



REPUBLIC OF KENYA



KENYA LAW
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**Warugongo v Tata Chemicals Magadi Limited (Cause 98 of 2019)
[2024] KEELRC 276 (KLR) (16 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 276 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 98 OF 2019
B ONGAYA, J
FEBRUARY 16, 2024**

BETWEEN

EDWIN NDIRANGU WARUGONGO CLAIMANT

AND

TATA CHEMICALS MAGADI LIMITED RESPONDENT

JUDGMENT

1. The claimant filed on 21.05.2019 an Amended Memorandum of through Bemih Kanyonge Advocate. The claimant alleged that the respondent herein unfairly, unlawfully and constructively terminated his employment.
2. The claimant pleaded that he was employed by the respondent on or about 31.10.2016 and was confirmed to the position of Development Engineer earning a monthly salary of Kshs.691, 960/- per the respondent's letter dated 22.05.2017.
3. He further pleaded that he worked diligently and to the respondent's satisfaction and had exemplary performance recorded during the performance review for the Financial Year 2017/2018 by the then Managing Director.
4. That on 31.10.2018 without any further performance review the respondent decided to change his job title to Special Projects. The claimant alleged the decision led to his demotion because the role did not have a job description.
5. The claimant alleged he noted further frustrations when on 21.11.2018 the respondent's MD/ COO and Director Human Resources invited him to a meeting where he was asked to resign without justifiable reasons. He further avers that he received threats from the respondent that no recommendation would be given to him to secure future employment if he declined to resign.



6. The claimant stated that he was received a notice to show cause on 18.12.2018 and was subsequently invited to a disciplinary hearing on 19.01.2019. After the hearing, the respondent recommended his termination with an option of appeal in 7 days. The claimant appealed and was invited to an appeal hearing on 12.03.2019 where the decision to terminate his employment was upheld.
7. The claimant maintains that the entire disciplinary process conducted by the respondent was a mere formality and designed to have only one outcome, which was his unlawful termination of his employment.
8. Aggrieved by the respondent's alleged decision to unlawfully, wrongfully and unfairly terminate her employment, the claimant filed the instant claim seeking the following reliefs:
 - I. A declaration that termination of the claimant's employment was unfair and illegal.
 - II. A declaration that the respondent's conduct towards the claimant amounts to constructive dismissal.
 - III. Compensation for unfair and un-procedural termination of employment
 - IV. Dues of Kshs.11,590,184 tabulated as hereunder:
 - a. One month salary in lieu of notice Kshs. 691,960/-
 - b. 12 month salary for remaining duration of contract Kshs. 8,303,520/-
 - c. Bonus entitlement at 20% of annual gross Kshs. 760,704/-
 - d. Baggage allowance upon termination Kshs. 400,000/-
 - e. Erroneous deductions in calculations Kshs. 300,000/-
 - f. School fees for 1 year Kshs. 1,134,000/-Total Kshs. 11,590,184/-
 - V. Severance pay.
 - VI. The costs of the suit interests hereon at Court rates.
 - VII. Interest on IV, V and VI above.
 - VIII. Any other relief that the Court shall deem fit and just to grant.
9. In opposition to the claim, the respondent filed its statement of response dated 29.06.2019, together with the list and bundle of documents dated 29.06.2019. In its response, the respondent admits having engaged the claimant as alleged in the amended memorandum of claim. It however denied exemplary performance as contended by the claimant.
10. The respondent further avers that by a circular dated 31.10.2018 it announced organizational changes which affected six (6) of its employees including the claimant herein. That because of the organizational changes the claimant was re-designated to the position of Special Projects and was to report to the Executive Director & COO. Further, the claimant failed to perform his duties under the new role occasioning the respondent losses. Thus, as a consequence he was issued with a notice to show cause why disciplinary action should not be taken against him for the poor performance.



11. The respondent maintains that it conducted a disciplinary hearing prior to the claimant's termination. It maintained that the termination was for valid and fair reason and was done in accordance with fair procedure.
12. The respondent avers that the claimant has no reasonable or justified cause of action against it. The respondent termed the claim herein as an abuse of court process. The respondent prayed that the claim be dismissed with costs.
13. The matter proceeded for hearing on 7.11.2023 and on 22.11.2023. The claimant testified to support his case and the respondent called two witnesses.
14. The claimant adopted his witness statement dated 18.02.2019 as his evidence in chief. He also relied on the list and bundle of documents and the supplementary list of documents dated 18.10.2019 as exhibits in this matter. In his statement, he reiterated the averments made in his amended statement of claim. He further urged this Honourable Court to find his claim with merit and to allow it as prayed.
15. On cross-examination, the claimant stated that his re-designation was a demotion despite the fact that the respondent explained in its circular the reasons for the changes. He also confirmed that there was no salary change after the re- designation.
16. The claimant also confirmed he was invited and he attended the disciplinary hearing prior to his termination. He further confirmed having appealed the respondent's decision to terminate his employment and he attended an appeal hearing. He however insists that the minutes to the meeting were not valid, as parties had not signed. He also confirmed that he indeed oversaw the projects as highlighted by the respondent that led to his termination.
17. On re-examination, the claimant faulted the disciplinary process and indicated that he received the notice to show cause letter from the HRM despite the fact that he ought to receive the letter from his line manager, in his case the CEO, as per the respondent's policy. He nonetheless responded to the show cause letter and raised the issue.
18. On further re-examination, the claimant testified that his new docket had no job description and that his requests for the same were never honoured. He further testified that during the disciplinary hearing there was no mention of any wrong doing only that the respondent's board lacked confidence in him. He further testified that he did not sign the minutes of the disciplinary hearing and was subsequently issued with a letter of termination.
19. Both RW1 and RW2 adopted their witness statements dated 23.06.2023 as their evidence in chief and relied on the list and bundle of documents dated 26.06.2019 as exhibits in this matter. Both witnesses maintained that due process was followed and that the claimant's termination was for a valid reason. They testified that the claimant's termination was because of his poor performance thereby occasioning damages to the respondent. The respondent urged the Court to find the Claim without merit and to dismiss it with costs.
20. Parties filed their respective submissions. The Court has considered all the material on record. The Court returns as follows:
21. To answer the 1st issue, parties were undisputedly in a contract of service per their respective pleadings and evidence.
22. To answer the 2nd issue, the respondent terminated the claimant's employment by the letter dated 06.02.2019. The reason for termination was his failure in his roles as a manager in charge of projects



to ensure that the company achieved quality, efficient, and cost effectiveness in a number of projects resulting in financial losses to the respondent. The enumerated failures were as follows:

- a. In construction of a new water tank he failed to supervise to meet high quality work so that the tank had started to leak and was seriously corroded.
 - b. In sinking boreholes< the separate boreholes had been sank and only the 3rd one had been productive and he had failed to obtain his manager's approval prior to proceeding to sink the last two boreholes.
 - c. He failed to provide correct specifications leading to purchase of project water section tools that could not be installed namely the generator, compressor, welding set and air blowers that did not meet required specifications.
 - d. Failure to pay attention in providing specifications in building new flats.
23. To answer the 3rd issue, save for the failure that the letter to show-cause was not by his manager or supervisor, the CEO, per internal policy, the Court finds that the respondent accorded the claimant due process of a notice and a hearing per section 41 of the *Employment Act*. In terms of section 45 of the Act, it cannot be said that the respondent adopted an unfair procedure. Indeed, the claimant has not shown how the CEO in not personally signing the letter to show cause may have prejudiced him and in any event, the Court finds the alleged failure as an afterthought, excusable, as not raised in the claimant's appeal letter dated 19.02.2019.
24. To answer the 4th issue the Court returns that the claimant has not established a case of unfair constructive termination. That he was not given job description upon re-designation is a no issue as he continued to work as assigned until the disciplinary process issued. That he was asked to resign is equally no issue as he thereafter continued to work. The evidence was that there was no fundamental breach of the terms and conditions of service by the respondent that have been shown to force the claimant out of job. The evidence per pleaded case is that there was a disciplinary process leading to termination. While he wrote on 12.11.2018 asking for a job description upon re-designation and the same was not provided, he appears to have condoned that failure. The allegations of constructive termination by the claimant are unjustified.
25. The 5th issue is whether the reasons for termination were valid. The Court finds respondent alleged losses attributable to the claimant's failures in the projects as mentioned in the termination letter. In the reply to letter to show cause the claimant denied all levelled allegations. In his appeal, he demanded to be shown the alleged losses incurred by the respondent as was alleged. The Court returns that throughout administrative disciplinary process, appeal and before the Court the losses were not demonstrated at all. Further, the claimant has shown that upon re-designation on 31.10.2018 he wrote on 12.11.2018 for job description but the respondent failed to provide the same. In the circumstances and as submitted for the claimant, it cannot be said that as at termination, the respondent had a valid or genuine reason to dismiss as per section 43 of the *Employment Act*. Further, it cannot be said that the respondent had a fair reason attributable to the claimant's capacity, conduct or respondent's operational requirements as envisaged in section 43 of the Act – because in absence of the job description, a yardstick to establish the fairness of the reasons is lacking. In any event, the Court has carefully considered the claimant's reply to the letter to show cause and the grounds of exculpation in his letter of appeal and the respondent has not shown how the claimant's answers to levelled allegations were rebutted. The respondent's witnesses testified that they could not confirm that the claimant was involved in procurement processes and offered no evidence to justify the alleged reasons for termination per section 47(5) of the *Employment Act*. The Court finds that the termination was unfair for want of genuine and fair reasons per sections 43 and 45 of the Act.



26. The 5th issue is on remedies. The Court returns as follows:

- a. The termination has been found unfair for want of genuine and fair reasons. The aggravating factor is that, prior to termination, the respondent had upon no good basis, asked the claimant to resign. The claimant had worked for two years and three months. Those being considerations under factors in section 49 of the Act and to balance justice for the parties, the claimant is awarded 4 months' gross pay in compensation thus Kshs.691, 960.00 x 4 making Kshs.2,767,840.00 (Less PAYE). February 2019 payslip shows the claimant had received contractual two months' pay in lieu of notice and one further month's pay. The court has considered that one-month's extra pay in awarding the 4 months' pay in compensation. Further, the claimant is thereby not entitled to the claimed payment in lieu of notice.
- b. As submitted for the respondent no submissions have been made for the claimant to justify the prayers for bonus, baggage allowance, erroneous deductions, and school fees for one year, and, severance pay. The same will be declined as unjustified or abandoned for want of due submissions.
- c. The respondent will pay the claimant's costs of the suit.

27. In conclusion, judgment is hereby entered for the claimant against the respondent for:

1. The declaration the termination was unfair for want of genuine and fair reason.
2. The respondent to pay the claimant a sum of Kshs.2, 767,840.00 (Less PAYE) by 01.04.2024 failing interest to be payable thereon at court rates from the date of this judgment until the date of full payment.
3. The respondent to pay the claimant's costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 16TH FEBRUARY 2024.

BYRAM ONGAYA

PRINCIPAL JUDGE

