



**Riungu v Honey Care Africa Limited (Cause E520 of 2020)  
[2024] KEELRC 998 (KLR) (30 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 998 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E520 OF 2020  
K OCHARO, J  
APRIL 30, 2024**

**BETWEEN**

**EDWARD MWITI RIUNGU ..... CLAIMANT**

**AND**

**HONEY CARE AFRICA LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. By a Memorandum of Claim dated 28<sup>th</sup> July 2020, the Claimant seeks: -
  - a. A declaration that the Claimant's termination was unprocedural, unfair, and unlawful.
  - b. The Respondent to pay the Claimant statutory dues and benefits as tabulated in Paragraph 27 hereinabove.
  - c. Damages for discriminating against the Claimant during his employment.
  - d. Costs and interests in prayer (b) above from the date of filing suit.
  - e. Any other relief that this Honourable Court deems fit.
2. Alongside the Memorandum of Claim dated 28<sup>th</sup> July 2020, the Claimant filed a Verifying Affidavit sworn on 28<sup>th</sup> July 2020; List of Witnesses dated 28<sup>th</sup> July 2020; Witness Statement dated 28<sup>th</sup> July 2020; and List of Documents dated 28<sup>th</sup> July 2020.
3. Although the Respondent filed a Statement of Response, they failed to adduce any evidence in this matter.
4. The matter proceeded for hearing of the Claimant's case on 26<sup>th</sup> September 2023 with the Claimant testifying as CW1. Afterward, the Claimant filed submissions dated 21<sup>st</sup> November 2023.



## Claimant's case

5. The Claimant's case is that he was employed by the Respondent on 15<sup>th</sup> February 2018 as an Assistant Sales Manager earning a monthly salary of Kshs 70,000/-. Owing to his impressive performance, he was promoted to Sales Manager (Key Accounts Manager) on or about 15<sup>th</sup> August 2018 and his salary was gradually increased to Kshs 100,000/- per month.
6. A year and two months into the employment contract, the relationship between the Claimant and the Respondent started deteriorating. On 17<sup>th</sup> April 2019, when the Respondent reviewed his employment terms from permanent and pensionable to a non-permanent and pensionable one, a move that the Claimant feels was discriminatory and malicious, as the review was effected after he demanded for the commission that he had earned in February 2019.
7. The Claimant stated further that in May 2019, the company vehicle that had been issued to him for ease of transport was withdrawn without any justification. Upon enquiring why, he was not given reasons but was assured that he would receive a replacement within 3 weeks. The replacement was never done, forcing him to cater for his own transport for seven [7] months. Whenever he requested for petty cash for transport facilitation, his requests were never approved in time or at all. All through, the Respondent neglected and or refused to reimburse him monies spent on transport, insisting that he produce receipts for the same as a precondition for the reimbursement, yet other salespersons could be reimbursed transport allowance/facilitation promptly, and without being required to produce receipts.
8. The Relationship between him and the Respondent's CEO during this period was extremely frosty, to the extent that he began being excluded from management meetings held by the CEO.
9. The Claimant's ill-treatment by the Respondent came to a head on 10<sup>th</sup> January 2020 when he was recalled to the office by the Respondent's CEO and served with a termination letter dated 7<sup>th</sup> January 2020. The letter terminated his employment effective 10<sup>th</sup> January 2020. The letter did not provide reasons for the termination. When he sought an explanation from the Respondent's CEO and Human Resource Manager on the reasons for termination, he was denied the same and asked to clear with the Respondent. Further, prior to the termination, the Claimant was not accorded an opportunity to defend himself against any charges that might have been against him. For these reasons, it is the Claimant's position that he was unlawfully and unfairly terminated from employment.
10. The Claimant contended that his terminal dues have not been paid by the Respondent. He claims transport facilitation of Kshs 16,000/- per month from June 2019 to December 2019. He also claims the commissions that he earned under Clause 5 of his contract of employment.
11. The Claimant further stated that as a Key Accounts Manager, he was entitled to earn a commission of 0.25% of his gross salary if he achieved between 86%-95% of the month's target; 1% of his gross salary if he achieved between 96%-105% of the month's target; and 1.1% of his gross salary if he achieved 106% and above of the month's target. In the year 2019, he surpassed the monthly targets, refused, and or neglected to pay him the earned commissions. Further, the earned commission was to be calculated on the Respondent's old Commission Structure, not the New Structure that the Respondent insists on.
12. He asserts that the Respondent through its Counsel's letter dated 24<sup>th</sup> June 2020, admitted to owing commissions earned by the Claimant but wanted to pay the same using the revised sales commission structure, which formula the Claimant was not agreeable to. The total commissioned earned but not paid stood at Kshs 770, 000.



13. The Claimant urged the Court to adopt his witness statement dated 20<sup>th</sup> July 2020 as his evidence in chief, and the documents under the list of documents dated 7<sup>th</sup> April 2021 as his exhibits 1-8.

### **Claimant's Submissions**

14. The Claimant submitted that for termination of an employee's employment to be considered fair, the employer must show that due process was followed and that there existed justifiable reason[s] for the same, according to Section 45 of the *Employment Act* 2007. To support this submission, he placed reliance on the case of *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR.
15. He further submitted that the Respondent summarily dismissed him without taking him through a disciplinary hearing, a fact that the Respondent didn't dispute.
16. On the reliefs, the Claimant urged the Court to grant a compensatory relief pursuant to Section 49[1] [c] of the *Employment Act*, to the extent of 12 months' gross salary. In so awarding, should consider how the Respondent treated him.
17. The Claimant further submits that the relief he has sought for transport allowance should be availed to him, as his evidence that he was assigned a motor vehicle for use in the course of his employment which was unjustifiably withdrawn and that though he was entitled to transport allowance, the same was not paid to him for seven months, therefore Kshs 112,000. Further, the Respondent confirmed his entitlement, the only point of departure being the Respondent's insistence on the receipts.

### **Analysis and Determination**

18. I have reviewed the Claimant's pleadings, evidence, and written submissions, and return that the issues for determination are as follows: -
- a. Whether the Respondent unfairly terminated the Claimant's employment;
  - b. Whether the Claimant should be awarded the reliefs sought.

### **Whether the Respondent unfairly terminated the Claimant's employment**

19. In a matter like the instant one, where the Court is called upon to interrogate the fairness of the termination of an employee's employment, the Court is charged with the responsibility to consider and render itself on the presence or otherwise of two statutory aspects, in the termination, thus, procedural and substantive fairness. According to Section 45 of the *Employment Act*, the absence of either or both renders the termination unfair.
20. Section 43 of the *Employment Act* places a duty on the employer in a dispute regarding the termination of an employee's employment to prove the reason for the termination. Where the employer fails to prove the reason[s], the termination shall be deemed unfair under the provisions of Section 45 of the *Employment Act*. Time and again, this Court has stated that legal burdens are dischargeable by the party bearing the burden adducing sufficient evidence, to prove facts or matters that it is bound to. The Respondent didn't present any evidence in this matter. It is not difficult for this Court to hold, as a result, that it failed to discharge the legal burden under Section 43 of *the Act*, and consequently, by operation of the deeming provision under Section [45][2], the termination was substantively unfair.
21. It is worth stating that the *Employment Act* under the provisions of Section 45, places a further duty on the employer to demonstrate to the requisite standard, that the reason that led to the termination was fair and valid. Again, where the employer defaults to prove this, the termination is deemed unfair. It cannot be off the mark for this Court to hold that the employer becomes obligated to discharge



- the burden under Section 45, only after discharging that imposed under Section 43. Having failed to discharge its burden under Section 43, this Court can only and safely conclude that the Respondent failed to discharge its legal burden under Section 45.
22. I have carefully considered the termination letter dated 7<sup>th</sup> January 2020, and note that it does not state the reason why the Claimant’s employment was being terminated. This buttresses his evidence that the termination was without reason and a fair and valid one for that matter.
23. The Court hasn’t lost sight of the fact that the Claimant had a burden to discharge under Section 47[5]. That the termination of his employment was unfair. To discharge the burden, he was only required to establish prima facie that the termination was unfair. In my view, his unchallenged evidence established this. As a result, he discharged the burden. It is upon the discharge that it became imperative for the Respondent to discharge the burdens aforementioned, and the one under Section 41 of the Act, as shall come out shortly hereinafter.
24. Section 41 of *the Act* provides for the second statutory aspect, fair procedure. The provision provides for a mandatory procedure that any employer contemplating terminating an employee’s employment must adhere to before deciding to terminate. The employer must explain to the employee, in a language the employee understands, the reason for which the employer is considering the termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation, the employer must allow the employee adequate opportunity to prepare and make representations on the reason[s]. Further, the employer must consider those representations while making a final decision. See *Kenfreight (E. A) Limited v Benson K. Nguti*, [2016] eKLR.
25. In the present case, the Respondent did not adduce evidence to demonstrate that it adhered to the dictates of procedural fairness as encompassed in the above-stated provision. The Claimant’s evidence that procedural fairness was absent in the termination of his employment, remained uncontroverted.
26. It is clear to my mind that the Respondent terminated the Claimant’s employment with immediate effect, making the termination a summary dismissal.
27. The premise upon which an employee may be summarily dismissed is strictly regulated by Section 44 of the *Employment Act* 2007 which states that:

“44. Summary dismissal

- (1) Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.
- (2) Subject to the provisions of this section, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.
- (3) Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by her conduct indicated that she has fundamentally breached her obligations arising under the contract of service.



- (4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:—
- (a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of her work;
  - (b) during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform her work properly;
  - (c) an employee willfully neglects to perform any work which it was her duty to perform, or if she carelessly and improperly performs any work which from its nature it was her duty, under her contract, to have performed carefully and properly;
  - (d) an employee uses abusive or insulting language, or behaves in a manner insulting to her employer or to a person placed in authority over him by her employer;
  - (e) an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of her duty to obey, issued by her employer or a person placed in authority over him by her employer;
  - (f) in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or
  - (g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of her employer or her employer's property.”

28. Section 44 (4) (a) legitimizes summary dismissal on the above set out grounds. However, I am unable to find that there have been expressed any reasons for the termination of the Claimant's employment, reasons that can fit in the catalogue put forth in the stated section.



29. As a result of the foregoing premises, I conclude that the Claimant was summarily dismissed from his employment without any fair and valid reason[s], and adherence to the canons of procedural fairness. The dismissal was substantively and procedurally unfair, therefore.

**Whether the Claimant should be awarded the reliefs sought.**

30. Having held that the Claimant was indeed unfairly dismissed from his employment, I now turn to consider the reliefs that he could be entitled to, if any.
31. The Claimant seeks *inter alia*, unpaid transport allowance from June to December 2019, a period of seven [months], at Kshs 16000/- per month, therefore cumulatively Kshs 112,000/-. I have carefully considered the Respondent's Counsel letter dated 24<sup>th</sup> June 2020. The tone of the letter is in acknowledgement that during the stated period, the Claimant was without a vehicle to use in the course of his employment. Further, the Claimant could in the situation get entitled to compensation for money expended by him in travelling when he didn't have a business vehicle.
32. The Respondent however contended that the Claimant could not be paid the compensation [travelling allowance] sought as he didn't produce receipts in proof of the expenditure. The Claimant contended that the travel allowance was a standard amount per month and that other employees could be paid the allowance without being asked to produce receipts as a pre-requisite. This evidence was not challenged. It is persuading. As a result, I hereby award the Claimant, the sum sought, Kshs 112,000/-, under this head.
33. I now turn to the prayer for compensation for unfair termination. Under Section 49 (1) (c) of the [Employment Act](#) 2007, this Court has the discretion to award compensation up to a maximum of 12 months' gross salary considering the relevant factors contained in Section 49 (4) and the peculiar circumstances of each case.
34. Considering the manner through which the Claimant was dismissed from employment, the casual disregard for the law by the Respondent to the extent that it did not follow the statutory procedure during dismissal, or even bother to defend this suit, her length of service, being almost 2 years, and the manner the Respondent treated the Claimant prior to the dismissal which easily passes for an unfair practice, I find that the Claimant is entitled to a compensatory award for the unfair dismissal. I award him six months' gross salary. Per the pay slip, tendered in evidence by the Claimant, I note that his gross salary was Kshs 90,000/- not Kshs 100,000/- as pleaded. He is consequently awarded Kshs 540,000/-.
35. The Claimant's contract of employment under Clause 5 provided;
- “Like all other personnel in sales, you shall enjoy a sales commission based on the achievement of set sales target on a graduated scale. This shall be monitored on a weekly basis and awarded according to the set commission structure.”
36. The Claimant's position was that at all material times, he met the targets and therefore was entitled to commissions computed using the set commission structure that obtained then. This Court notes that through a letter dated 17<sup>th</sup> April 2020, by his Advocate, addressed to the Respondent, the Claimant did set forth expressly his monthly achievements for July – December 2019. This letter was responded to by the Respondent through its Advocate's letter dated 24<sup>th</sup> June 2020. In the response letter, the Respondent didn't deny the achievements, in fact, the tone of the letter is that it acknowledged the same.



37. Having said this, the question that springs up then is, was the Claimant paid the commissions earned due to the achievements? In my view, the answer is a straight no. The response letter expressly admits this. The Respondent indicated that it was willing to pay the Claimant commissions on the achievements but based on a new commission structure.
38. Considering the tone of the response letter, one cannot be off the mark in concluding that at the material time, the commission computation regime that was applicable was what both the Claimant and the Respondent termed the “old commission structure”. Further, it comes out clearly that the Respondent wanted to compute and pay the Claimant the commissions, under a new structure, which apparently could yield him less amounts.
39. In the absence of any evidence by the Respondent to demonstrate the justification, consultation with, and consent by the Claimant, for the computational formula, I hesitate not to conclude that the Claimant was right to insist on the employment of the old commission structure for computation of the commissions.
40. The Respondent didn’t dispute that for the period 2018/2019, there were unsettled commissions of Kshs 205,500/-.
41. The Claimant in his pleadings claimed Kshs 770, 000/- as unpaid commissions for February, May, June, and July to December 2019, this figure seems to be a departure from the one that was put forth in the demand letter. As a result, I will only grant the Claimant Kshs 696,000/-, not Kshs 770,000/-.
42. It is trite law that per Section 51 of the Employment Act 2007, the Claimant should be issued with a Certificate of Service.
43. In the upshot, judgment is hereby entered for the Claimant in the following terms: -
- a. A declaration that the dismissal of the Claimant from employment was unfair and wrongful.
  - b. The Claimant be paid the following: -
    - I. Salary *in lieu* of notice, tabulated at Kshs 90,000/-.
    - II. Compensation for unfair and wrongful dismissal, under Section 49[1][c] of the Employment Act, six months’ gross salary, Kshs 540,000/-.
    - III. Travel allowance, Kshs 112, 000/-.
    - IV. Commissions earned but unpaid, Kshs 696,000/-.
  - c. The Claimant be issued with a Certificate of Service within 30 days of this Judgment.
  - d. Interest on (b) above at Court rates from the date of this judgment until payment in full.
  - e. The Respondent shall bear the costs of this suit.

**READ, DELIVERED AND SIGNED THIS 30<sup>th</sup> DAY OF APRIL, 2024.**

**OCHARO KEBIRA**

**JUDGE**

In the presence of:

Mr. Munene for Mr. Ayieko Claimant

N/A for the Respondent



## **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.

**OCHARO KEBIRA**

**JUDGE**

