the same day.
27. The Claimant submitted that section 41 of the *Employment Act* read with Article 41 of the *Constitution* on fair labour practice frown upon the Respondent's actions.

### **Respondent's Submissions**

28. The Respondent submitted that the Claimant was dismissed due to careless and improper conduct of his duties which led to production of substandard products which caused the Respondent waste time, money and reputation. His dismissal falls well within Section 44 of the *Employment Act*.
29. The Respondent submitted that despite his careless and improper performance being legal grounds for summary dismissal, the Claimant was accorded a disciplinary hearing on 28.04.2017 where the outcome was termination of his duties. The Claimant received his summary dismissal letter and the same was delivered to the District Labour Officer, Machakos Labour Office. All his dues were paid and a certificate of service issued.
30. The Respondent submitted that the Claimant was well aware he performed his duties carelessly as the client's complaints were public knowledge. The company had to set up an emergency line to check over 10,000 boards that had already been packed for shipment and further 12,000 boards that had already been shipped to the UK, costing the company its reputation and resources. From an investigation conducted all substandard boards were from the team supervised by the Claimant herein.



## Analysis and Determination

31. The main issue for determination is whether the claimant's summary dismissal was unlawful and unfair.
32. It is trite law that for an employer to lawfully and fairly dismiss an employee's employment, he must have a substantive justification and conduct the same with procedural fairness. This is well established under Section 45 of the *Employment Act* which states: -
- (1) No employer shall terminate the employment of an employee unfairly.
  - (2) A termination of employment by an employer is unfair if the employer fails to prove—
    - (a) that the reason for the termination is valid;
    - (b) that the reason for the termination is a fair reason—
      - (i) related to the employees conduct, capacity or compatibility; or
      - (ii) based on the operational requirements of the employer; and
    - (c) that the employment was terminated in accordance with fair procedure.”
33. The Respondent summarily dismissed the Claimant on grounds that he devised unscrupulous, careless and improper means of performing his duties to finish his work faster and earn higher bonuses. This caused the Respondent losses.
34. However, the Claimant averred that the dismissal was discriminatory as the machine that allegedly produced substandard work was being operated by himself and one Jeremiah Nzivo.
35. Further, the Claimant stated that the Respondent has quality control officer who ascertain the dartboards produced were to the required standard and in the event, they noted an anomaly they would recommend that it be rectified before dispatch.
36. None of these other employees were summarily dismissed together with the Claimant and neither did the Respondent explain to this court or produce any substantive evidence before this court to controvert the Claimant's claim that he was dismissed without a valid reason.
37. Section 43 of the *Employment Act* provides that: -
- “In any claim arising out of termination of a contract, the employer shall be required 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.”
38. This was further emphasized under Section 47(5) of *the Act* which provides: -
- “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 for the termination of employment or wrongful dismissal shall rest on the employer.”
39. The Respondent has failed to satisfactorily prove to this court it had valid reasons to dismiss the Claimant. It did not deny the fact that the machine was not operated solely by the Claimant or that the Claimant was a junior employee subordinate to other senior employees tasked with ensuring the dartboards produced are up to standard. These employees neither were dismissed by the Respondents



together with the Claimant nor was any investigation report produced in court to show how it narrowed the blame on the Claimant alone.

40. Accordingly, the claimant's summary dismissal was not substantively justified.
41. In respect to procedural fairness, Section 41 of the *Employment Act* clearly sets out what is required of an employer as follows:
  - (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.
  - (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.”
42. In the instant case, the Respondent never issued the Claimant with a NTSC laying down the allegations of gross misconduct thereby giving him a chance to respond to the allegations before summoning him to the said disciplinary hearing held on 28.04.2017.
43. The Claimant was merely summoned for a meeting without knowledge it was disciplinary hearing and he was denied an opportunity to defend himself as he was not aware of the said allegations or provided with any evidence or witnesses relied upon by the Respondent. Further, he was not accompanied by any employee or shop floor union representative or informed of this right beforehand as mandated in section 41 of *employment act* 2007.
44. Therefore, the Respondent failed to adhere to procedural fairness in breach of Section 41 of the *Employment Act*.
45. The summary dismissal being deficient of substantive justification and procedural fairness, this court declares that the Respondent's decision to summarily dismiss the Claimant's employment was unlawful and unfair. It was held in the case of *Kenfreight (EA) Limited vs Benson K. Nguti* [2016] eKLR as follows:

“ Apart from issuing proper notice according to the contract (or payment in lieu of notice as provided), an employer was duty bound to explain to an employee in the presence of another employee or a union official, in a language the employee understood, the reason or reasons for which the employer was considering termination of the contract. In addition, an employee was entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service was taken.”
46. Having established in the instant case the summary dismissal was unlawful and unfair and in consideration that the Respondent did not produce any evidence to show that the Claimant was duly paid his terminal dues, the Claimant is entitled to be compensated.

#### **Reliefs awarded**

- a. Payment in lieu of notice kshs 16,150/-
- b. Unpaid leave for 2017 kshs 16,150/-



- c. Compensation for unlawful termination at 4 months equivalent kshs 64,600/-  
Total award is kshs 96,900/-
- d. Claimant is awarded costs plus interest at court rates from date of judgment till full payment.  
Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 16<sup>TH</sup> 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**

