



Chege v Unilever Kenya Ltd (Employment and Labour Relations Cause 822 of 2018) [2024] KEELRC 849 (KLR) (12 April 2024) (Judgment)

Neutral citation: [2024] KEELRC 849 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 822 OF 2018**

**AN MWAURE, J
APRIL 12, 2024**

BETWEEN

GERISHON CHEGE CLAIMANT

AND

UNILEVER KENYA LTD RESPONDENT

JUDGMENT

1. The claimant filed a statement of claim dated 22nd May 2018.

Claimant's case

2. The claimant avers that he was employed by the respondent since 1990 and he worked diligently and received good or excellent performance evaluation.
3. He says on 7th July 2017 he was terminated without any lawful basis. He therefore prays for the reliefs enumerated in the claim referred thereto.

Respondent's case

4. The respondent in their response denies they terminated the claimant unlawfully but instead avers he was terminated for gross negligence from fraudulent conduct and that fair procedure was followed.
5. The respondent states the claimant failed to follow their code of ethics as provided in the respondent's human resource manual. He says on 11th May 2018 a DHL truck KAY 595A mistakenly delivered an extra 132 cases of royco a product of respondent to its national distribution centre. The anomaly was reported to the claimant but he failed to report to its line manager.
6. The respondent states the claimant was in conspiracy to steal the products through loading excess goods. The claimant was sent a notice to show cause dated 19th June 2017 and he failed to respond



satisfactorily. The notice to show cause had detailed grounds of misconduct. The claimant having failed to respond satisfactorily to the allegations was terminated by a letter dated 7th July 2017.

7. The claimant appealed the termination and on 24th July 2017 the respondent informed him the appeal panel had upheld his dismissal.
8. The respondent therefore avers the claimant was not unfairly terminated and is not entitled to the damages claimed.

Claimant's evidence

9. The claimant in his evidence adopted his witness statement dated 17th July 2019. The claimant said he did not have a contract of employment. He says a truck arrived on 11/5/2017 with extra royco goods and he was away by the time and only got to know about the anomaly on 15/5/2017.
10. He says he was served with a NTSC on 19th June 2019 and termination letter on 7th July 2017. He says on receipt of notice to show cause letter he was asked to leave the premises until otherwise summoned.
11. He says he responded to all the allegations. He says the goods alleged to have had anomalies were delivered when he was on leave.
12. He says on 17th July 2017 he was called to the office and was handed a termination letter. He says he was not taken through disciplinary process and the reason for the termination was in relation to production and palletisation which was not in his job description.
13. He says the shuttles that deliver goods are loaded and supervised by the security and factory palletizing team were responsible of excess packing and furthermore there was no established mechanism to tell if pallets were packed with excess package or not.
14. He says when he was terminated he appealed the decision and his appeal was handled by a foreign country director whom he had never met and so no disciplinary hearing was scheduled for his appeal.

Respondent's case

15. The witness Mercy Wanyonyi says she is HR business partner with the respondent. She says when some goods were found missing investigations were conducted and the claimant was found to have been one of those culpable of the loss. He was served with a termination letter dated 7th July 2017.
16. Further he appealed the termination and his appeal was found unmerited and therefore by their letter dated 24th July 2017 the said termination was upheld.

Submissions.

17. The claimant's submissions dated 13th January 2024 were considered by the honourable court and also the respondent's submissions dated 28th February 2024.

Analysis and determination.

The court having critically considered the rival parties pleadings, submissions and evidence does deduce that the main three issues for determination are as follows:-

1. Was the claimant unlawfully terminated.
2. Was the right procedure used in terminating him.
3. Is he entitled to any reliefs prayed.



18. The evidence adduced is that the claimant was away out of office on 12th May 2017. It is said that on 15th May 2017 he received an email from one Ndiga Nancy who was the inventory manager that her team had found out 11 pallets delivered on 12th May 2017 had 3 pallets with excess of 44 cases each. The email was apparently copied to the claimant's line manager Stephen Makau. The evidence by the claimant is that it is not his responsibility to inspect and ascertain goods which are being loaded but is the duty of factory management and security.
19. It is crucial that an employer who is considering dismissing an employee from his employment must give a valid reason for doing so. This is clearly stated in section 45(1) of the [employment act](#) which provides as follows:-

No employer shall terminate the employment of an employee unfairly.
20. The reason given by the respondent in the notice to show cause letter dated 19th June 2017 was that he was in “ a conspiracy to steal finished goods from the company through loading excess cases...” This accusation contradicts the evidence given by the claimant that he was not on duty on the day in question. The respondent witness Mercy Wanyonyi also confirmed that the claimant was not on duty that day. She also says the claimant was identified as one of the culprits. No other conspirators have been named in the respondent's evidence even though he was also accused of conspiracy to steal from the company.
21. Furthermore, the said respondent witness informed the court that when investigations were conducted claimant was found to be one of those culpable. The court was not presented with any evidence or report of the said investigation.
22. She further testified that when the anomaly was reported to the claimant it was copied to his line manager Stephen Makau. Yet one of the accusations of the claimant is that he failed to report the anomaly and so was culpable of negligence.
23. He is simultaneously charged with conspiracy to steal goods from the company and negligence to report the anomaly of the excess goods. It is the courts finding that the respondent have not proffered a valid and clear reason or reasons for terminating the claimant.
24. The respondent also admitted that there were a number of other people who worked under claimant and were also involved in loading the goods.
25. In the case of [Loice Otieno vs Kenya Commercial Bank Limited](#) Cause No 1050 of 2011 the court held:

“summary dismissal even in the face of a fundamental breach of the employment contract/ obligations or gross misconduct must not be resorted to without complying with procedural fairness and natural justice. An employer who dismisses an employee summarily without a hearing will be falling a foul of section 41(2) of the [Employment Act](#).”
26. In section 43(1) of the [Employment Act](#) provides as follows:

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.
27. In view of the foregoing, the court finds the respondents have not established with certainty the reason or reasons which are valid as the cause of considering terminating the claimant from his employment.



28. The second issue which is the procedure required to take an employee through disciplinary process before terminating an employee. Section 41(1) of the *employment act* is not a suggestion but is mandatory that procedural fairness must be followed before terminating an employee. The said section 41(1) provides as follows:

41.

(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

29. The evidence both from the respondent and the claimant show beyond a shadow of a doubt that there was no hearing conducted to give the claimant an opportunity to explain himself before a witness of his choice. He was served with a notice to show cause letter and at the same time interdicted for two weeks. After he responded to the notice to show cause he was served with a termination letter.

30. He appealed the summary termination but was not given an opportunity to be heard. He just received a letter stating that the termination was upheld. In the case of *Antony Mkala Chitai vs Malindi Water & Sewerage Co Ltd* (2013) eKLR the Court stated:

“Section 41 of the *employment act*, 2007 has now made procedural fairness part of the employment contract in Kenya. Prior to the enactment of the act, the right to a hearing was not part of the employment contract unless it was expressly incorporated into the contract by agreement/staff manuals or policies of the parties or through regulations for public entities”

31. The respondent in his submissions avers that section 41(1) of *Employment Act* does not mandate an oral hearing and cites case of *Kenya Revenue Authority vs Menginya Salim Murgant* (2010) eKLR which states:

“in our view the Fairness of a hearing is not determined solely by its oral nature. It may be conducted through an exchange of letters and as it happened in the matter before us and we are satisfied that it was a fair hearing.”

32. The court still finds the instant case the claimant was interdicted for two weeks as well as being served with a notice to show cause. There is no evidence he was informed there would be a disciplinary hearing oral or otherwise but after his response to the NTSC he was terminated. The court finds there is no justification that a notice to show cause letter which is the only evidence of communication to the claimant before his termination amounted to a hearing as provided in section 41(1) of the *Employment Act*.

33. In view of the foregoing, the court comes to a finding that all evidence on record points to unfair and unprocedural termination of the claimant and therefore judgment is entered in his favour.

The reliefs

34.

(1) Claimant is awarded 1 month salary in lieu of notice amounting to kshs 300,000/-.



- (2) Service pay is not proved as there were NSSF remittances according to the evidence adduced by the claimant in court and provident fund. This prayer is therefore declined.
- (3) Damages for wrongful termination according to section 49(1) are pegged at 4 months working out to kshs 1,200,000/-.
- (4) Costs are also awarded to the claimant.
- (5) Interest is awarded to the total award of kshs 1,500,000 at court rates from date of this judgment till full payment.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 12TH DAY OF APRIL, 2024.

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.

ANNA NGIBUINI MWAURE

JUDGE

