



**Makau v DPL Festive (Employment and Labour Relations Cause
612 of 2018) [2024] KEELRC 1998 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1998 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 612 OF 2018**

K OCHARO, J

JULY 26, 2024

BETWEEN

GIDEON MAINGI MAKAU CLAIMANT

AND

DPL FESTIVE RESPONDENT

JUDGMENT

Introduction

1. Contending that at all material times he was an employee of the Respondent, who was summarily dismissed from employment by the letter, and that the dismissal was unfair, the Claimant sued them seeking for various reliefs; security money; overtime (unpaid), unpaid leave; salary for the month of April and May 2015; damages for unfair termination, and one month salary in lieu of notice.
2. The Respondent resisted the claim through a memorandum of Defence dated 13th May 2019, asserting that the dismissal of the Claimant from employment was justified and fair. Further, he is not entitled to the reliefs sought.

The Claimant's case

3. It was the Claimant's case that he first came into the employment of the Respondent on the year 2011, as a salesman at a monthly salary of KShs.25,850/-.
4. That he worked for the Respondent diligently until 8th May 2015, when the Respondent terminated his employment ostensibly for failing to execute his employment duties with diligence.
5. The Claimant contended that the Respondent's action was prompted by malice and was solely intended to deny him his entitled dues.
6. Upon termination, the Respondent illegally refused and/or failed to pay him;



- a. Security money – KShs.120,000.00
 - b. Overtime (unpaid) - KShs.129,250.00
 - c. Unpaid leave - KShs.129,250.00
 - d. Damages for unfair termination – KShs.25,800.00
 - e. One month’s salary in lieu of notice - KShs.310,200
 - f. Salary for the month of April and May 2015 – KShs.51,700.00
7. The Claimant testified that his employment was terminated without any valid reason. The Respondent accused him of failure to account for crates.
 8. Cross-examined by Counsel for the Respondent, the Claimant testified that on or about the 24th April 2015, there was an incident of loss of crates. The crates got lost within his route of operation.
 9. The Claimant insisted that he was not issued with any show cause letter, before the dismissal, the letter exhibited by the Respondent dated 29th April 2018 was not served on him.
 10. Further cross-examined and shown his letter undated that he addressed to the Respondent, the Claimant testified that in the letter he rendered an apology and accepted responsibility for the loss.
 11. He confirmed that upon writing the letter he did not continue reporting to work.
 12. He reiterated that he was summarily dismissed through the letter dated 8th May 2015. In the letter it was expressed that he was being dismissed on account of the lost crates.
 13. He further testified that he explained to the Respondent that he was not aware as to how the crates got lost.
 14. In his evidence under re-examination, the Claimant asserted that he was dismissed on 29th April 2015 not as alleged by the Respondent.

The Respondent’s case

15. The Respondent presented one witness, Lilian Oyatta, its Human Resource Manager to testify on its behalf in this matter. She adopted her witness statement filed herein, and dated 13th May 2019 as her evidence in chief.
16. The witness testified that the Claimant first came into the employment of the Respondent on the 1st August 2014, as a salesman, earning a gross salary of KShs.20,562/-. He worked up to 8th May 2015, when he was summarily dismissed. His contract was to lapse on an appointed date, 11th August 2015.
17. The witness stated that as per the “duties and responsibilities” part of his employment contract, the Claimant was among other things, required to be in charge of goods and crates given to him and would be held liable for any loss of crates in his care which would be deducted from his salary.
18. She further stated that on or about 24th April 2015, while in the course of his duties, the Claimant lost 64 crates of bread belonging to the Respondent. He was questioned as regards the loss. In response, he admitted in writing to have been negligent.
19. On 29th April 2015, the Respondent issued the Claimant with a show cause letter for desertion and theft of the crates. The Claimant did not respond to the show cause letter for desertion and theft of the crates. After futile attempts to try and locate him for purposes of conducting disciplinary process, the



- Claimant attended the Respondent's premises on 4th May 2015, after deserting work from 24th April 2015 and asked the Respondent to pay him his dues.
20. She testified that the Claimant was not subjected to any disciplinary process. When he failed to respond to the notice to show cause, the Respondent decided to terminate his employment, and issued him with the termination letter dated 8th May 2015. His undated letter was received by the Respondent before he was issued with the show cause letter.
 21. The witness stated that the Claimant was paid his dues less the cost of the crates as envisaged in his contract of service.
 22. Cross-examined by Counsel for the Claimant, the witness testified that it was in the practice of the respondent to communicate to its employees both in writing, and orally.
 23. The witness admitted that neither the show cause letter nor the termination letter was signed by the Claimant in acknowledgment of receipt.
 24. The witness further testified that the Claimant's identity card number as per the contract of employment is 28974417, quite different from that (33198056) reflected on the payslip, said to be his.
 25. After receiving the letter from the Claimant, the Respondent did not give him a chance to try and trace the crates. This notwithstanding that, the dismissal letter gave an impression that he was accorded the opportunity.
 26. The witness further testified that the Claimant attended the offices on 4th May 2015. He had been given time off to trace the crates by the manager. However, it was not within her knowledge how many days those were supposed to be.
 27. The Respondent concluded that he had deserted duty because after being given the off, he did not go to the route where the crates were allegedly lost to try and trace them. However, she did not have any evidence to support this conclusion.
 28. The witness asserted that the show case letter issued to the Claimant is dated 29th April 2018, apparently three years after he had been dismissed. The show cause letter was not issued to him but was given to his cousin Nicholas Kyalo to deliver it to him. The cousin reported back that he served the letter but the Claimant refused to acknowledge the service by signing on it.
 29. The contract of employment provided that if the Claimant were to incur a loss, he was to be surcharged to the extent of the loss.
 30. The price per a crate was KShs.500/- at the material time. The value of the crates was expected from his dues. Further, the Claimant did not work in the month of May. For April 2017, his salary was paid into his account.
 31. The witness stated that the Respondent deducted one month's salary from the Claimant's dues because he deserted duty.
 32. According to the witness, salesman could work for between 6-7 hours a day.
 33. In her evidence under re-examination, the witness stated that the Claimant did not attend their offices to pick the termination letter. He would not be expected to have executed the same. Equally the letter was given to his cousin for service.



Analysis and Determination

34. I have carefully considered the material placed before this Court and distil the following issues for determination;
- a. Whether the dismissal of the Claimant from employment was fair.
 - b. Whether the Claimant is entitled to the reliefs sought.

a. Whether the dismissal of the Claimant from employment was fair

35. The Claimant pleaded, and contended in his witness statement (turned) evidence in chief, that he first came into the employment of the Respondent in the year 2011. He did not mention the exact date or place forth any document from whence it can be deducted his exact date of employment. Conversely, the Respondent asserted that he joined its workforce on 1st August 2014, under a written contract. As there is divergence on this point, and as the length of service of an employee normally has an influence on the compensatory award contemplated under section 49 (1) (c) of the *Employment Act*, it becomes imperative that I settle the issue at this point before I delve further into this first identified issue.
36. I have carefully considered the document dated 1st August 2014, an employment agreement, it is captioned “contract renewed”. This suggests therefore, that there existed an earlier contract that was being unaware. This signified a relationship that was and had come to an end, which relationship parties consented to continue with under the terms and conditions of the document. This persuades me that true as the Claimant contended, the employer – employee relationship between the Respondent and him, started earlier than 2014.
37. However, it is imperative to state that notwithstanding the above stated divergence, there was convergence on the point, the contract under the document was a fixed term contract, with a lifespan of one year, 1st August 2014 to 1st August 2015.
38. In determining fairness or otherwise of termination of an employee’s employment or dismissal of an employee from employment, the court has to consider two statutory aspects, substantive justification and procedural fairness, not unless the controversy as between the parties is only on lack of one.
39. Section 43, 45(2), 45(7) and 47(5) of the *Employment Act*, 2007, speak to substantive fairs. Section 43, imposes a legal burden on the employer in a dispute regarding termination of an employee’s employment, to prove the reason(s) for the termination. However, prove of the reason(s) isn’t all that is required of the employer. Section 45 (2) places a further burden on the employer to show that the reason(s) was fair and valid. Under section 47 (5) of the Act, the employer is obligated to justify the termination. In terminating an employee’s employment, the employer is obligated to act in equity, and justly as provided for section 45 (7) of the Act.
40. The Respondent asserted that the Claimant was dismissed from employment on the grounds of theft of crates and desertion of duty. Indeed, the termination letter speaks to this. The Respondent’s witness testified that after the crates got lost, the Claimant was given time off by his manager to enable him trace and recover, the crates. The witness did not assert that the Claimant was given specific days for this purpose but thereafter continued to be absent from work without authority. This court has not lost sight of the fact that in her evidence under cross examination the witness testified that she could not tell how many days the Claimant was given for the purpose.



41. Additionally, the termination letter in its contents expressly appreciated the fact that the Claimant was allowed an opportunity to go search for the crates, and that on the 4th day of May 2015, he attended the witness's office.
42. In the circumstances foregoing, it is very difficulty for one to, be persuaded and conclude that the Claimant was absent from duty without authority; (a key component of the infraction of desertion), and that he was so absent with the intention of not coming back to work. The act in issue does not fit in the description of desertion.
43. The termination letter expressed that the Claimant was dismissed from employment on the reason of theft of the crates, in addition to the reason, desertion. In my view, there was no material placed before this court to demonstrate that the Claimant perpetrated a theft or any reason or circumstances that was present that could make the employer (Respondent) or any reason employer suspect that the Claimant had stolen the crates.
44. With due respect, the reason given by the Respondent's witness for the reason why the Respondent took the view that the Claimant had stolen the crates, was too simplistic, the Claimant did not go searching the crates along the route whose the crates got lost. However, she quickly admitted that she did not have any evidence to support this reason. This totally white washed the conclusion, and exposed the reason as too unreasonable to be believed.
45. In fact, a keen look at the contents of the letter, despite it having the reason "theft" in the caption, reveals not, any basis for the reason. Indeed, what the body of the letter reveals as reasons are grounds of alleged desertion and willful neglect, to perform and careless performance, of duty. The letter led in part;
- “Undersection 44(4) (c) of the *Employment Act*, which clearly states that an employee who without leave, or any other lawful leave, absent himself from the place of work that the employee should be deemed to have deserted duty and to be dismissed or an employee wilfully neglects to perform his duty which was his duty to perform or performs it carelessly leading to loss or damage.”
46. By reason of the foregoing premises, I come to the inevitable conclusion that the Respondent did not prove the reason for the summary dismissal as mandated by section 43 of the Act, and that there was a valid and fair reason for the dismissal.
47. The Respondent's witness testified under cross-examination to the effect that where a salesman incurred a loss, the Respondent could surcharge the salesman to the extent of the loss. That indeed, the Claimant's employment contract provided for this. Further, the Respondent deducted the amount from the Claimant's dues. It was not explained why the Respondent in the Claimant's matter decided to go beyond its practice of surcharging, to dismiss and surcharge. I find that, for this, the Respondent did not act with equity and justly.
48. In sum, I come to the conclusion that the dismissal of the Claimant from employment was substantively unfair.
49. I now turn to consider the 2nd aspect, procedural fairness. Section 41 of the *Employment Act* which is couched in mandatory terms provides for a procedure that must be adhered to by any employee contemplating terminating an employee's employment. The employer must notify the employee of their intention to take action against him or her, and the grounds informing the intention. Thereafter accord the employee an opportunity to make a representation. Cojoined with this right to be heard



is the right to accompaniment. The employee should be allowed to be accompanied by an employee of his or her choice or a trade union representative (if he or she is a member of a trade union), during the time of the hearing. Lastly, the employee is bound to consider the representations made, before taking a decision.

50. I have carefully considered the evidence by the Respondent's witness who bore the duty to adduce evidence to aid the Respondent discharge the burden of proving that procedural fairness was present in the summary dismissal, and find no difficulty in concluding that in fact the evidence critically considered, supports the Claimant's position that procedural fairness was absent.
51. In sum therefore, I hold that the summary dismissal of the Claimant from employment was both substantively and procedurally unfair.

Of the Reliefs sought

52. The Claimant sought for "security money", what this relief entails and the justification for its award was not explained to the Court. This court holds that the same was not proved therefore. The KShs.120,000/- cannot be availed to the Claimant, therefore.
53. Under the head ("overtime/unpaid"), the Claimant sought an award of KShs.129,250/-. This figure was just thrown to the court. No evidence was tendered by the Claimant to demonstrate that indeed he worked overtime and how the figures were arrived at. The Claimant is inviting this Court to enter the space of speculation, space which I decline to enter. The relief sought is declined.
54. I have carefully considered the pleadings by the Claimant, there is no averment that he did not proceed for his annual leave for particular years or period in the course of his employment. His evidence in court, and witness statement are silent on this, too. The Claimant needed to prove this. He did not. The claim under this head is declined.
55. The Claimant asserted that the Respondent did not pay him, his salary for April, and the days worked in May. The Respondent's witness testified that the salary for April 2015 was paid into his account. The witness did not bring forth any document to demonstrate this. Nothing could have been easier for the Respondent than to tender documentary evidence for instance a cash electronic transfer document, or any document that can show that indeed the money was transmitted from its account to the Claimant's account. As a result, I am not persuaded that the salary for the month was paid.
56. I note that the Respondent contended that the Claimant did not work beyond 24th April 2015, and therefore if the court were to award the salary sought, the award should be limited to the days up to 24th April 2015. Having found as I have hereinabove that the Claimant was off duty with permission for a specific purpose, till 8th May 2015, I am unable to agree with the Respondent's position.
57. The Respondent argues that the salary should in the alternative be deemed deducted to compensate for the loss suffered as a result of the loss of the crates.

The Respondent did not prove that the Claimant stole the crates as alleged in the summary dismissal letter. There was not counterclaim filed for compensation for the loss. The Respondent did not prove the value of each crate. It is for these reasons that I find myself unpersuaded by the submissions of Counsel for the Respondent on this point.
58. By reason of the foregoing, I am convinced that the Claimant is entitled to the unpaid salary for April and the eight (8) days worked in May.
59. Section 49(1) (c) of the *Employment Act*, 2007 bestows upon this court the authority to award a compensatory relief to a minimum of twelve (12) months gross salary of the employee who has



successfully assailed his or her employer's decision to terminate his or her employment or summarily dismiss him or her from employment. However, the authority is exercised discretionarily depending on the circumstances of each case.

60. I have carefully considered the want of procedural fairness and substantive justification in the summary dismissal of the Claimant, the length of period he had worked for the Respondent, the period that he was expected to work under his fixed term contract, the fact that he did not contribute to the dismissal in any proven manner, and the unjustified disregard of the law by the Respondent, and come to the conclusion that the Claimant is entitled to the compensatory relief, to an extent of eight months gross salary.
61. There is no doubt that the Claimant's employment was terminable by a twenty-eight days' notice under section 35 of the Act. No doubt the Claimant was not issued with the notice contemplated thereunder. This coupled with my finding hereinabove, that the summary dismissal was unjustified, I see not reason why the relief, notice pay cannot be availed to the Claimant.
62. By reason of the premises, judgment 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. Unpaid salary for April 2015 and an eight (8) days worked in May 2015 – KShs.32,743.30.
 - c. Compensation pursuant to section 49(1)(c) of the Act for unfair termination – KShs.206,800.00
 - d. Salary in lieu of notice - KShs.25,850.00
 - e. Interest on the sum awarded in (b) above from the date of it fell due, 8th May 2015 till full payment.
 - f. Interest on the sums awarded in (c) and (d) above, at court rates, from the date of this judgment till full payment.
 - g. Costs of this suit.
 - h. The Respondent to issue the Claimant with a Certificate of Service pursuant to section 51 of the Employment Act within 30 days from the date of this judgment.

READ, DELIVERED AND SIGNED THIS 26TH DAY OF JULY, 2024.

OCHARO KEBIRA

JUDGE

In the presence of:

Ms Waweru for the Claimant

No appearance 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 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.

OCHARO KEBIRA

JUDGE

