



Nduiga v Sunflag Textiles and Knitwear Mills Ltd (Employment and Labour Relations Cause 712 of 2017) [2024] KEELRC 198 (KLR) (9 February 2024) (Judgment)

Neutral citation: [2024] KEELRC 198 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 712 OF 2017**

**AN MWAURE, J
FEBRUARY 9, 2024**

BETWEEN

ANTHONY M NDUIGA CLAIMANT

AND

SUNFLAG TEXTILES AND KNITWEAR MILLS LTD RESPONDENT

JUDGMENT

Introduction

1. The Claimant filed a Memorandum of Claim dated 14th March 2017.

Claimant's Case

2. The Claimant avers that he was employed by the Respondent on 1st April 2003 as a machine operator and was later issued with an appointment letter on 26th June 2005 as a packer/operator with a salary of Kshs 7,128 per month and house allowance of Kshs 2,800 per month.
3. The Claimant avers that he is a registered member of the Tailors and Textiles Workers Union and he was unlawfully and unjustifiably dismissed on 10th June 2016 and his salary at the time was Kshs 20,032 and house allowance of Kshs 3,200.
4. The Claimant avers that he was unlawfully and unjustifiably dismissed on allegations that he carelessly handled the delivery of records to the boiler room in Pate division together with desks burnt under mysterious and unacceptable circumstances.
5. The Claimant avers that without a consultative meeting between himself and the HR Manager, on 5th June 2017, the Respondent served him with a letter dated 17th May 2017 setting out his entitlements and last working day as 8th June 2017.



6. The Claimant avers that in 2014, he was promoted to a storekeeper in the Engineering Department and transferred and assigned extra duties in the Human Resource Department from Pate Road Godown in addition to functions in Adix Godown which were 2 kilometres apart.
7. The Claimant avers that the macadamia nutshells godown in Adix was established in 2012 where two other storekeepers namely Mr. Njuguna (left) and Mutunga (still in employment) were stationed.
8. The Claimant avers that the two left without handing over all previous records and the Respondent failed to inquire or follow up until when the Adix store was closed and transferred to Pate Road weaving division in mid-May 2016 when he was the only one in charge despite earlier attempts to have the stock of previous years taken before taking over as the substantive storekeeper.
9. The Claimant avers that in mid May 2016, the Respondent constructed their own Godown for macadamia nutshells in Pate Road and was to relocate as the Adix Godown was rented and had to be handed back to the landlord to save operational costs
10. The Claimant avers that a private truck was hired to carry out the relocation and the nuts were loaded without being weighed and transported to Pate Road. He was left behind to carry out cleanliness which he did till late in the evening; he did not report to Pate Road as there were other employees waiting to offload the furniture into the new store.
11. The Claimant avers that the store in Pate Road was locked and the private truck driver and his agents were directed to offload the goods in the boiler room as there was no other suitable storage space.
12. The Claimant avers that when he reported to work the following day, he was informed everything got burnt by the contracted employees as advised by the private truck driver.
13. The Claimant avers that he reported the matter to the Plant Manager, Engineer and Assistant Personnel and he was suspended for 3 days for investigations but the contract workers were never called for questioning or investigations.
14. The Claimant avers that on 10th June 2016, he was called by the Respondent and handed a dismissal letter.
15. The Claimant avers that the matter was reported to the labour office and recommendations and findings were released to the parties to which they were not agreeable hence the matter before this court.

Respondent's Case

16. In opposition to the Claim, the Respondent filed its statement of response dated 23rd June 2017.
17. The Respondent avers that the Claimant was summarily terminated on 31st May 2017 on grounds of gross misconduct following the unexplained loss of 611,476 kgs of macadamia nutshells valued at 1.5 million.
18. The Respondent avers that in April 2016, the physical stock carried out of the Godown revealed an anomaly and thereafter the Claimant was instructed to transfer the furniture he was using in the Godown together with the record books to the weaving division in Pate Road as the company was vacating.
19. The Respondent avers that the Claimant maliciously, carelessly and negligently handled the transfer of the records and furniture resulting to the items being offloaded into the boiler where they were completely consumed and destroyed by fire.



20. The Respondent avers that the Claimant had full knowledge of the missing stock of macadamia nutshells and the burning of the records was a deliberate move to destroy evidence hence the summary dismissal.
21. The Respondent avers that the Claimant's dismissal from employment was lawful and justifiable.

Evidence in Court

Claimant's Case

22. The Claimant (CW1) testified and adopted his witness statement as his evidence in chief.
23. CW1 testified that the company was using hired trucks when transporting the records and the driver and turn hoy were not called to explain anything. Further, he was never arrested for stealing the Respondent's properties.
24. During cross examination, CW1 testified that at the time of his termination he was working at the Respondent's human resource department as a reliever store keeper.
25. CW1 testified that he was overseeing the work of Mr Njuguna at the Godown, who then left the company and he took charge.
26. CW1 testified that the company used hired trucks to transfer the records which were under the engineer's instructions and he was manning the Godown.
27. CW1 testified that he was not aware of stock taking before the relocation and the same was only done when a variance of records and physical stock was found.
28. CW1 testified that transportation was done as stock taking was happening and he was not given a chance to compute the records when stock taking was taking place.
29. CW1 testified that he never went to the new Godown but the supervisor there received them and there were other employees waiting to receive the records and macadamia nutshells.
30. CW1 testified that the items ended at the boiler room as the store had been locked by the supervisor from the engineering department.
31. CW1 testified that upon his termination, he went to the labour office and he was never given a chance to defend himself hence he filed this case.
32. CW1 testified that he was represented by the union during the proceedings. The labour officer/ conciliator ruled he is entitled to some reliefs but there was gross misconduct.

Respondent's Case

33. The Respondent's witness, Chris Mukung testified and adopted his witness statement dated 17/10/2017 and list of documents dated 23/6/2017 and supplementary list of documents dated 19/8/2023 as his evidence in chief and exhibits.
34. RW1 testified that the Claimant was a store keeper and his duties included receiving macadamia nutshells and issuing the same to the consuming department.
35. RW1 testified that the Claimant was dismissed when stock taking was conducted in April 2016 which revealed there was a shortfall of 611 kgs of macadamia nutshells. The Claimant was suspended for 7 days pending investigations.



36. RW1 testified that the Claimant was invited for a disciplinary hearing which he attended with a shop steward on 9/6/2016. During the hearing, he was informed of the offence and the consequences.
37. RW1 testified that after termination the Claimant reported the matter to the trade union which proceeded to the Ministry of Labour and a conciliator was appointed.
38. RW1 testified that a meeting was held between the parties and the conciliator's findings were similar to the actions the Respondent's had taken.
39. RW1 testified that the Claimant was entitled to salary for days worked, accumulated leave days and the Respondent wrote a cheque of Kshs 47,666 but the Claimant declined to collect.
40. RW1 testified that the anomaly at the store was discovered by the engineer who was on leave overseas in April and on his return, he did a stock take where he found the anomaly between the stocks and records kept by the Claimant.
41. RW1 testified that before the Claimant was suspended, he was asked to show cause why disciplinary action should not be taken against him in respect to the discrepancy. The Claimant responded that he did not take over properly as there was no proper handover at the time.
42. RW1 testified that there was complete handover when the Claimant took the stock and he maintained the records. When the Claimant was suspended he did not hand over the records.
43. RW1 testified that the Claimant hired the truck that took the records and furniture Sunflag Division in Parklands which were burnt. The Claimant did not accompany the delivery truck.
44. RW1 testified that the records were put in the boiler and were destroyed completely during the incident.
45. During cross examination, RW1 testified that stock taking took place in April 2016, however, stock taking was done regularly and all records were in the Claimant's custody.
46. RW1 testified that the storekeeper was the custodian of all records.
47. RW1 testified that the Claimant was employed as a machine operator then a store keeper. The Claimant was initially a trainee and had done a certificate course in Accounting hence he was competent to execute the job.
48. RW1 testified that the Claimant failed to accompany the macadamia nutshells and furniture that was transported and no other person would have given instructions to move the records except the Claimant as he was in charge of the Godown.
49. RW1 testified that it was the Claimant's responsibility to ensure who received the records and the boiler attendants were not entitled to receive the records.
50. RW1 testified that the truck drivers were not called as witnesses and neither did the Respondent call the boiler operators and engineers to testify.

Claimant's Submissions

51. It was submitted that the Claimant was given duties as a storekeeper although he had no qualifications and knowledge as he was not trained to do so. The Respondent wilfully opted to transfer the Claimant to a position he could not competently handle hence the Respondent should be held responsible for the alleged loss.



52. It was submitted for the Claimant that RW1 testified that the Claimant did not accompany the goods from Adix to Sunflag Textiles & Knitwear Mills Limited in Pate Road, therefore, the Claimant cannot be held responsible.
53. It was submitted for the Claimant that the outsourced truck and drivers are not named or called to any disciplinary meeting convened by the Respondent or their witness statement given in court to account for what transpired in between Adix and Pate Road Godowns and as such the allegation that the Claimant instructed anybody to burn records in the boiler room are mere hearsay.
54. It was submitted for the Claimant that burning company property and records is a criminal offence that should have been reported to the nearest police station and recorded in an occurrence book. There is no evidence in court that this process was followed and as such an occurrence did not happen.
55. It was submitted for the Claimant that the Respondent must have backup and its records are not always centralized at one point hence the allegations that all store records were burnt at one go does not hold water as there are other departments that dealt with macadamia nuts issues.
56. It is the Claimant's submissions that the final computation was not adequate for terminal benefits and the Claimant was not given a chance to peruse neither was any cheque written for that purpose. The records prepared was an afterthought to defeat the ends of justice.
57. It is the Claimant's submissions that RW1 testified that there was no regular stock taking apart from the impromptu physical check by the auditor when the Respondent was relocating from Adix to Pate Road.

Respondent's Submissions

58. The Respondent submitted that there was substantive justification in terminating the Claimant's employment as at the time of the incident, the Claimant was the storekeeper in charge of stores and record keeping. When the annual stock taking was done which revealed an anomaly between stock recorded and physical stock of the macadamia nutshells at the company's Godown and the Claimant ought to have given an explanation of the anomaly. Instead, the Claimant crafted a way of destroying the records so as to interfere with investigations. When he was asked to transfer the Furniture and the records, he seized that opportunity and ensure that the records ended up in the boiler where they were destroyed.
59. It was submitted for the Respondent that the Claimant's actions amounted to negligence of duty which amounts to gross misconduct.
60. The Respondent submitted that it has proved that the reasons for the Claimant's dismissal were justified and fair as Section 43(2) of the *Employment Act* provides that the reasons for termination are the matters that the employer at the time of termination genuinely believed to exist and which caused the employer to terminate.
61. It was submitted for the Respondent that the Respondent adhered to procedural requirements while terminating the Claimant's employment. The Claimant was informed of the particulars of his misconduct after which he was suspended from his duties and a disciplinary hearing was consequently held.
62. Further, the Claimant was represented by Mr. James Ocholla, a Shop Steward for the Union at the disciplinary hearing. However, the Claimant failed to give any explanation as to the variance with the Recorded Stock and the Physical stock. Additionally, he failed to explain how the furniture that he



was using and the Records and books that ought to have been in his custody ended up in the boiler. Consequently, the Claimant's employment was terminated for gross misconduct.

63. The Respondent submitted that the Claimant never appealed its decision but instead reported to the Ministry of Labour and Social Protection where a conciliator was appointed. As per the report dated 15th December 2016, the conciliator found that the Claimant's failure to carry out instructions leading to the destruction of company property amounted to gross misconduct which is liable to summary dismissal.
64. The Respondent submitted that the Claimant has failed to prove that his summary dismissal was unfair as provided under section 47(5) of the Act. The Claimant has not furnished this court with positive evidence to support his assertions.
65. The Respondent submitted that having established that the reasons for the summary dismissal, the claim for notice pay automatically becomes extinguished as the law does not provide for notice pay on account of summary dismissal.
66. The Respondent submitted that the Claimant is not entitled to gratuity pay service pay as he was registered under the National Social Security Fund. It relied in the case of *Fred Makori Ondari v The Management Committee of the Ministry of Works Sports Club* [2013] eKLR.

Analysis and Determination

67. The issues raised for this court's determination are:
 - a. Whether the Claimant's termination of employment was unlawful and unfair.
 - b. Whether the Claimant is entitled to the reliefs sought.

Whether the Claimant's termination of employment was unlawful and unfair.

68. For termination and/or dismissal to be deemed fair, it must pass both the substantive test and the procedural test. In the instant case, it is not in dispute that the Respondent followed the procedural requirement sent out under Section 41 of the *Employment Act*.
69. In *Walter Anuro v Teachers Service Commission* [2013] Eklr where the court observed thus;

“... for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”
70. The Claimant main argument is that the Respondent did not have any substantive justification to dismiss him from his employment.
71. Substantive justification is provided under Section 43 of the *Employment Act* which states: -
 - “(1) 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.



- (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”

72. In *Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR the court observed:

“In terms of section 43 of the *Employment Act*, an employer will be deemed to have a substantive justification for terminating a contract of service if he/she genuinely believed that the matters that informed the decision to terminate existed at the time the decision was taken. In other words, it is not a requirement of the law that the substantive ground informing the decision to terminate must in fact be in existence. All that is required is for the employer to have a reasonable basis for genuinely believing that the ground exists even if it later turns out that it, in fact, did not. In my view, what the law is concerned with here is whether the circumstances surrounding the decision to terminate would justify a reasonable man on the street, standing in the same position as the employer, to reach a similar decision as him/her regarding the termination.

Commenting on this question, the Court of Appeal in *Kenya Revenue Authority v Rewel Waitbaka Gitabi & 2 others* [2019] eKLR said as follows: -

“The standard of proof is on a balance of probability, not beyond reasonable doubt, and all the employer is required to prove are the reasons that it “genuinely believed to exist,” causing it to terminate the employee’s services. That is a partly subjective test.”

73. Further, in *Thomas Sila Nzivo v Bamburi Cement Limited* [2014] eKLR, the court observed as follows:

“The Respondent had reasonable and sufficient grounds to suspect the Claimant of having acted to the substantial detriment of the Respondent and its property, and was justified in summarily dismissing the Claimant under *Section 44 [4] [g] of the Employment Act 2007*. The Employer was not required to have conclusive proof of the Claimant’s involvement; it was only expected to have reasonable and sufficient grounds. The physical audit, the discovery that no oil was available even as the Claimant protested he received such oil..... all gave the Respondent reasonable and sufficient grounds to act against the Claimant.”

74. The evidence adduced inclusive the documents and submissions hereto the claimant states he was assigned work in the store as a storekeeper even though he was not trained. It is however on record he worked in the store since 2012 to the time of his termination.

75. He says in his submissions that there is no evidence adduced that audit used to be conducted at the respondents organisation. The fact however remains that audit was conducted in April 2016 and some anomalies were discovered. The evidence further reveals the claimant was instructed to transfer furniture he was using and record books to weaving division in Pate road.

76. It is only common sense that as the one in charge of his furniture and having been the store keeper he had a duty to take care of those assets. Instead he says he did not accompany them but instead left the lorry driver and loader to take them. As a result they were stored in the boiler and were all burnt.

77. He admits he did not go to check them until the following day and of course he found they had all been burnt. The court would find that was clearly an act of negligence on the part of the employee who was supposed to be in charge of the assets.



78. The claimant further said that if at all there was criminal activities to wit theft and arson the respondent should have reported the matter to the police. However, the fact that the case was not reported to the police would not indicate the employer had no valid grounds to dismiss an employee. It is a prerogative of a person whether to involve the police in their affairs or not.
79. In view of the foregoing, the Respondent was substantively justified to terminate the Claimant's employment as it has proved that the Claimant was negligent in undertaking his duties which led to the destruction of its property and essential records.
80. The Claimant has failed to prove his assertions as he has tried to shift blame back to the Respondent yet it was his mandate as the storekeeper to ensure that the said goods and records are safeguarded and also ensure that in the event that he did not accompany the hired trucks that the said good they were well received by an employee duly designated by himself to do so.
81. The court is also satisfied the respondent followed the procedural requirements taking the claimant through the disciplinary process as provided in section 41 of the employment act.
82. In view of the foregoing, the Claimant's dismissal was lawful and fair.
83. Having established the Claimant was lawfully and fairly dismissed, the Claimant is not entitled to the reliefs sought herein but is entitled to his duly earned dues as follows:-
- a. Salary up to 10th June 2016 at kshs 20,032 per month and kshs 3,700/- house allowance
 - b. Accrued leave days 2003/2004 Kshs 20,567.70
 - c. Leave 2004/2005 Kshs 20,567.70
 - d. Leave 2005/2006 Kshs 20,567.70
 - e. Leave 2015/2016 kshs 20,567/70
- Total awarded is kshs 106,002/80 plus interest at court rates from date of filing the suit till full payment.
84. Each party will meet their respective costs.
85. Claimant to be given certificate of service within 30 days.
- Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 9TH DAY OF FEBRUARY 2024

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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.

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ANNA NGIBUINI MWAURE

JUDGE

