



Otieno v General Industries Limited (Employment and Labour Relations Cause 1053 of 2018) [2024] KEELRC 2040 (KLR) (29 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 2040 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1053 OF 2018**

K OCHARO, J

JULY 29, 2024

BETWEEN

DENNIS OWINO OTIENO CLAIMANT

AND

GENERAL INDUSTRIES LIMITED RESPONDENT

JUDGMENT

Introduction

1. By a Statement/Memorandum of Claim dated 25th June 2018, the Claimant seeks: -
 - a. That this Honourable Court finds that the Respondent is guilty of terminating the claimant unfairly, and an order compelling the Respondent to settle the aforesaid claims.
 - b. That this Honourable Court compels the Respondent to pay damages for wrongful and unlawful termination from employment occasioned by a failure to observe due process as stipulated in the *Employment Act* 2007.
 - c. Any other or further relief as may be appropriate in the circumstances.
2. Contemporaneously with the filing of the memorandum of claim, he filed a witness statement dated 28th June 2018, and documents under a list of documents of the even date. At the hearing, the Claimant adopted the contents of his statement as his evidence in chief and had the documents admitted as his documentary evidence.
3. In response to the claim, the Respondent filed a Reply to Memorandum of Claim dated 30th March 2020, denying the allegations in the memorandum of claim, and the Claimant's entitlement to the reliefs sought. Alongside the reply it filed a witness statement of Sam Kiura dated 25th March 2020; and Respondent's List of Documents dated 30th March 2020. Equally, at the hearing, the witness statement



was adopted as the evidence in chief of the Respondent's witness, and the documents were admitted as documentary evidence.

Claimant's case

4. The Claimant's case is that the Respondent employed him as a General Worker on 1st July 2015 vide a contract of service for an initial term of six (6) months, and a monthly salary of Kshs.31,007.15. The Claimant was issued with subsequent contract extensions from 1st January 2016 to 31st June 2016, and from 1st July 2016 to 31st December 2016. Further, the contracts were structured in a way suggesting that his employment was on permanent terms.
5. The Claimant contends that he was assigned the duty to discharge chemicals from a mixing machine. This is even though he was not trained for such an assignment and was not appraised of the dangerous nature of the chemicals he was assigned to handle.
6. He suffered a permanent injury to his right eye on 10th April 2017 when the chemicals splashed into his right eye. As a result of the injury, the Claimant's eyesight was irreversibly damaged. Its functionality was gravely affected. This placed him on the path of frequently seeking medical attention. As a result, the performance of his duties was greatly impaired.
7. He asserted that after the incident, he suffered regular harassment from the Respondent all aimed to remove him from employment. He was issued with memos, suspension and warning letters. Accusations were made against him without proof.
8. On the 12th of May 2018, the Respondent summarily dismissed him from employment. The dismissal was without procedural fairness. He was not allowed, to defend himself, and the right of accompaniment. Further, there was no valid reason the basis for the dismissal.
9. Cross-examined by Counsel for the Respondent, the Claimant testified that he worked as an assistant machine operator. His contract described his position as a "general worker".
10. He testified further that he was instructed to move to the stores' department but declined. Further, contrary to the Respondent's assertion, he was not issued with any notice to show cause over the refusal to move. The show cause letter dated 2nd May 2018, tendered in evidence by the Respondent was not given to him.
11. The Claimant further testified that he was asked to explain why he had declined to move to the department, he refused to render an explanation, insisting that he should be given a formal transfer first. Subsequently, he was given a suspension letter.
12. He didn't pick up the cheque for his terminal benefits which had been forwarded to by the Respondent to the Labour Officer.

Respondent's case

13. The Respondent presented Sam Kiuria, its Human Resource Manager to testify on its behalf. The witness testified that the Claimant first came into the employment of the Respondent as a general worker from 2015 to 28th April 2018. The Claimant earned a monthly salary of Kshs. 12, 926/- rather than the claimed Kshs. 31,007.15.
14. He stated that the Claimant was lawfully re-assigned to the Stores Section, on 28th April 2018 from the Production Section. He was instructed to report to his new workstation on 30th April 2018 but failed to do so, and instead absconded from work without lawful reason and/or permission.



15. On 2nd May 2018, a disciplinary hearing was held. The Claimant duly attended the hearing. At the hearing, he was required to explain why he had failed to report to his workstation as directed. Instead of giving an explanation, he became uncooperative and declined to do so. He resorted to making wild allegations which had nothing to do with the subject matter of the disciplinary hearing.
16. On the same day, the Claimant was issued with a Notice to Show Cause setting out the charges brought against him, and requiring him to respond within seven (7) days. The Claimant declined to accept the Notice to Show Cause and failed to submit a response, as was required.
17. The witness stated that on 5th May 2018, the Claimant was given a suspension letter. He was excluded from work for seven (7) days to pave the way for investigations. He had previously been suspended on 4th April 2018 for failing to report to his workstation and had received a warning that if he repeated the infraction stern action would be taken against him, including summary dismissal.
18. After the investigations, the Respondent decided to dismiss the Claimant from his employment. The decision was communicated to the Claimant through a letter dated 12th May 2018.
19. It was asserted that the actions of the Claimant fell within the ambit of gross misconduct under Section 44 of the *Employment Act* 2007 warranting summary dismissal. Specifically, the Claimant absented himself from his place of work without leave or other lawful cause and refused to obey a lawful and proper command issued by his superior. Further, due procedure was followed in dismissing the Claimant. Following his refusal to collect his terminal dues, the same was forwarded to the Ministry of Labour, Social Security and Services for onward transmission to him.
20. The allegation that the Claimant suffered serious irreversible damage to his right eye in the course of his duties is not true. The Claimant underwent assessment by the Company doctor who confirmed that he had healed.
21. Cross-examined by the Claimant, the witness testified that his instructions to the Claimant to move from the Production Department to the Stores Department were verbal. Further, as stated in the dismissal letter, the Claimant was rude to him.
22. He stated further that he suspended the Claimant for seven days to enable the Respondent to decide what step to take against the Claimant who had refused to move to another department despite the transfer. The Claimant had been transferred from one department to the other without him declining.
23. The witness contended that the Claimant was employed as a general worker and as such, he would work in any section. Under the contract, it was within the Respondent's discretion to transfer the Claimant from one department to the other, or from one branch to the other.
24. After the dismissal, he [the witness] informed the Claimant that the cheque for his terminal dues was ready for collection, but he failed to avail himself for collection of the same.

The Parties' submissions.

25. In line with the directions of this Court issued on 15th May 2023, the Claimant filed written submissions dated 2nd June 2023, and the Respondent filed theirs dated 18th July 2023.

Issues for Determination

26. I have reviewed the pleadings, oral and documentary evidence, and submissions filed by both parties and authorities. The issues for determination are as follows: -
 - a. Was the Claimant fairly dismissed from his employment?



- b. Whether the Claimant should be awarded the terminal dues sought in his Statement/Memorandum of Claim.

a. Was the Claimant fairly dismissed from his employment?

27. It is not in dispute that the Claimant was an employee of the Respondent since 2nd January 2018 parties having entered into a contract of employment dated the same day, which was subsequently renewed several times. It is also not in dispute that the Claimant was summarily dismissed from employment through a letter dated 12th May 2018.

28. The reason for the summary dismissal was set out in the letter dated 12th May 2018 as follows:

“By refusing to comply/obey a lawful order issued by your supervisors, absenting yourself without permission from your duly appointed work station and your crude behaviour towards your superiors, you are in breach of Section 44 (a)n, (c) and (d) of the Employment Act. Such breaches amount to gross misconduct punishable by summary dismissal.

In line with the foregoing, you have vide a copy of this letter been summarily dismissed from the date of this letter.”

29. The Claimant contended that the Respondent dismissed him from employment unfairly. Section 45 of the Employment Act 2007 defines unfair termination as follows:

“(2) A termination of employment by an employer is unfair if the employer fails to prove—

- (a) that the reason for the termination is valid;
- (b) that the reason for the termination is a fair reason—
 - i. related to the employees conduct, capacity or compatibility; or
 - ii. based on the operational requirements of the employer; and
- (c) that the employment was terminated in accordance with fair procedure.”

30. Thus, it is easy to conclude that a fair summary dismissal of an employee from his employment or termination of an employee’s employment embodies two statutory aspects, substantive justification and procedural fairness. In the case the case of Walter Ogal Anuro –v- Teachers Service Commission (2013) eKLR, the Court aptly captured it, thus:

“... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”

31. Section 43 of the Employment Act places a burden on the employer in a dispute regarding the termination of an employee’s employment to prove the reason[s] for the termination. It is imperative to state that for one to discharge the burden, it must be demonstrated by sufficient evidence that the



reason genuinely existed. It won't suffice for the employer to just state that the employee was dismissed for this reason.

32. I have carefully considered the reasons put forth in the dismissal letter, the basis for the dismissal of the Claimant from employment, the Respondent's witness's evidence adduced thereon and the Claimant's testimony under cross-examination more particularly the admission that he refused to move from the Production Section to the Stores Section when he was instructed to. The Claimant didn't challenge the Respondent's case that after declining to report to the new station, he absconded duty. By reason of these premises, I am convinced that the Respondent has discharged the legal burden under the provision.
33. Having found as I have hereinabove that the burden under Section 43 of the Act has been discharged, I now turn to consider whether the reasons were valid and fair. Section 45[2], imposes an additional burden to that under Section 43, on the employer to prove that the reason[s] was valid and fair, otherwise, the dismissal or termination shall be deemed unfair.
34. There is no doubt that the Claimant was summarily dismissed from employment. Section 44 of the Act governs summary dismissals as follows:
 - “(1) Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.
 - (2) Subject to the provisions of this section, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.
 - (3) Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.
 - (4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:—
 - (a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;
 - (b) during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly;
 - (c) an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;



- (d) an employee uses abusive or insulting language, or behaves in a manner insulting to his employer or to a person placed in authority over him by his employer;
- (e) an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer;
- (f) in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or
- (g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.”

35. As stated herein above, the Respondent contended that the Claimant without any reasonable cause, declined to move to another department after being transferred from the Production Department. The Claimant admitted that indeed he refused to after being instructed to verbally, contending that the refusal was informed by the fact that the Respondent had not given him a written transfer letter. The transfer was inter-departmental, within the same station, I find the reason given by the Claimant as not plausible. As a result, I hold that the Claimant unreasonably defied instructions by his superior, and employer, a gross misconduct under Section 44[4][e]. Further, he absented himself from duty when on the 30th day of April 2018, refused to report to work, a fact that he has not challenged.

36. In sum, I find that the reasons for the dismissal were valid and fair. The Respondent has discharged its legal burden under 43 and 45[2]. As a result, I conclude that the summary dismissal was substantively justified.

37. I now turn to the issue of procedural fairness. The procedure which the Respondent followed by their own admission was: they held a disciplinary hearing on 2nd May 2018 where the Claimant was called upon to explain why he had been absent; they then issued him with a notice to show cause dated 2nd May 2018; what followed was a suspension letter dated 5th May 2018; and was finally summarily dismissed from employment on 12th May 2018.

38. The Section 41 procedure for procedural fairness is incremental. It provides as follows:

“Notification and hearing before termination on grounds of misconduct

- (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.
- (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an



employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.”

39. This has been held by the Courts to mean that there should be information, hearing and consideration of an employee’s representation, prior to termination. In the present case, the Respondent purported to suspend the Claimant on 5th May 2018 in order to carry out investigations, after they had already held a disciplinary hearing and issued him with a notice to show cause. This implies that the result of the disciplinary process was already pre-determined. He was also issued with a notice to show cause on the same day that a disciplinary hearing was held, indicating that he was not given adequate opportunity to respond to the charges that were brought against him. The Respondent’s failure to produce the Minutes of the purported disciplinary hearing also cast into doubt whether the Claimant was granted an opportunity to defend himself.
40. Despite the Respondent’s submissions that it followed due procedure in the termination of the Claimant’s employment (contained in its submissions dated 18th July 2023), for the above set out reasons, I return that the process of summarily dismissing the Claimant from employment lacked procedural fairness, and was therefore unfair and unlawful within the context of Section 45 of the Act.

b. Whether the Claimant should be awarded the terminal dues contained in his Statement/Memorandum of Claim.

41. The Claimant seeks one month’s salary in lieu of notice; 12 months’ salary as compensation for unfair termination; service pay; and unpaid annual leave.
42. The Respondent tendered in evidence a letter dated 28th May 2018 under which it forwarded the Claimant’s terminal benefits [Cheque Number 005898 for the sum of Kshs. 31,672.30.] to the Ministry of Labour, Social Security and Services, together with his Certificate of Service. The terminal benefits included one month’s salary and house allowance (Kshs. 12,926.55 and Kshs. 1,939/= respectively); severance pay for 3 years (Kshs. 19,390.00); and leave due (Kshs. 3,480.22).
43. The Claimant asserted that he didn’t pick up the cheque and cash the same. The Respondent did not place any evidence before this Court to demonstrate that indeed the cheque was picked and cashed. As a result, I hold that the Claimant was not paid the cheque amount.
44. The parties were not in agreement as regards the Claimant’s salary. The Claimant pleaded that he earned a monthly salary of Kshs. 31,007.15 while the Respondent asserted the salary was Kshs. 12,926.55. The Claimant produced a pay slip for January 2018 to support this position. The pay slip indicated that he earned a gross amount of KShs 31, 007.15. I have keenly looked at the pay slip, the amount includes overtime pay. From the slip, the basic pay was Kshs. 12,926.55 and house allowance Kshs. 1,938.98. There was no indication that the overtime amount was constant throughout the months.
45. Having stated as I have hereinabove, I conclude that the Claimant’s salary was not as expressed by the Claimant but as was by the Respondent.
46. I treat the amounts of the cheque as amounts admitted by the Respondent as payable to the Claimant and I direct that the same be paid to him.
47. The Claimant sought to be compensated under section 49[1][c] of the *Employment Act* for unfair dismissal. The compensatory relief contemplated under the provision is discretionarily granted, depending on the circumstances of each case.



48. This Court has carefully considered how the Claimant was dismissed from employment, the fact that the Claimant did indeed contribute to or cause the dismissal, his length of service, being over 3 years, and the fact that liability attaches against the Respondent only as a result of want of procedural fairness in the dismissal and conclude that the Claimant is entitled to 3 months gross salary as compensation.
49. In the upshot, judgment is hereby entered for the Claimant in the following terms: -
- a. A declaration that the summary dismissal was procedurally unfair.
 - b. The Claimant be paid compensation for unfair termination (14,865.53x3) Kshs. 44,596.59
 - c. The Claimant be paid the sum of the cheque hereinabove mentioned, Kshs. 31, 672.30.
 - d. Interest on (b) and [c] above at Court rates from the date of this judgment until payment in full.
 - e. The Respondent shall bear the costs of this suit.

READ, DELIVERED AND SIGNED THIS 29th DAY OF JULY, 2024.

OCHARO, KEBIRA

JUDGE

In the presence of:

Claimant in Person

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

