



**Odeny v Kenya Breweries Ltd (Cause E033 of 2022)
[2024] KEELRC 618 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 618 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E033 OF 2022
CN BAARI, J
MARCH 14, 2024**

BETWEEN

PAUL ODENY CLAIMANT

AND

KENYA BREWERIES LTD RESPONDENT

JUDGMENT

1. Paul Odeny the Claimant herein, lodged a Memorandum of Claim dated 25th July, 2022 and filed on similar date. Under the claim, the Claimant seeks orders for issuance of a Certificate of Service, damages for unlawful termination in the sum of Kshs 4,959,042.79/=, costs of the suit and interests thereon.
2. The Respondent filed a Memorandum of Response on 11th October, 2022, wherein, he acknowledged employing the Claimant, but vehemently denied his claim.
3. Efforts at mediating the matter did not bear fruits, culminating in the file being referred back to Court for hearing and final determination.
4. The case was heard on 11th October, 2023, when the Claimant testified in support of his case. He adopted his witness statement and produced documents filed as exhibits in the matter. A Ms. Michelle Karimi, the Respondent's Talent Manager testified in support of the Respondent. She adopted her witness statement and produced the Respondent's documents as exhibits in the matter.
5. Both parties closed their respective cases on this first hearing, paving way to filing of submissions.
6. Both parties filed written submissions.



The Claimant's case.

7. It is the Claimant's case that he was employed by the Respondent as a Customer Relations Representative in the year 2006, and rose through the ranks to the position of Area Business Development Manager by 17th November, 2015.
8. He avers that he served diligently and with distinction gathering accolades such as a certificate of long service, cash awards and shares.
9. Additionally, he contends that during his many years of service he worked in various stations around the country, exhibiting stellar performance and outdoing his peers.
10. It is his case that he was issued with a notice to show cause on 11th July, 2019, over allegation of attempts to defraud the Respondent by submitting an irregular expenditure amounting to Kshs 51,058/=.
11. He states that pursuant to the notice to show cause, he attended a disciplinary hearing on 18th July, 2019. It is his contention that during the hearing, he was not allowed an opportunity to cross-examine his accuser, and neither was he furnished with any evidence in support of the allegations against him.
12. It is his further case that he was terminated on 24th July, 2019, on account of gross negligence. He avers that despite appealing against the dismissal, the appeal was never heard.
13. It is the Claimant's position that his termination was actuated by malice and was unjustified, resulting in cutting short of his career ambitions and dreams.
14. On cross-examination, the Claimant confirmed that he is aware of the submission of fake receipts. He further confirmed receipt of a show cause letter and that he responded to the show cause.
15. It is the Claimant's testimony that the show cause letter carried the allegations levelled against him. It is his further evidence that he was invited to appear before a disciplinary committee, and the invitation informed him of his right to appear with a representative of his choice.
16. The Claimant confirmed on cross-exam that his basic salary was per the pay slip produced in evidence. He further confirmed that he was taken through a disciplinary process earlier in the year 2015, that resulted in him being issued a warning letter.
17. The Claimant prays that this court gives him justice for the unfair termination.

The Respondent's case

18. It is the Respondent's case that on 11th July, 2019, it issued the Claimant a show cause letter after the Claimant had lengthy discussions with the Controls, Compliance and Ethic team and the Head of Sales Nairobi, on his investigations relating to breach of the Respondent's travel and Expense Policy.
19. The Respondent avers that its division Sales Manager, while signing off concurs, came across submissions from the Claimant for the month of May, 2019 amounting to Kshs 152,912/=, spent for the month of May, 2019, which he suspected to have anomalies.
20. According to the Manager, this was an anomaly necessitating inspection of the original receipts. After extensive investigations the Respondent contends that it uncovered irregular expenditure by the Claimant amounting to Kshs 51,058/=.
21. The Respondent avers that the Claimant breached their travel and expense policy by using the travel and expense card for personal expenditure without approval from the Line Manager, and outside the designated area.



22. It is the Respondent's case that the Claimant used the card while on leave and attached false receipts contrary to the travel and expense policy. It is its further case that the Claimant spent Kshs. 26,210 between 10th -20th May, 2019, which is a period he was on official leave, and a further Kshs. 16,398 was spent out of territory and within the vicinity of his residence.
23. The Respondent states that the Claimant provided forged receipts to support an expenditure of Kshs. 8,450. It is its case that sampled itemized expenses also indicated falsified attendees.
24. It is the Respondent's case that this breaches necessitated issuance of a notice to show cause on in accordance with clause 3.3 of its disciplinary manual.
25. It states that it subsequently convened a disciplinary hearing as stipulated by clause 3.4 of its disciplinary manual. It is its case that the disciplinary hearing was per clause 3.5.5 of the manual, and after which, the Claimant was informed of the decision as provided by clause 3.6 of the manual.
26. The Respondent contends that the process culminating in the Claimant's dismissal was above board, hence the Claimant is not entitled to the reliefs sought.
27. On cross-exam, Ms. Karimi told Court that the travel and expenses policy requires that the card is used during working hours. She further testified that the policy produced in evidence is one for 2022, while the Claimant was terminated in 2019, and further explained that the relevant clauses are similar to those in the 2019 policy.
28. Its is RW1's evidence that the expenditure was not work related because the Claimant was on leave. She further told Court that the Claimant produced false receipts, and did not produce the originals, but instead, provided statements from owners of outlets who stated that he was at their establishments.
29. It is her further evidence that the Claimant took part in the investigation and which is a fact captured in the investigation report. She further testified that she was not sure if the Claimant's appeal was determined or whether it was responded to.
30. The Respondent prays that the Claimant's suit be dismissed with costs.

The Claimant's submissions

31. In his submissions dated 11th December, 2023, the Claimant outlines the following issues for determination:
 - i. Whether his termination was unlawful/unfair.
 - ii. Whether the he is entitled to the reliefs sought.
 - iii. Who should bear costs of the suit.
32. On the first issue the Claimant submits that the disciplinary procedure was contrary to the Respondent's disciplinary policy specifically clause 3.4.4. he placed reliance in Professor Macha Isunde vs Lavington Security Guards limited [2017] eKLR where the Court reiterated the employer's role of proving and justifying reasons for termination.
33. It is the Claimant's submission that he was not accorded the opportunity to cross-examine his accusers, contrary to Section 41 (2) of the [Employment Act](#), which requires that an employee be allowed to make representations before termination.
34. On the strength of the foregoing, he urges this Court to find the termination unfair.



35. The Claimant urges this Court to award him damages as prayed in the Statement of claim in line with the provisions of Section 49 (1)(c) of the Employment Act. He further prays that he is awarded 12 months compensation for the unfair termination. He sought to rely in Joseph Otiego Apiyo vs Modern Coast Express Ltd [2019] eKLR to support this position.

The Respondent's Submissions

36. The Respondents submits that the reason for the Claimant's termination was valid and fair on the basis that the Claimant had on 11 instances used the card outside his working territory. It states that in 5 out of these 11 instances, he had used the card on Sundays, and in 3 instances the Claimant had uploaded fake receipts.

37. The Respondent further submits that the Claimant falsified 3 attendees against some expenditure, but the three attendees later confirmed not being present at the event, in contravention of the company's travel and expense policy amounting to gross misconduct.

38. It is the Respondent's submission that the termination procedure was fair and in accordance with their disciplinary policy. It further submits that it issued a notice to show cause outlining the charges and requiring the Claimant to Respond within 72 hours.

39. It is the Respondent's further submission that it invited the Claimant for disciplinary hearing, during which he responded to every claim as outlined in the notice to show cause.

40. The Respondent avers that it informed the Claimant of its decision to terminate and duly notified him of his right of appeal.

41. It contends that even though the outcome of the appeal was not communicated, an inference could be made that it was unsuccessful based on the filing of this suit. It submits that the Claimant would not have filed suit in the absence of knowledge of the outcome of the appeal.

42. It is the Respondent's submission that given the fairness of the termination, the Claimant is not entitled to anything. It further submits that this Court should compute the Claimant's salary at Kshs. 264,179.65, and not Kshs. 381,464.23 as alleged by the Claimant. It had reliance in Richard Erskine Leakey & 2 others v Samson Kipkoech Chemai [2019] eKLR for the holding that: -

“In our view, there are certain allowances that are dependent on actual performance of the contract of employment. When calculating damages due to an employee in the event of unfair or wrongful termination, it is only the emoluments or gross salary of the employee that should be taken into account not allowances and privileges dependent on actual service and performance of the contract.”

43. The Respondent urges that this Court dismisses the Claimant's case.

Analysis and Determination

44. Upon careful appraisal of the pleadings, oral testimonies, and submissions by both parties, the issues that crystallize for determination are whether the Claimant's termination was fair, and if so, what are the appropriate remedies.



Whether the termination of the Claimant was fair

45. Section 41 of the [Employment Act](#), behoves an employer to explain to the employee in a language the employee understands, the reasons for which termination is being considered. It further obligates the employer to hear and consider any representations by the employee before dismissal/termination.

46. The Court expounded the provisions of Section 41 in the case of *Hosea Akunga Ombwori v Bidco Oil Refineries Limited* (2017) eKLR, 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. In other words, the notice should be set out in clear terms.”

47. It is not disputed that the Claimant was issued with a notice to show cause on 11th July, 2019. It is also agreed that the notice indicated the charges contemplated against the Claimant, and required that the Claimant responds to the charges.

48. The Claimant further confirmed that he was invited to a disciplinary hearing slated for 18th July, 2019, and that he attended and made representations as evidenced by the minutes of the disciplinary hearing evenly dated.

49. During the hearing, RW1’s testimony is that she was not aware whether the Claimant’s appeal was determined, and the Respondent in its submissions calls for an inference to be made that the appeal was not successful. The Claimant on his part, contends that his termination is unfair for reason that his appeal was not heard and determined.

50. In my view, an administrative appeal, is just that. It is not a statutory essential, and I would be slow to fault a disciplinary process based solely on the ground that an employee’s appeal was not determined, or if it was, that the outcome was not communicated to the employee. It is sufficient that the employer/ Respondent adhered to the provisions of Section 41 and Section 4 of the Fair Administrative Actions Act.

51. In *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR, the Court of Appeal stated:

“Section 41 of the [Employment Act](#), provides the minimum standards of a fair procedure that an employer ought to comply with. The Section provides for notification and hearing before termination on grounds of misconduct.

The court stated that four elements must be discernible for the procedure to pass:

- 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 employer 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.”

52. I thus return that the Respondent met the irreducible minimums of a fair trial, and which renders the termination procedurally fair. I so hold.
53. The second determinant of a fair termination, is whether the dismissal or termination is substantively justified. In *Charles Musungu Odana v Kenya Ports Authority* [2019] eKLR the Court stated thus: -
- “It is now clear that the burden placed on an employer by Section 43 of the *Employment Act*, is to establish a valid reason that would cause a reasonable employer to terminate employment.”
54. The charges against the Claimant as captured in the notice to show cause were that he attempted to defraud the Respondent through submission of irregular concur expenditure amounting to Kshs 51,058/=.
55. According to the Respondent, the Claimant expended a sum of Kshs 26,210/= while on leave, and spent Kshs 16,398/= outside the designated territory, and outside working hours at 1am and 3am on a weekend. The Respondent’s further evidence is that the Claimant defrauded it of Kshs 8,450/= through submissions of fake receipts.
56. It is the Respondent’s assertion that the Claimant deliberately falsified attendees on itemised expenses in the concur, and submitted expenses not pre-approved by his line manager contrary to the travel and expense policy.
57. In answering to the charge of submitting fake receipts at the disciplinary hearing, the Claimant acknowledged that he had lost the original receipts and had to source for others that were not original.
58. In regard to the charge of falsifying itemised expenses, the Claimant acknowledged that in some instances, the attendees were not present. In another instance, he acknowledged submitting a different name in the concurs from that of the person who he met with.
59. In view of the Claimant’s own admissions of breach of the Respondent’s policy, this Court is convinced that the Respondent has proved that reasons for his dismissal were valid and fair.
60. It then follows that the Claimant’s termination is both procedurally and substantively fair. I so hold.

Whether the Claimant deserves the remedies sought

61. The Claimant sought payment of 12 months’ salary as damages for unlawful termination and one-month salary in lieu of notice.
62. The Court has found the Claimant’s dismissal fair. He is thus not entitled to any form of compensation.
63. The claim is dismissed.
64. On the claim for payment in lieu of notice, the Claimant was summarily dismissed for gross misconduct. In accordance with Section 44(4)(c) of the *Employment Act*, employees dismissed for gross misconduct are not entitled to payment in lieu of notice.
65. The claim similarly fails, and is dismissed.



Certificate of Service

66. A certificate of service is a statutory requirement under Section 51 of the [Employment Act](#). The Respondent is thus directed to issue the Claimant a certificate of service within 14 days of this judgment.

Conclusion and Disposition

67. The upshot is that the Claimant's Memorandum of claim dated 25th July, 2022, is without merit and is dismissed.

68. Parties shall bear their own costs of the suit.

69. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 14TH DAY OF MARCH, 2024.

C. N. BAARI

JUDGE

Appearance:

Ms. Khisa present for the Claimant

Mr. Samuel Ochieng present for the Respondent

Arwin Odhiambo - C/A

