



REPUBLIC OF KENYA



**Ngoge v Ponders Limited (Cause 210 of 2017)
[2024] KEELRC 266 (KLR) (9 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 266 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 210 OF 2017
NJ ABUODHA, J
FEBRUARY 9, 2024**

BETWEEN

STEPHEN OCHOKI NGOGE CLAIMANT

AND

PONDERS LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed his claim on 1st February, 2017 and pleaded inter alia as follows: -
 - a. The Claimant was an employee of the Respondent from January 2015 earning a monthly salary of ksh 14,500/.
 - b. The Claimant averred that on 9th June,2016 while on duty the Respondent's director alleged there had been theft of the Respondent' goods. This allegation was levelled against the Claimant and his three colleagues.
 - c. The Claimant averred that they were arrested and taken to Ruaraka Police station, detained and the Claimant was released on cash bail of ksh 15,000/= on 11th June,2016.
 - d. The Claimant averred that upon his release on 11th June ,2016 the Respondent's director summoned him into the Respondent's office and in presence of OCS and DOCS Ruaraka Police station upon realization that he could not substantiate the said allegations, forced him to sign a document admitting the theft.
 - e. The Claimant further averred that the Respondent thereafter terminated the Claimant's employment which was malicious and also meant to harass and intimidate him in order to justify the illegal action of dismissing him from employment.



- f. The Claimant averred that at the time of termination the Respondent did not pay him his 11 days worked in June 2016. He termed his termination as unfair and unlawful hence entitled to the terminal dues.
2. The Claimant in the upshot prayed for the following against the Respondent;
 - a. A declaration that the Termination of the Claimant was unfair and unlawful.
 - b. Payment of his terminal dues amounting to ksh 208,317 /.
 - c. Certificate of service.
 - d. Costs of the suit.
 - e. ...
3. The Respondent neither entered appearance nor filed its Response to Memorandum of Claim. Further the respondent never participated in these proceedings.

Evidence

4. The Claimant, CW1, testified in court on the 28th September,2023 where he adopted his witness statement together with the pleadings filed in court dated 1st February,2017.
5. CW1 testified that he was working as a delivery person when he was suspected of the theft with his colleagues. That no criminal proceedings have been preferred against him. He confirmed that no disciplinary hearing was conducted and that he was not issued with termination letter. He prayed for compensation as prayed.

Claimants' Submissions

6. The Claimant filed written submissions dated 18th October, 2023. On the issue of whether the termination was wrongful and unfair, the Claimant submitted on the import of both substantive and procedural fairness.
7. It was his submissions that the Respondent never adhered to either of the two tests and contravened section 43 and 41 of the Employment Act regarding the reason and procedure for termination respectively. The Respondent never gave him a termination notice or pay him one month salary in lieu thereof. The Claimant relied on the court of Appeal case of Pius Machafu- Isindu v Lavington Security Guards Limited(2017) Eklr in this respect.
8. It was further his submissions that when he was summoned to the Manager's office after being released from police custody, he was never represented by any representative and no hearing was conducted. He was only coerced in to signing a document admitting to the theft in presence of OCS Ruaraka Station. He was then asked to go home without any termination letter.
9. On the issue of whether the Claimant is entitled to Reliefs sought, the Claimant submitted that he was entitled to the reliefs sought in his claim. The Claimant submitted that the termination by the Respondent was flawed and in breach of requirements of Sections 45 and 41 of the Employment Act 2007.
10. He relied on the provisions of Section 18 of the Employment Act while submitting that wages are a legal entitlement as well as Section 49 and 50 on remedies for wrongful dismissal and unfair termination.



11. The Claimant prayed that his claim be allowed as prayed since his allegations stood uncontroverted when the Respondent failed to enter appearance or take part in these proceedings.

Determination

12. I have reviewed and considered the pleadings, testimonies and submissions by the Claimant's counsel in support of the case as well as authorities relied on. I have also noted that the Respondent never entered appearance or take part in the proceedings of this case to challenge the Claimant's allegations.
13. I have I have come up with two main issues;
 - a. Aa. aa. Whether Whether the claimant was unfairly terminated.
 - b. Whether the Claimant is entitled to the reliefs sought.

(a) Whether the Claimant was Unfairly Terminated

14. In this case, the Claimant in his testimony stated that his services were terminated by the Respondent's manager following accusation of theft and thereafter forced to sign a document whose contents indicated his admission to those allegations. Despite being accused of theft by the Respondent, he was never charged with any criminal offence.
15. Further, it was the Claimant's case that he was not represented by any representative when he appeared in the manager's office and therefore coerced into admitting that he was guilty of theft in the presence of OCS and deputy OCS.
16. The Respondent was bound to adhere to two tests before terminating the services of the Claimant which is the substantive test and procedural test. On the Substantive test the employer must give a fair and valid reason as per section 43 of the Employment Act. Section 45 of the Employment is clear that where there is no valid and fair reason such termination is unfair.
17. In this case the Respondent never took part in these proceedings to prove the reasons for termination. The Court therefore has no reason to disbelieve the account of events as per the claimant and therefore proceeds to agree that there was no valid reason since no criminal proceedings were preferred against the Claimant over the allegations of theft.

Whether the Claimant is Entitled to Reliefs Sought.

18. The respondent never defended the claim therefore the claimant ought to ideally be granted the prayers sought if proved and or justified. The Court holds the view that the reliefs sought are justified and are within the parameters of section 49 of the Employment Act. From the pleadings it would seem the claimant had worked for the respondent for about one and a half years. Further the respondent had the claimant arrested and locked in custody on suspicion of theft but never proceeded to push for any criminal prosecution against the claimant. The respondent further though served never bothered to defend the claim. In the circumstances an award of eight months' salary would adequately compensate the claimant on account of unfair termination. The court therefore awards the claimant as follows:
 - a. Salary for June 2016. 11 days worked -----5,317/=
 - b. One month's salary in lieu -----14,500/=.
 - c. Compensation for the unlawful termination at 8 months 14,500 x 8-----116,000/=.



d. Unpaid leave for 2015-----14,500/=.

Total-----ksh 121,317/=

19. It is so ordered.

DATED AT NAIROBI THIS 9TH DAY OF FEBRUARY, 2024

DELIVERED VIRTUALLY THIS 9TH DAY OF FEBRUARY, 2024

ABUODHA NELSON JORUM

JUDGE

