



REPUBLIC OF KENYA



KENYA LAW
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Aseyo v Omega Opticians Limited (Employment and Labour Relations Cause 1079 of 2018) [2024] KEELRC 1717 (KLR) (28 June 2024) (Judgment)

Neutral citation: [2024] KEELRC 1717 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1079 OF 2018**

**K OCHARO, J
JUNE 28, 2024**

BETWEEN

CAROLINE ASEYO CLAIMANT

AND

OMEGA OPTICIANS LIMITED RESPONDENT

JUDGMENT

Introduction

1. By a Memorandum of Claim dated June 27, 2018, the Claimant seeks:-
 - a. A declaration that the Claimant's dismissal by the Respondent was wrongful, unfair and in breach of the Rules of natural justice.
 - b. An amount of Kshs. 1,030,769/- compensation for wrongful and unfair dismissal.
 - c. Certificate of Service.
 - d. Interest on b and c.
 - e. Costs of the suit.
 - f. Any other relief that this Honourable Court may deem fit and just to grant.
2. In response to the memorandum of claim, the respondent filed a defence to memorandum of claim and counterclaim dated July 23, 2018. In the statement of defence, it denied the claimant's claim in toto, while in the Counter-Claim, it sought Kshs. 95,775/- from the Claimant.



Claimant's case

3. The Claimant's case is that she was employed by the Respondent in the year 2009 at a monthly salary of Kshs. 50,000/-. She worked diligently securing salary performance-based increments from time to time, and never received any disciplinary issues, complaint and/or negative review for the duration of her employment.
4. On April 3, 2018, she was issued a suspension letter accusing her of fraud. She was later summarily dismissed vide a letter dated April 30, 2018. The dismissal was not preceded by any notice, and an opportunity to be heard. It was without justifiable reason[s].
5. The Claimant postulates that during her tenure, Respondent infringed upon her right against unfair labour practices by preventing her from going on annual leave for over two (2) years; using her personal line on company documents and products; allowing its clients to call her late at night jeopardizing her marriage; and causing her to work on Saturdays and on weekdays until 7.30 pm without compensation.
6. She firmly asserts that she was unfairly, unlawfully and maliciously dismissed from employment, which dismissal caused her mental anguish, severe financial distress, defamation and loss of future earnings.
7. For all the above reasons, the Claimant is confident that she is entitled to the reliefs sought.

Respondent's case

8. The Respondent admits that it employed the Claimant in the year 2009 as a Sales person based at the 20th century branch. She was later promoted to Head of Branch. On or about March 2018, the Respondent discovered that the Claimant had committed acts of fraud against it, and on 31st March 2018 summoned her to a meeting at the head office. The Claimant was requested to step aside to pave way for investigations with regard to fraud that occurred under her supervision at the 20th century branch, and since she was uncooperative, she was requested to report to the head office on 3rd April 2018.
9. On April 3, 2018, the Respondent issued the Claimant with a suspension letter, and directed her to attend a meeting on April 24, 2018 for further investigation.
10. By her letter dated April 7, 2018, the Claimant submitted a resignation from employment. The resignation notwithstanding, she still showed up for the meeting of 25th April 2018, which was earlier scheduled for 24th April 2018, but postponed.
11. During the meeting of 25th April 2018, the Respondent determined that the Claimant had committed acts of fraud against the company by taking money from the daily sales without authority. It was resolved that the Claimant would write a letter to the Company pleading for leniency, and attend another meeting on 27th April 2018, later postponed to 30th April 2018. By 30th April 2018, the Claimant had not complied with the resolution that she writes the letter to the Company, hence she was issued with a summary dismissal letter dated 30th April 2018.
12. The Respondent denies using the Claimant's personal number for sales, and affirms that the Claimant was dismissed from employment on the basis of gross misconduct and unprofessional conduct.
13. The Respondent postulates that the Claimant was unable to account for the sum of Kshs. 95,775/- lost at her branch. She is liable to pay the same.



Claimant's Submissions

14. Submitting on procedural fairness, Counsel for the Claimant submits that section 41 of the [Employment Act](#) 2007 imposes upon an employer the obligation to comply with the tenets of procedural fairness prior to terminating an employee's employment on grounds of misconduct, poor performance or physical incapacity. Non-adherence with fair procedure will render the termination of an employee's employment unfair by dint of the provisions of section 45[2] of the Act.
15. It is further submitted that contrary to the Respondent's assertion that there was a meeting held on the April 27, 2018, there wasn't any. In fact, the Respondent has not tendered any evidence in form of minutes to demonstrate that there was a meeting on that day, a meeting where the Claimant was in attendance. Further, it failed to prove the alleged meeting of April 30, 2018. In absence of prove of the meetings and therefore, that there was a disciplinary hearing, it should be concluded that true as the Claimant alleges, procedural fairness was absent in the process leading to her dismissal.
16. It is further submitted that the law requires the employer to prove the reason for termination of an employee's employment or dismissal of an employee from employment. It cannot be enough for the employer to just assert that an employee was dismissed for gross misconduct. The Respondent's assertion that the reason for the dismissal, the subject matter of this case was the misconduct of stealing by servant on the part of the Claimant, cannot stand the fairness test of being, in existence, fair, and valid. The Respondent didn't put out any sufficient evidence from which it can be discerned that the Claimant did steal the money. The case of *Nicholas Muasya Kyula v Farm Chem Limited Industrial Cause Number 1992 of 2011 (2012) LLR 235 (JCK)* has been cited to buttress the submission that it is not sufficient for an employer to make allegations of misconduct against the employee. They must investigate and verify the misconduct before arriving at the decision to terminate.
17. On the issue of the reliefs sought, it is submitted that the Claimant never went on annual leave during the duration of her employment, contrary to section 28 of the Act. She is therefore entitled to compensation for the leave days she earned but not utilized in the 8 years that she remained in the Respondent's employ.
18. The Court is urged to keep in mind that Respondent's witness confirmed that the Claimant did not receive any terminal dues following her summary dismissal. It should direct payment of the reliefs sought.

Respondent's Submissions

19. The Respondent submits that there can be no doubt that the procedure under Section 41 of the [Employment Act](#) 2007 was complied with duly. The evidence by both Claimant and the Respondent's witness pointed at the fact that prior to the suspension of the Claimant, there were meetings on 31st March 2018 and 3rd April 2018 where the alleged fraud was discussed. Further, on 25th April 2018, the Respondent conducted a disciplinary hearing, where in attendance were 4 company officers plus herself, a fact which she admitted to during cross-examination.
20. On the Claimant's resignation letter, the Respondent submits that the same was forwarded to the Respondent by the Claimant on 7th April 2018 after she had been issued with the Suspension letter, in a bid to derail the investigations into her misconduct. The Respondent takes the position that the submission of the resignation letter by the Claimant on 7th April 2018, amounted to an admission that she committed the acts of fraud that she was accused of.



21. It is submitted that under section 43 of the *Act*, an employer is required to prove the reason or reasons for termination, failure to which the termination will be deemed to be unfair. The reason presented by the Respondent in the present case is fraud committed by the Claimant against the Respondent company. The evidence of the fraud was presented to the Claimant during the parties' meeting held on 25th April 2018, namely invoices containing the Claimant's phone number, and an audit report giving details of the fraud. They therefore had valid and fair reasons for the termination. It is the Respondent's submission that they adhered to section 45 of the Act.
22. According to the Respondent, fraud is a very serious offence by an employee and amounts to gross misconduct. The summary dismissal was therefore warranted. It was also justified by the Claimant's Letter of Appointment which expressly authorized summary dismissal in the case of theft of company property, or collusion to defraud the company.
23. Having failed to prove that the termination was unfair under section 47 (5) of the Act, and that she is entitled to the reliefs sought, the Respondent submits that the Claimant should be denied the reliefs.

Issues for Determination

24. I have reviewed the pleadings, oral and documentary evidence of both parties, submissions filed by both parties and authorities in support thereof. I find that the issues for determination are as follows: -
 - a. Whether the Respondent unfairly terminated the Claimant's employment; and
 - b. Whether the Court should grant the prayers sought by the Claimant.

Whether the Respondent unfairly terminated the Claimant's employment

25. Before I delve further into this issue, it becomes imperative that I comment about the resignation letter by the Claimant. It was common cause that the Claimant did indeed submit to the Respondent a resignation letter, a few days after she had received the suspension letter. Ordinarily, a resignation letter by an employee will bring to termination an employment contract. But in the instant matter I declare that it didn't. After the issuance of the letter, the parties continued to relate as if the letter hadn't been issued. In my view, by their conduct they waived the effect of the letter on their relationship. Carefully considering the manner both parties couched their pleadings and even submissions one will not be off the mark in concluding they give credence to this view.
26. Having said this, I now turn to consider the fairness or otherwise of the dismissal of the Claimant from employment. Faced with a controversy where it is alleged that an employee's employment was terminated unfairly or that an employee was dismissed wrongfully, the Court is enjoined to consider two statutory aspects, procedural fairness and substantive justification.
27. Fair procedure is contextualized under Section 41 of the Act to mean that the employer must 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 or her choice present during this explanation, the employer must hear and consider any representations which the employee makes, and the employer must consider those representations while making a final decision. See *Kenfreight (E. A) Limited v Benson K. Nguti*, [2016] eKLR. It is imperative to state that this provision is aligned to fair hearing under article 50 of the *Constitution* of Kenya 2010.
28. The Respondent contended that prior to the decision to dismiss the Claimant, there had been meetings between it and her on the alleged fraud. The Respondent's witness testified that the first meeting was



supposed to be on the April 24, 2018, but it was postponed to April 25, 2018. The meeting was to be for further investigations. The Claimant in her testimony under cross examination admitted that the meeting occurred. According to her, the circumstances under which she was invited for the meeting weren't as the Respondent asserts in this matter. Ms. Margret called her to the Respondents offices for a discussion on the resignation letter.

29. The Respondent suggests that a disciplinary hearing was conducted on 25th April 2018, and in the course the Claimant admitted the alleged fraud. I am not convinced that there was any hearing as stated for the reasons; the purpose for the meeting that had been slated for 24th April 2018, was clearly stated to be for further investigations, therefore it wasn't meant to be a disciplinary hearing forum; the Respondent who bore the burden to prove that indeed there was a hearing, failed totally to tender any minutes of the hearing; the Respondent's witness in her evidence on the alleged hearing was sketchy, unsure, and casual.
30. Any meeting cannot be called a disciplinary hearing for purposes of satisfying the requirements of section 41 of the *Employment Act*. The employer must demonstrate that the affected employee was expressly invited for a disciplinary hearing, with the employer's allegation[s] against him or her again expressly stated. Further, his right of accompaniment brought to his attention. That way, it can be stated safely that the employer wasn't oblivious of the statutory requirements under Section 41 of the Act.
31. By reason of the foregoing, I am prompted to come to an inevitable conclusion that the Respondent didn't adhere to the procedural fairness requirements. As a result, the dismissal was unfair.
32. The Court of Appeal in the case of *Standard Group Limited v Jenny Luesby* [2018] eKLR, aptly elaborated this very issue. Thus:

“With respect, we think the trial court was on firm ground in such finding. As stated above, the procedure under section 41 of the Act is mandatory. Apart from a mere assertion that there was an attempt made on November 14, 2013 in a meeting with the HR Director and respondent in the CEO's office, where the incident was discussed and the respondent is said to have apologized, there was nothing on record to show that the requirements of section 41 were complied with...

It follows that the act of summarily dismissing the respondent without giving her an opportunity to be heard amounted to unfair termination as defined in section 45 of the Act. The burden was on the appellant to prove 'that the employment was terminated in accordance with fair procedure.' See *Kenfreight (E. A) Limited v Benson K. Nguti*, [2016] eKLR.”

33. Having dealt with the statutory aspect of procedural fairness and how it relates to the instant matter, I now turn to consider the second aspect, substantive fairness. Substantive fairness speaks to the decision itself, while procedural fairness does to the procedure leading to the decision. Various provisions of the *Employment Act* speak to substantive fairness, section 43 [reason[s] for the decision], section 45[2] [requirement that the reason[s] must be valid and fair], section 45[7], [the employer must be seen to have acted in equity and justice in the decision], and 47[5], [justification for the decision must be demonstrated].
34. In a dispute regarding an employee's dismissal from employment or a termination of an employee's employment, the law [section 43] enjoins the employer to prove the reason for the dismissal or termination. It is trite that this burden on the employer cannot be discharged by the employer by just asserting that the dismissal or termination was for this reason or that. Proving the reason must entail;



the employer demonstrating that truly the reason alleged existed; presence of material by the employer from which the reason pointed out can be discerned.

35. In the present case, the reasons given for the termination of the Claimant's employment are contained in the letter dated April 30, 2018. It reads in part as follows:

“Please note that the findings have been concluded and you have been found to have committed a gross misconduct which amounts to summary dismissal.”

In my firm view, this isn't the most proper way for an employer to bring out a reason for the termination of an employee's employment. In fact, it is improper. This is too generalized a reason. Gross misconduct comes in various shades and style, the employer must be clear on which of the many. I say this because not every infraction by an employee is deemed a gross misconduct. It must be shown that it is one of those that obtain on the catalogue under section 44[4] of the *Employment Act*, or its gravity is similar to theirs. Hence, the insistence on specificity on the infraction alleged to have been committed.

36. One can argue that the specific reason can be deduced from Respondent's letter to the Claimant dated April 25, 2018. In the circumstances of this matter, I could have a challenge with the reasoning. First, there was neither proof or testimony that the letter was delivered to the Claimant. Second, I have looked at the alleged audit report that the Respondent purportedly carried out on the alleged fraud, it is not signed. It is not clear on how the Claimant got involved in the alleged fraud. She is not implicated therein. Further, curiously the report is dated same date as of the dismissal date. Reasonably, an audit report would predate disciplinary proceedings and action. This report is in my view, an afterthought.

37. For clarity of record, the letter read in part: -

“We would like to remind you about the session discussions and conclusions as follows:

Both parties are not in doubt that you committed an act of fraud by taking some money from the daily sales without the management authority. You were also informed that this has been investigated and the evidence is with the company and also shown to you.”

38. This Court's finding as hereinabove finds fortification in the finding in the case of *Nicholus Muasya Kyula v Farmchem Ltd* [2012] eKLR, where the Court held;

“The court therefore finds that the termination of the claimant's employment by the respondent was unfair because the Respondent has failed to prove the reasons for termination as envisaged under Section 43 of the *Employment Act*, 2007...

In making the finding the court considers that it is not sufficient for the employer to make allegations of misconduct against the employee. The employer is required to have internal systems and processes for undertaking administrative investigations and verifying the occurrence of the misconduct before a decision to terminate is arrived at. Typically, the process would entail the following steps:

- (a) A report to the relevant authority that a misconduct has been committed by an employee.
- (b) A preliminary report to gather relevant information on the alleged misconduct...”



39. In the upshot, I find that the reason for the dismissal was not proved, neither was it proved that the reason was valid and fair as required by section 45[2] of the [Employment Act](#). The dismissal was substantively unjustified therefore.

Whether the Court should grant the prayers sought by the Claimant.

40. Having found that the dismissal of the Claimant from her employment was both substantively and procedurally unfair, I now turn to consider the reliefs sought by the Claimant.
41. The Claimant's contract in its nature was on terminable by notice, pursuant to the provisions of section 35 [1][c] of the [Employment Act](#), 28 days' notice. The Termination Clause in her Letter of Appointment also provided for one month's termination notice. There is no doubt that the Claimant was not issued with any such notice. The Respondent didn't address this issue at all. Undoubtedly, in the circumstances of this matter, she is entitled to notice pay. It is hereby granted.
42. The Claimant contended that for the two years preceding the date of her dismissal, she hadn't been allowed to take her annual leave. I get her as saying that she had earned but unutilized leave days, but which she was not compensated for. Just like the [Employment Act](#) [section 28], the contract of employment provided for 21 working days leave per year. I find that the Respondent didn't sufficiently challenge this claim, despite being the keeper of employment records under section 74 of the [Employment Act](#) 2007. If at all she had proceeded for leave, contrary to her assertion, nothing could have been easier for the Respondent than to tender her leave record, to disabuse her contention. I hereby award the leave pay for 21 days per year, for two years.
43. With regard to the claim for unpaid salary for March 2018, again the Respondent was under an obligation as the keeper of employment records to produce evidence of payment of this salary to the Claimant. They did not. This claim is therefore awarded.
44. I note from the Claimant's pay slip exhibited herein the presence of an item, a deduction of Kshs. 200/- per month for the National Social Security Fund. The Claimant hasn't alleged that the deducted sums were not remitted dutifully by the Respondent or challenge the item. She is therefore precluded by Section 35 (6) of the Act from pursuing the benefit, service pay. For this reason, the claim under this head is denied.
45. I now turn to the prayer for the compensatory relief under section 49[1][c] of the [Employment Act](#). The Claimant seeks for the maximum award of 12 months' gross salary contemplated therein. Under Section 49 (1) (c) of the [Employment Act](#) 2007, this Court is bestowed with the authority to award compensation up to a maximum of 12 months' gross salary. It is imperative to note however, that the authority is exercised discretionarily. The exercise heavily depends on the circumstances of each case.
46. I have considered; that the Respondent in dismissing the Claimant from employment was little bothered with the statutory requirements of procedural and substantive justification; the length of service [9 years] to the Respondent by the Claimant; and that the Claimant did not in any proven was contribute to the dismissal, and hold that she is entitled to the compensatory relief and to the extent eight [8] months' gross salary. Per her evidence, the Claimant earned a gross salary of Kshs. 50,000/- per month. This evidence remains uncontroverted by the Respondent.
47. It is trite law that per section 51 of the [Employment Act](#) 2007, the Claimant should be issued with a Certificate of Service.
48. I have carefully considered the Respondent's counterclaim. It required to be specifically proved. I fear no sufficient evidence was placed before this Court to show that the Claimant occasioned the loss of,



took for her own use, or enabled the defrauding of, the Kshs. 95,000/-. The counterclaim was not proved. It is hereby dismissed.

49. In the upshot judgement is hereby entered in favour of the Claimant in the following terms: -

- a. A declaration that the dismissal of the Claimant from employment was unfair.
- b. The Claimant shall be paid:
 - i. One month's salary in lieu of notice Kshs. 50,000/-
 - ii. Compensation for earned but unutilized leave days for 2 years (50,000/30x21x2) Kshs. 70,000/-
 - iii. Unpaid salary for March 2018 Kshs. 50,000/-
 - iv. Compensation for unfair dismissal (8 months gross salary) Kshs. 400,000/-
Total Kshs. 570, 000/-
- c. Interest on (b) above at court rates from the date of this Judgment until payment in full.
- d. The Respondent to issue the Claimant with a Certificate of Service within 30 days of this Judgment.
- e. Costs of this suit.
- f. The Respondent's counterclaim is hereby dismissed with costs.

50. It is so ordered.

READ, DELIVERED AND SIGNED THIS 28th DAY OF JUNE, 2024.

.....
OCHARO KEBIRA.

JUDGE

In the presence of:

Ms. Monyangi holding brief for Mr. Githui for Claimant

Mr. Nyaga for 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 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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OCHARO KEBIRA
JUDGE

