



Kenya Union of Road Contractors and Civil Engineering Workers v H. Young & Company (E.A) Limited (Cause E742 of 2021) [2024] KEELRC 885 (KLR) (24 April 2024) (Judgment)

Neutral citation: [2024] KEELRC 885 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E742 OF 2021**

**JK GAKERI, J
APRIL 24, 2024**

BETWEEN
**KENYA UNION OF ROAD CONTRACTORS AND CIVIL ENGINEERING
WORKERS CLAIMANT**
AND
H. YOUNG & COMPANY (E.A) LIMITED RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Memorandum of Claim filed on 9th September, 2021 alleging unfair termination of employment.
2. It is the Claimant's case that he was employed by the Respondent as a Mechanic on 15th April, 2015 at a consolidated salary of Kshs.40,886.40.
3. That on 12th March, 2020 at 6.25pm, a driver of a staff bus reported that the bus had developed a mechanical problem and he was sent to check and discovered that the bus had no fuel and the fuel tank had been tampered with.
4. That he used Pick-up Reg. No. KBA 984G to visit the site and returned the Pick-up at 19.10 hours and handed over the keys to the guard manning the site.
5. That on the following morning at 6.15 am, the guard informed him that fuel in all the vehicles had been siphoned the previous night.
6. That the incident had occurred at mid-night after the Claimant had retired to his house.
7. It is the Claimant's case that he was called upon to show cause on 16th March, 2020 and was suspended on 19th March, 2020 and summarily dismissed vide letter dated 18th March, 2020.



8. That the Claimant was accused of having colluded with security guards to siphon fuel from vehicles parked at the Respondent's parking.
9. The Claimant prays for;
 - a. Terminal and contractual dues Kshs.856,774.00 comprising;
 - i. Days worked Kshs.40,884.60
 - ii. 2 months' notice Kshs.70,866.00
 - iii. Illegal deductions of union dues Kshs.36,900.00
 - iv. Service pay Kshs.122,655.40
 - v. 12 months' salary Kshs.516,240.00
 - b. Costs of this claim and interest thereon at court rates.
 - c. A declaration that termination of the Claimant's employment was unfair and unjust.
 - d. Any other relief that this court may deem just and fit to grant.

Respondent's case

10. In its response dated 4th November, 2021, the Respondent admits that it employed the Claimant as alleged.
11. The Respondent avers that it had installed CCTV Cameras at the Karagita Parking Area and the same showed the Claimant participating in the theft of fuel.
12. That on 11th March, 2020, a total of 75 litres of fuel were siphoned at the parking area at Karagita at around mid-night and the Claimant was an accomplice.
13. That the notice to show cause was dated 6th March, 2020, the Claimant responded in writing and was suspended on 19th March, 2020.
14. It is the Respondent's case that the Claimant participated in the siphoning of fuel on 11th March, 2020 and motor vehicle KBA 984G was involved and he left around 19.10 – 19.15 hours and internal investigations confirmed as much.
15. The Respondent denies having dismissed the Claimant unfairly and prays for dismissal of the suit with costs.
16. In his response, the Claimant states that the Respondent had not availed CCTV on the time the fuel was siphoned and did not report the crime to the police.
17. That union membership was recorded by an affidavit and the Respondent's reply consisted of general denials and should be struck out.

Claimant's evidence

18. On cross-examination, the Claimant confirmed that he claims for the days worked in March 2020 having left on 16th March, 2020 and had no evidence in support of the 2 months' salary in lieu of notice.
19. The Claimant testified that he objected to the deduction but had not filed any evidence and had not disclosed union membership to the Respondent.



20. The witness admitted that the Respondent was deducting and remitting National Social Security Fund contributions.
21. The witness admitted that he received the notice to show cause dated 16th February, 2020 and was suspended vide letter dated 19th March, 2020 for investigations but did not sign to acknowledge receipt.
22. That he viewed the CCTV footage provided by the Respondent and had no evidence to show that he was at home at the time the siphoning of fuel took place.
23. He admitted that he returned the pick-up at 19.10 hours and the area had CCTV cameras.
24. The witness admitted that he did not return to the Respondent's work place after suspension.
25. On re-examination, the witness admitted that he responded to the notice to show cause and was suspended on 19th March, 2020.

Respondent's evidence

26. RWI, Mr. Nyabuto testified that the theft of fuel was not reported to the police.
27. That the suspension letter was wrongfully dated 19th March, 2020 as opposed to 16th March, 2020 and termination took place on 25th March, 2020.
28. On re-examination, RWI testified that after suspension on 16th March, 2020, the Claimant did not report back and efforts to contact him fell through.
29. RWII, Mr. Augustine Mutua testified that the Respondent had contracted security guards to man the Karagita Parking Area and fuel was siphoned at around mid-night on 12th March, 2020 and the CCTV captured the Claimant's face, and guards were accomplices.
30. On re-examination, RWII testified that siphoning of fuel took place three times at 01.29 – 01.32 am, 01.46 – 01.52 am and 01.57 am as per the CCTV footage.

Claimant's submissions

31. Mr. Osicho submitted on whether the Respondent complied with the procedure in terminating the Claimant's employment and the reliefs sought.
32. He submitted although the Respondent issued a notice to show cause, the Claimant was not accorded fair hearing as he was not given a chance to defend himself as no minutes were availed.
33. It was further submitted that the siphoning took place at mid-night and the Claimant parked the vehicle at 19.10 hours.
34. Reliance was made on the decisions in *Christone Charo Matesesho V Charles Richard Weston* (2019) KEELR C1554 and *Galgalo Jarso Jillo V Agricultural Finance Corporation* (2021) eKLR on procedural fairness.
35. On entitlement to the reliefs sought, Mr. Osicho relied on Clause 19 of the *Labour Institutions Act, 2007* (Building and Construction) Order on termination notice.
36. Finally, Mr. Osicho submitted that the Respondent had no genuine reason to terminate the Claimant's employment and thus violated the provisions of Sections 41, 43, 44 and 45 of the *Employment Act, 2007*.



Respondent's submissions

37. Counsel submitted on whether the Claimant absconded duty and entitlement to the reliefs sought.
38. On the 1st issue, counsel cited the provisions of Section 44(4) of the *Employment Act*, 2007 on absence without leave or lawful cause and the sentiments of the court in *Banking, Insurance and Finance Union (Kenya) Ltd V Barclays Bank of Kenya Ltd (2014) eKLR* to reinforce the submission and urge that after suspension, the Claimant did not report back to work and admitted as much and did not acknowledge receipt of the letter of dismissal.
39. That the Respondent expected to hear from the Claimant but to no avail.
40. On the reliefs sought, counsel submitted that if the court found that termination of the Claimant's employment was unfair, the Claimant had only worked for 16 days in March 2020 and Claimant did not avail his employment contract to prove entitlement to the 2 month's salary in lieu of notice and termination was summary, thus no pay in lieu of notice as held in *Vincent Abuya Obunga V Mast Rental Services Ltd (2019) eKLR* and *Naftal Priva Kitatu V Jitegemee Sacco Society Ltd (2021) eKLR*.
41. Counsel further urged that Section 35(6)(d) of the *Employment Act*, 2007 disqualified members of the NSSF from service pay and the Claimant was a registered member of the NSSF as held in *Kennedy Nyanguncha Omang V Bob Morgan Services Ltd (2013) eKLR*.
42. On union dues, counsel submitted that the Claimant never objected to the deductions to 2 unions and did not inform the Respondent his preferred union.
43. Finally on compensation, counsel cited the decision in *Bernard Mutuku Kimolo V East African Growers Ltd (2018) eKLR* and *Mustafa Abas Misri V Akiyda 2000 Ltd (2014) eKLR* to urge the court to award the Claimant one month's salary.

Findings and determination

44. The issues for determination are;
 - i. Whether termination of the grievant's employment by the Respondent was unfair.
 - ii. Whether the grievant is entitled to the reliefs sought.
45. On the 1st issue, parties have adopted opposing positions with the Claimant submitting that the termination was unfair as it violated the provisions of the *Employment Act*, 2007 as the Respondent had neither a valid or fair reason nor did it comply with the procedural requirements.
46. According to the Claimant, the Respondent did not adduce evidence to prove the grievant's culpability in the alleged siphoning of fuel at the Karagita Parking Area.
47. Both the provisions of the *Employment Act*, 2007 and case law are consistent that for a termination of employment to pass the fairness test, it must be proved that the employer had a valid and fair reason to terminate the employment and conducted the same in a fair manner. Put in the alternative, there must have been a substantive justification for the termination and procedural fairness. (See *Walter Ogal Anuro V Teachers Service Commission (2013) eKLR*, *Naima Khamis V Oxford University Press (EA) Ltd (2017) eKLR*).



Reason for termination

48. It is common ground that the grievant was an employee of the Respondent from April 2015 until dismissal in March 2020 and was a mechanic.
49. From the evidence on record, it is clear that the Claimant was on duty on 12th and 13th March, 2020.
50. According to the grievant, on 12th April, 2015, he was sent, he did not disclose by whom, to proceed to an unknown place to check on a bus that had a mechanical problem, whose registration number he could not recall and he discovered that it had no fuel.
51. He did not disclose who called him, at what time or who instructed him to use motor vehicle registration number KBA 984G, which was not his regular vehicle.
52. Similarly, the witness did not explain what he did with the bus but he returned the vehicle at 1910 hours and on the following day at 6.15 am, the guard told him that fuel in all vehicles at the parking had been siphoned at mid-night.
53. In his response to the notice to show cause, the Claimant stated that on 11th March, 2020, he arrived at the Karagita Parking Area at 7.00 pm and left for his residence until the following day.
54. On 12th March, 2020 at 6.10 am, a driver of a staff bus called him and informed him he was stuck on his way to Kasarani and he rushed there with the workshop pick-up and tried to trouble shoot the faulty bus for sometime but it was not until security officers brought fuel that he realised that the bus had no fuel.
55. A juxtaposition of the two versions by the Claimant leave no doubt that the Claimant was economical with the truth about the occurrences on 11th and 12th March, 2020.
56. The written statement makes no reference to 11th March, 2020 while the response to the notice to show cause makes no reference to the return of the motor vehicle at 19.10 hours on 12th March, 2020. While one version states that the driver of the bus made the call to the grievant at 6.10 am, the other states that the driver called the Transport Officer at 6.25 pm.
57. It is noteworthy that while the response to the notice to show cause was prepared on 16th March, 2020, four (4) days after the occurrences, the witness statement was written in 2021 about 18 months later.
58. In sum, and in the court's view, the grievant's version of events is of nominal probative value.
59. The Claimant admitted that he drove pick-up registration number KBA 984G on 11th or 12th March, 2020 and arrived at 19.10 hours, the same time captured by the CCTV cameras and was involved in the siphoning of fuel from staff bus 11 in the company of a security guard and left.
60. The Respondent's CCTV cameras captured the siphoning of fuel from the Respondent's buses upto around 2.15 pm.
61. In determining whether the Respondent had a valid and fair reason to terminate the Claimant's employment, the court is guided by the provisions of Section 43(2) of the [Employment Act](#), 2007 and judicial pronouncements.



62. Section 43(2) of the *Employment Act*, 2007 provides that;
- “The reason or reasons for termination of a contract are the matters that the employer at the time of the termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee.”
63. In *Galgalo Jarso Jillo V Agricultural Finance Corporation* (2021) eKLR, B.O. Manani J. stated as follows;
- “In other words, it is not a requirement of the law that the substantive ground informing the decision to terminate must be in existence. All that is required is for the employer to have a reasonable basis for genuinely believing that the ground exists.
64. Finally, in *Kenya Revenue Authority V Reuwel Waithaka Gitahi & 2 others* (2019) eKLR, the Court of Appeal laid it bare that;
- “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 claimant’s services. That is a partly subjective test.”
65. The foregoing sentiments resonate with the sentiments of Lord Denning in *British Leyland (UK) Ltd V Swift* (1981) I.R.L.R 91 on the range or band of reasonableness test.
66. The court is in agreement with these sentiments.
67. Flowing from the foregoing, it is the finding of the court that the Respondent has on a preponderance of probabilities demonstrated that it had a valid and fair reason to terminate the Claimant’s employment.
68. Having admitted that he was at the Karagita Parking Area at around 19.00 hours and was driving motor vehicle Registration number KBA 894G which was captured by the CCTV arriving at 19.10 hours and he was captured participating in the siphoning of fuel from Staff Bus 11 in the company of others, this was a valid and fair reason for summary dismissal, the fact that it was not reported to the police notwithstanding.

Procedure

69. As held in *Pius Machafu Isindu V Lavington Security Guards Ltd* (2017) eKLR, Section 41 of the *Employment Act*, 2007 prescribes an elaborate and mandatory process to be complied with by employers in the termination of an employment relationship.
70. The specific precepts of procedural fairness have been elaborated upon in legions of decisions such as *Loice Otieno V Kenya Commercial Bank Ltd* (2013) eKLR by Radido J. and the Court of Appeal in *Postal Corporation of Kenya V Andrew K. Tanui* (2019) eKLR.
71. The elements include reason(s) for which termination of employment is being considered, explanation of the grounds of termination in a language understood by the employee, entitlement of the employee to the presence of another employee of his/her choice as well as hearing and considering representations by the employee and/or the person chosen by the employee.
72. Case law is unwavering that a termination of employment conducted otherwise than in accordance with the provisions of Section 41 of the *Employment Act*, 2007 is irregular.



73. In the instant case, the Claimant was issued with a notice to show cause dated 16th March, 2020 and confirmed on cross-examination that that was his last day at the workplace and was suspended vide letter dated 19th March, 2020 and dismissed on 25th March, 2020, though the letter is dated 18th March, 2020 and RWI confirmed as much.
74. The grievant responded to the notice to show cause on the same date.
75. Significantly, although the suspension letter informed the grievant that he would be invited for a hearing on a date to be communicated, no invitation was made and no hearing took place contrary to the requirements of Section 41 of the *Employment Act, 2007*.
76. Equally, the Respondent did not furnish the grievant with a copy of the investigation report.
77. In a nutshell, the grievant was not accorded an opportunity to confront the charges facing him and present his case. He was condemned unheard which rendered the termination procedurally flawed and thus unfair.
78. In sum, it is the finding of the court that termination of the grievant's employment by the Respondent was unfair for want of procedural propriety.

Whether the grievant is entitled to the reliefs sought.

a. Declaration

79. Having found that termination of the grievant's employment by the Respondent was unfair for want of procedural propriety, a declaration to that effect is merited.

b. Days worked in March 2020

80. As the grievant worked for some days in March 2020, he is entitled to remuneration for the 16 days worked.

SUBPARA c. 2 months' notice

81. The grievant adduced no evidence of this prayer as he provided neither a written contract of service nor a Collective Bargaining Agreement.
82. The Claimant's attempt to introduce the provisions of the Labour Institutions (Building and Construction) Order to justify the 2 months' salary is of no avail as it adduced no evidence to prove that the grievant and other employees of the Respondent were subject to the order cited.
83. Similarly and as contended by the Respondent's counsel and held in several decisions including *Vincent Abuya Obunga V Mast Rental Services Ltd (Supra)*, the grievant was summarily dismissed and is not entitled to pay in lieu of notice.

The prayer is declined.

d. Illegal deductions

84. The grievant adduced no evidence as to when and how the deductions were made by the Respondent and why he did not correct the anomaly, if any.
85. Although the grievant stated that he had objected to the deductions and remission, he admitted that he had no evidence to demonstrate the objection and he had not notified the employer about union membership.



86. How then could the Respondent deduct the alleged Kshs.615/= per month for 5 years and remit the same to trade unions unknown to the grievant.
87. The prayer is unproven.
88. The court is persuaded that the grievant is less than candid and the prayer is declined.

e. Service pay

89. As correctly submitted by the Respondent's counsel, since the grievant was a registered member of the National Social Security Fund (NSSF), as evidenced by the payslip on record, a fact the grievant admitted on cross-examination, the provisions of Section 35(6)(d) of the Employment Act, 2007 disqualifies him from service pay.

The prayer is declined.

f. 12 months compensation

90. Having found that termination of the grievant's employment by the Respondent was unfair for want of procedural fairness, the grievant is entitled to the relief under Section 49(1)(c) of the Employment Act, 2007.
91. The court has taken into consideration that;
- i. The grievant was an employee of the Respondent for about 5 years which is not long.
 - ii. The grievant had no recorded warning or misconduct.
 - iii. The grievant did not express his wish to remain in the Respondent's employment or appeal the Respondent's decision.
 - iv. The grievant substantially contributed to the summary dismissal.
92. In the circumstances, the court is satisfied that the equivalent of one (1) month's gross salary is fair.
93. In conclusion, judgment is entered in favour of the grievant against the Respondent as follows;
- a. Declaration that termination of employment was unfair.
 - b. 16 days salary for March 2016.
 - c. Equivalent of one (1) month's gross salary.
 - d. The Claimant is awarded reimbursement of direct costs at Kshs.25,000/=.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 24TH DAY OF APRIL 2024

DR. JACOB GAKERI

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 *Civil 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.

DR. JACOB GAKERI

JUDGE

