



Kimengich v East Africa Breweries Limited & 2 others (Cause E296 of 2020) [2024] KEELRC 1648 (KLR) (24 June 2024) (Judgment)

Neutral citation: [2024] KEELRC 1648 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E296 OF 2020
NZIOKI WA MAKAU, J
JUNE 24, 2024**

BETWEEN

BRENDA KIMENGICH CLAIMANT

AND

EAST AFRICA BREWERIES LIMITED 1ST RESPONDENT

KENYA BREWERIES LIMITED 2ND RESPONDENT

UNITED DISTILLERS VENTURES LIMITED 3RD RESPONDENT

JUDGMENT

1. The Claimant filed the Statement of Claim dated 10th July 2020 against the three Respondent Companies alleging unfair termination of her employment and wrongful dismissal. The 1st Respondent is a multinational company registered in Kenya while the 2nd and 3rd Respondents are subsidiaries of the 1st Respondent and also registered under the Kenyan Companies Law. The Claimant averred that the Respondents offered her employment as a Process Clerk, which offer she accepted by signing the same on 29th March 2018 and she commenced working on 2nd April 2018. She went through a probationary period of six (6) months and upon review by the Human Resource, was confirmed in employment of the 2nd Respondent on 28th September 2018.
2. The Claimant's case was that through a letter dated 3rd September 2019, the 2nd Respondent suspended her from work without any justifiable cause or without a hearing being conducted, on account of unverified diverse grounds not investigated. That the Claimant's suspension was extended in October, through November and later December through a letter dated 2nd December 2019 albeit without any notice or hearing her side. She contended that following a complaint over the continued suspension that had lasted more than three months, the Respondents issued her with a Notice to Show Cause on 15th November 2019. She responded to the show cause on 18th November 2019 and subsequently attended a disciplinary meeting held at the 2nd Respondent's Offices on 28th November 2019.



According to the Claimant, she made her case to the Disciplinary Committee Panel notwithstanding she was denied to bring any representatives or be accompanied by legal representative. She averred that the Respondents proceeded to summarily dismiss her through a letter dated 17th December 2019 without paying her notice and for the services she had rendered to them. That she was summarily dismissed for being in breach of the Company's Standard Operating Procedure (SOP) on Receipt and Issuance of Materials yet she had neither been issued with such SOP nor trained on the same during her entire employment stint at the Company. Furthermore, the alleged breach of SOP was an ambush on her since it was not raised in the Notice to Show Cause letter to allow her address the issue substantively. The Claimant further averred that the Respondents had never warned her either verbally or in writing and that the decision to dismiss her was rather harsh considering her service to them.

3. It was the Claimant's further stance that her performance track record had always been appraised by her line managers. That having diligently worked for the 1st Respondent during her tenure, the Respondents' actions leading to her dismissal was unfair and inhumane treatment and in breach of the Rules of Natural Justice. That she therefore appealed the decision vide a letter dated 19th December 2019 and specifically contested the callous manner in which the Respondents dismissed her from work after prolonged suspension. The Claimant particularised the Respondents' malice to include the possibility that she would not be able to attract alternative employment and her reputation having been tarnished. She thus sought two months' gross salary plus in lieu of notice, compensation for wrongful dismissal at 12 months' salary, severance pay, damages at 60 months' salary, extraneous allowance for overtime, and confirmation of remittance of any statutory deductions (as applicable). She further prayed for judgment against the Respondent for a declaration that her dismissal was illegal, unfair and unlawful/ wrongful, costs of the suit, interest on the payments sought, and any other relief this Court may deem fit to grant.
4. In her Witness Statement, the Claimant asserted that she was summoned to Kasarani Police Station on 2nd September 2019 whereat she was informed that a criminal complaint had been lodged on behalf of the 2nd Respondent regarding an attempted theft of 6,600 pieces of closure of Kane Extra. And of which she was to assist with the investigations. That later on the same date, she received a text message on her mobile phone from the 3rd Respondent's Production Manager informing her not to go back to work, which act she contended resulted to her suspension from work on 3rd September 2019. The Claimant stated that she was not supplied with any internal investigation or inquiry on the aforesaid investigations as stipulated in clause 3.2.1 of the Company's Disciplinary Policy. That she was issued with a Notice to Show Cause letter despite criminal charges being preferred against other Company employee and not against her. That the words used in the said show cause letter among others, that is, "your breach as highlighted above exposed the company to...perpetrating counterfeit trade by availing opportunities through your acts and omissions...", connoted she had been found liable for gross misconduct and that the disciplinary hearing that followed was just a mere formality. She further asserted that she categorically stated in her response to the show cause letter that she was on the night shift from 7pm on 21st August 2019 yet the brand change from Kane Extra to Kenya Cane had taken place during the day shift on the same day.

Respondent's Case

5. The Respondents averred in the Memorandum of Reply dated 10th March 2021 that the Claimant was given a letter of employment by the 1st Respondent and was therefore not employed by all the Respondents jointly. That the Claimant was sent on suspension in accordance with the provisions of the Company's Code of Business Conduct following an attempted theft of Kane Extra Closures from the 1st Respondent's plant in Ruaraka. In this regard, the Respondents explained that the Claimant



was suspended to ensure she did not report to work during the period of police investigations, for her to assist the police in investigating the alleged theft, and also to allow the 1st Respondent carry out an internal investigation to ascertain whether there was any breach of any of its policies and codes. That in any event, the Claimant was paid her full employment benefits during the period of suspension and was also notified that the suspension did not constitute disciplinary action. They admitted to having extended the Claimant's suspension vide letters dated 28th October 2019 and 2nd December 2019.

6. Further, the Respondents averred that they issued the Claimant with a show cause letter because they had sufficient reason to believe that she should answer to several adverse allegations against her regarding the attempted theft of the Respondent's products. They stated that in the Notice to Show Cause on 15th November 2019, the Claimant was given a right to give a written explanation and/or response to the allegations and further notified that she would be called upon to attend a meeting to clarify her responses. That at the said meeting, the Claimant was reminded of her rights to be accompanied by or call a witness to testify on her behalf, to which she responded in the negative. The Respondents assert that upon her summary dismissal, the Claimant was given the reasons for her termination and paid her terminal dues, being her salary and pay in lieu of 29 leave days earned, both up to and including 17th December 2019. They contended that contrary to her assertions, the Claimant was at all material times aware of the existence of the Respondents' SOPs on Receipt and Issuance of Material and was therefore required to comply with the same during her employment but failed to do so. That she was summarily dismissed for gross misconduct within the provisions of section 44(3) of the *Employment Act* because her actions amounted to breach of her terms of service under the contract of service. Further, that the Respondents considered the Claimant's explanations and found her in clear breach of the SOPs that required her to ensure that all materials in the process are cleared and taken back to the user store before the next brand, but which she failed to do.
7. The Respondents denied that the Claimant worked overtime during her employment as she used to work on shifts and had in any event not given any particulars for the specific days she worked overtime. They further refuted that the Claimant has suffered reputational damage and stated that she was not the only employee affected by the said process or who was involved in the attempted theft of the Kane Extra Closures. They maintained that the Claimant was accorded a fair hearing and was even allowed to appeal against the decision of the Respondents to terminate her. That the Claimant having been lawfully summarily dismissed, she is not entitled to the salary, notice pay and compensation sought and is further not entitled to any severance pay as she was a member of the Respondent's pension scheme and they deducted and remitted her NSSF contributions per statute. The Respondents averred that the Claimant had not furnished any proof of mental anguish or diminished employability or at all and is therefore not entitled to the claim for 60 months' gross salary equivalent. They prayed that the Claimant's suit be dismissed with costs.
8. The 1st and 2nd Respondents also filed a Witness Statement made by Pauline Njoroge, who stated that the 1st and 2nd Respondents have no knowledge and/or affiliation with the 3rd Respondent. She asserted that the Claimant was employed by the 1st Respondent on or about 27th March 2018 and was at inception entitled to a basic salary of Kshs 111,420.93 per month, to be reviewed annually based on the performance assessed through the Respondents' performance management system. That it was also a term of the employment contract that the 1st Respondent would be at liberty to summarily terminate the employment of the Claimant if she was found to have, among others, behaved dishonestly or recklessly in relation to the Respondents' assets, premises, staff or reputation.
9. Ms. Njoroge asserted that whilst the Claimant was on duty at the Respondents' factory situated at Ruaraka Area, Nairobi sometime on or about 22nd May 2019, the security manager of the premises notified the control room of an attempted theft of UDV closures from the site. That subsequently,



the Respondents embarked on an internal investigation that revealed how the attempted theft was carried out before the night security manager discovered the closures in the forklift. She fronted that the Claimant lodged a formal written Appeal dated 20th December 2019 addressed to the General HR Director of the 1st Respondent Company indicating that she was not involved in the attempted theft and prayed that the decision to dismiss her employment be reversed. That the appeal committee considered the matter and rendered its decision on 21st February 2020, upholding the decision of the disciplinary committee to dismiss the Claimant.

Claimant's Submissions

10. The Claimant submitted that the issues arise for determination before this Honourable Court are whether the Claimant was unfairly and unlawfully dismissed from employment and whether the Claimant is entitled to the reliefs sought. It was the Claimant's submission that section 45(2) of the Employment Act stipulates that a termination of employment of an employee is unfair if the employer fails to prove that the reason for termination is valid and fair, and that the employment was terminated in accordance with fair procedure. That based on the foregoing provisions, the Respondents in the instant case failed to prove they had a valid and fair reason for terminating the Claimant's employment and that the termination was in accordance with fair procedure. She cited the case of *Postal Corporation of Kenya v Tamu* [2019] eKLR in which the Court emphasized that for substantial fairness to be met, the employer should have a valid reason. Further, that the burden of proving that an unfair termination of employment or wrongful dismissal has occurred rests on the employee, while the burden of justifying the grounds of the termination of employment or wrongful dismissal rests on the employer, as stated in *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR. The Claimant further submitted that section 43(2) of the Employment Act, 2007 defines the reason or reasons of termination of employment as the matters the employer, at the time of termination of contract, genuinely believed to exist and which caused the employer to terminate the services of the employee.
11. As regards fair procedure, the Claimant submitted that section 41 of the Employment Act provides for a mandatory and elaborate procedure for termination of a contract of employment. That in her case, the procedure followed in her dismissal from employment was flawed as the notice of disciplinary meeting was given very late in a calculated effort to defeat her right to bring a representative of choice. In addition, her representations were never considered and the summary dismissal appeared predetermined, as evidenced in the letter from the Appeal Committee. In support of her submissions on fair procedure prior to termination of employment or dismissal, the Claimant relied on the case of *Caliph O. Ogega v National Social Security Fund*, Cause 280 of 2013 (unreported) that was quoted with approval in *Zablon Bisonga Mose v Real Careers Limited* [2018] eKLR wherein the Court held that an employee must receive notice with an outline of the reasons for such termination and that due process must be followed. It was the Claimant's submission that the Respondents did not have any valid reason to terminate her employment and that her employer was equally bound to follow the due process as per law. She also relied on the finding of the Court of Appeal in *Standard Group Limited v Jenny Luesby* [2018] eKLR that where there is a fair reason for terminating an employee's service but the employer does it in a procedure that does not conform with the provisions of a statute, the same still amounts to unfair termination.
12. The Claimant further submitted that fair hearing, in principle, incorporates the rules of natural justice, which includes the concept of audi alteram partem (hear the other side or no one is to be condemned unheard) and nemo iudex in causa sua (no man shall judge his own case) otherwise referred to as the rule against bias. The Claimant maintained she was not given a fair hearing and that the Respondents' unlawful and unfair termination of her contract of employment violated her right to



fair labour practices and right to fair administrative action as envisaged under Articles 41 and 47 of the Constitution of Kenya, 2010, which is in tandem with section 41 of the Employment Act.

13. Finally, the Claimant submitted that section 49 as read with section 50 of the Employment Act, 2007 stipulates the remedies for wrongful dismissal and unfair termination. That she is as such entitled to the reliefs sought in the Statement of Claim owing to the unfair and unlawful dismissal from her exemplary services. She cited the case of *Alphonse Maghanga Mwachanya v Operation 680 Limited* [2013] eKLR wherein the Court awarded 12 months' salary compensation to the claimant who had served for 2 years, after holding that in determining whether to make an award of compensation, the court is to consider the 13 factors set out under section 49(4) of the Employment Act. The Claimant in the instant suit urged this Court to thus award her damages for unfair termination of employment and wrongful dismissal. In seeking general damages for violation of her rights and the shame she endured during the entire process of the dismissal, the Claimant relied on Industrial Court Cause 953 of 2011, *Patrick Njuguna Kariuki v Del Monte (K) Limited* [2012] eKLR, in which the Court awarded Kshs 5 Million as exemplary damages, to purge the malicious and outrageous conduct by the employer that caused suffering to the employee. She asserted that she should also be awarded costs in view of the litigation history of the matter and considering the suit would not have been instituted had the Respondents followed the law.

1st and 2nd Respondent's Submissions

14. 1st and 2nd Respondent's Submissions

On whether the Claimant's summary dismissal was procedurally lawful, the 1st and 2nd Respondents cited the case of *Anthony Mkala Chitavi v Malindi Water and Sewerage Co. Limited* [2013] eKLR in which the Court discussed the ingredients of procedural fairness in section 41 of the Employment Act as:

- a. the employer informing the employee the charges the employer is contemplating using to dismiss the employee;
- b. the employer affording the employee the right to a proper opportunity to prepare, to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union;
- c. and if it is a case of summary dismissal, the employer is obliged to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.

15. The 1st and 2nd Respondents further cited the case of *Walter Ogal Anuro v The Teachers Service Commission* [2013] eKLR, where it was held that for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness. It was their submission that the Claimant's actions were nothing but obstacles to defeat the Respondent's internal disciplinary procedures and that it is even difficult for the Court to know what her defence is to the allegations leading up to her termination. The 1st and 2nd Respondents maintained that the Claimant was accorded every opportunity to defend herself against the allegations levelled against her.

16. As regards substantive justification for the Claimant's summary dismissal, the 1st and 2nd Respondents submitted that section 44(3) provides that an employer may dismiss an employee summarily when it can be shown that the employee has fundamentally breached his or her obligations arising under the contract of service. That pursuant to the terms of the employment contract executed between the parties herein, the Respondent was at liberty to terminate the Claimant's employment on grounds of



gross misconduct. They asserted that a careful consideration of the facts by an independent committee indicated that the Claimant admitted gross negligence exposing the company to theft risk and had also admitted that she did not exercise professional care in her role as a process clerk. That the Claimant was thus summarily dismissed on grounds of breach of clause 7.8 of the EABL Disciplinary Policy for negligence which exposed the company to unacceptable loss, breach of clause 7.3 of the EABL Disciplinary Policy for failing to turn up to record a statement, and breach of SOPs governing her area of work. In this regard, the Respondents relied in the case of *Japhet Nyaberi Maranga v Kenya Power Limited* [2017] eKLR where the Court held that negligence leading to loss of employer's property is a valid and justifiable reason for dismissal. It was the 1st and 2nd Respondents' submission that this Court should find that they had fully discharged their burden under section 47 of the *Employment Act*, 2007 in proving that the Claimant's dismissal was fair and justified. That in essence, the dereliction of duty on the part of the Claimant exposed them to a real risk of loss of property through theft.

17. The 1st and 2nd Respondent submitted that it is now a well-developed principle that in any pleading alleging violation of a constitutional right, the party that alleges violation of their rights must plead with reasonable precision regarding the manner in which there has been such alleged violation, as was enunciated in the case of *Anarita Karimi v The Republic* [1976-1980] KLR 1272. They asserted that the Claimant alleged that she underwent discrimination in that neither was she accorded an opportunity to be represented nor were her responses considered, but did not provide any evidence of the discrimination during her disciplinary hearing as provided in section 5(2) of the *Employment Act*, 2007. The Respondents argued that they took all steps to ensure there was fairness in the disciplinary hearing as espoused in Article 10 of the *Constitution* of Kenya.
18. It was the Respondents' submission that considering their foregoing submissions, the prayers for a declaration that the Claimant's dismissal was unfair/unlawful, for two months' salary in lieu of notice and for compensation cannot stand. They noted that the Claimant's Employment Contract provided the notice period to be issued by either party to be one (1) month in writing. They further submitted that the Claimant is not entitled to severance pay as the same only accrues upon redundancy, which is not the case herein (see *John Rioba Maugo v Riley Falcon Security Services Limited* [2016] eKLR). As regards the prayer for damages for aspersed reputation, mental anguish following wrongful dismissal and loss of career, the Respondents fronted that she was not entitled to the same as her was fair and within the law. That the Claimant had also notably not furnished evidence to prove she is entitled to an award of damages for frustration and mental tenure and for discrimination. On this submission, they relied on the case of *Swalleh C. Kariuki & another v Viloet Owiso Okuyu* [2021] eKLR, where it was held that a court will not act in a vacuum or whimsically where there is no evidence regarding special damages. For extraneous allowance for overtime, the Respondents submitted that the Claimant had similarly not furnished sufficient evidence/proof for her to be awarded the relief and that the same must fail. They cited the case of *George Okello Munyolo v Unilever Kenya Limited* [2019] eKLR wherein the Court found that when a claimant fails to adduce evidence in support of their case for unlawful termination of employment, they would have failed to discharge their obligation under section 47(5) of the *Employment Act*, meaning their claim shall fail. The 1st and 2nd Respondent maintained that all statutory deductions arising from the Claimant's salary were remitted to the relevant authorities in accordance with the law unless she furnishes evidence of the otherwise.
19. This case exemplifies what can and sometimes goes wrong when an employer does not pay heed to its own SOPs. The Claimant was dismissed for an alleged act of commission or omission. The Respondents deal with alcoholic beverages such as Kenya Cane whose labelling products for Kane Extra were the cause of the dismissal. It was alleged that there was an attempt at stealing the labelling products. The Claimant explained without any rebuttal from the Respondents, that the labelling was changed during the day shift and not on the night shift which she was in charge of. The Police



investigations did not result in her being charged. Indeed, the charge sheet produced indicated 5 males who were charged for the loss of 6,600 pieces of closure for Kane Extra 250ml. The Claimant was not complicit and was exonerated by the Police investigation. The Claimant was not guilty of security lapses on the part of the Respondents. As such, given the products were prepared for stealing by a different shift, the Claimant cannot be said to have been complicit. The disciplinary meeting notes do not show any evidence connecting her to the loss. She ought not have been dismissed. Nevertheless, the Respondents went ahead and had her contract terminated. The Claimant has sought a slew of reliefs and some cannot be granted. In her claim, she sought payment for 60 months, a sort of future payment. As she did not work for the Respondent, the claim for 60 month's salary cannot stand as she was not entitled to automatic contract extensions nor was she engaged in such a manner as to guarantee she would work for a minimum of the 60 months she seeks pay for. As such, she can only recover damages in terms of section 49 of the Employment Act. The law provides that a court may grant any of the following reliefs:

- (a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;
- (b) where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract.; or
- (c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.

20. The Claimant therefore would be entitled to notice pay, pay for days worked and 12 months salary as compensation as the Respondents have continued to hinder her from getting any other engagement. The accusation was made the Respondents have been malicious in connecting her to the unlawful activities yet she was exonerated in the investigation. As the Respondents have continued to make the employee suffer, the 12 months compensation shall apply. The Court only wishes there was more sanction to give against the Respondents. The Respondents are to issue a certificate of service entirely in keeping with section 51 of the Employment Act within the next 10 days failing which the Claimant will be at liberty to move court for penal sanctions against the Respondents.

21. In the final analysis, judgment is hereby entered against the Respondents jointly and severally for:-
- a. One months salary notice – Kshs 156,365.18
 - b. 12 months salary as compensation – Kshs 1,876,382.16
 - c. Costs of the suit
 - d. Interest at court rates on the sums in (a), (b) and (c) above from the date of judgment till payment in full.
 - e. Certificate of service.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JUNE 2024

NZIOKI WA MAKAU

JUDGE

