



**Lukati & 3 others v Kenya Meat Commission (Cause 1360 of 2016)
[2024] KEELRC 2401 (KLR) (24 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2401 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1360 OF 2016
K OCHARO, J
SEPTEMBER 24, 2024**

BETWEEN

**KEVIN SHIKANGA LUKATI 1ST CLAIMANT
SIMON N. GITHONGORI 2ND CLAIMANT
GODFREY MAINGI 3RD CLAIMANT
JOHN KARIUKI 4TH CLAIMANT**

AND

KENYA MEAT COMMISSION RESPONDENT

JUDGMENT

Introduction

1. By their joint memorandum of claim dated 12th July 2016, the Claimants contended that at all material times, they were employees of the Respondent, whose employment the latter terminated unfairly on 7th March 2016, and sought the following reliefs, against it;
 - a. 12 months gross salary for each of them as compensation for unfair and wrongful dismissal.
 - b. Unpaid leave.
 - c. Pay in lieu of one month’s notice.
 - d. overtime compensation.
 - e. Unpaid allowance.
 - f. Issuance of a certificate of service.
 - g. Costs of the suit.



2. The Respondent filed a statement of defence dated 8th August 2016, wherein it denied that the Claimants' dismissal from employment was wrongful and that they are entitled to the reliefs sought.
3. Per Procedure Rules, the Claimants filed a reply to the statement of Defence dated 7th September 2016, reiterating the contents of their memorandum of claim, and denying the averments of the Respondent in its Defence.
4. At the close of pleadings, the matter got destined for hearing on merit. However, despite filing a statement of defence, the Respondent did not present any witness to testify in support of its defence against the Claimants' claim. Further, it expressly waived the right to cross-examine the Claimants when an opportunity was availed.

The Claimants' Case

5. At the hearing, the Claimants adopted their witness statements filed herein as their evidence in chief, and the documents they contemporaneously filed therewith as their documentary evidence.
6. The 1st Claimant stated that he first came into the employment of the Respondent as a stock clerk on the 12th of January 2007. At the time of his dismissal from employment on the 7th of March 2016, he was earning a monthly salary of KShs.25,000/-.
7. He asserted that he worked for the Respondent diligently and honestly for nine years up to the date forestated when the latter wrongfully, illegally and unlawfully terminated his employment. The Respondent effected the stated termination without a justifiable reason and conforming with tenets of fair hearing.
8. He further asserted that during his employment, he worked for twelve (12) hours daily i.e. from 7.00 a.m. to 7.00 p.m., therefore, four hours overtime daily. The Respondent never compensated him for the overtime work.
9. The 1st Claimant further contended that throughout the life of his contract of service, the Respondent did not pay him a house allowance. It never allowed him to proceed with his statutory annual leave. It never compensated him for the earned but untaken leave days.
10. Save as regards their dates of employment, thus, the 2nd Claimant, 1st February 2007, 3rd Claimant 12th February 2007 and 4th Claimant, 12th January 2009, these Claimants had similar accounts to that of the 1st Claimant, concerning the claim herein.

The Claimants' submissions

11. The Claimants identified five issues for determination;
 - a. Whether or not the termination was fair is procedure and substance.
 - b. Whether or not the Claimants were terminated on account of gross misconduct.
 - c. Whether or not the Claimants are entitled to certificates of service.
 - d. Whether or not the Claimant is entitled to the reliefs sought.
 - e. Whether the Claimant is entitled to the costs of this suit.
12. It was submitted that Section 43 of the *Employment Act*, places a legal obligation on the employer to prove the reasons for termination of an employee's employment. Where the employer fails to do so, it shall be deemed that the termination was unfair.



13. Further the law obliges the employer to accord the employee(s) to be affected by its intention to terminate his or her employment, an opportunity to be heard on the allegations against him. To support this submission or procedural fairness and substantive justification, the Claimants placed reliance on the decision in *Ken Freight (EA) Limited v Benson K. Nguti* (2016) eKLR.
14. It was further submitted that the Respondent failed to demonstrate that the termination of the Claimants' employment conformed with fair procedure, and with substantive justification. As a result, this court should find that the termination was unfair under the provisions of section 45(2) of the *Act*.
15. The Claimants further submitted that as the termination of the Claimants' employment was unfair, they should be awarded compensation, to the maximum extent contemplated in the *Employment Act*, twelve months' gross salary.
16. Under law, their employment was supposed to be terminated by one month's notice. None of them was issued with a termination notice. They should be paid salary in lieu of notice as provided for under section 36 of the *Employment Act*.
17. On the relief for certificate of service, the Claimants submitted that under section 51 (1) of the *Employment Act*, a certificate of service is a right to the employee whose services have been terminated.
18. Costs should follow the event.

The Respondent's submissions

19. On its part, the Respondent distilled three issues for determination, thus;
 - a. Whether the Claimants' dismissal from employment was unlawful and unfair.
 - b. Whether the Claimants are entitled to the prayers sought in the statement of claim.
 - c. Whether the Claimants are entitled to the costs of this suit.
20. The Respondent submitted that on the 9th September 2015, it issued show cause letters to the Claimants upon realizing that they aided the pilferage of its assets by colluding with loaders to raise fictitious Goods Return Notes not supported by relevant documents.
21. After the show cause letters, the Claimants were on 4th February 2016, invited to a disciplinary hearing, where they were heard on the allegations that had been levelled against them. As such, this Court should find that they were dismissed from employment procedurally. To support this position, reliance was placed on the case of *Milana Electronics Ltd v Dickson Nyasi Mubaso* (2021) eKLR.
22. The Claimants were dismissed under the provisions of section 44 of the *Employment Act*. They were given the reasons for the dismissal.
23. The Respondent acknowledges the Claimants' right to certificates of service, however, it contends that the same was not issued as the Claimants have gone through the internal clearance processes.
24. The Respondent having demonstrated that the dismissal of the Claimants was with substantive justification and procedural fairness, the other reliefs sought cannot be granted in their favour.
25. The Claimants' claim should be dismissed with costs.

Analysis and Determination

26. I have carefully considered the pleadings, by the parties, the Claimants' evidence and the submissions by both counsel for the parties, and the following issues emerge for determination;



- a. Were the Claimants unfairly dismissed from employment?
 - b. Are the Claimants entitled to the reliefs sought?
27. It is now trite law that for termination of an employee's employment or summary dismissal of an employee from employment to be considered fair, the presence of two statutory aspects in the termination or dismissal must be established. Them being procedural fairness and substantive justification. This is what section 45 of the *Employment Act*, 2007 commands. See *Pius Ishindu v Lavington Security* (2017) eKLR.
 28. Procedural fairness finds statutory anchorage on the provision of Section 41 of the *Employment Act*. A keen look at the provision reveals that the aspect of procedural fairness embodies three components, the notification component, the employer must inform the employee of the grounds fermenting its contemplation to dismiss the employee from employment or terminate his or her employment; the hearing component, employer must accord the employee an adequate opportunity to prepare and defend himself against the accusations against him and also allow him or her exercise the right of accompaniment; lastly the consideration component; the employer must consider the representation made by the employee before making a final decision.
 29. It is imperative to state that the absence of any of the ingredients above-mentioned in the process leading to the decision to terminate or dismiss, will always render the termination procedurally unfair.
 30. It is also pertinent to point out that the legal burden lies on the employer to prove that there was adherence to the canons of procedural fairness contemplated by law.
 31. The 1st and 4th Claimants placed before this court show cause letters dated 9th September, 2015. This Court notes that in the letters, the Claimants were informed that they had committed gross misconduct thus; "On various dates between 23rd January 2015 and 19th August 2015, you aided the pilferage of Commission assets by colluding with loaders to raise fictitious goods return notes (GRNs) which were not supported by meat products that have been returned from van sale. The GRNs have subsequently been used to raise credit notes (CNs) and hence understating the expected cash from van sales."
 32. In the letters, the Respondent expressly stated that it contemplated dismissing them from service on account of gross misconduct if cause was not shown. The two were interdicted from office pending finalization of the matter.
 33. As regards the two, I have no hesitation in concluding that the Respondent satisfied the notification component.
 34. For the 2nd and 3rd Claimants, there was no document tendered in evidence from which it can be discerned that they were informed of the accusations against them and that the Respondent expressed its contemplation to take action against them. Therefore, it can be safely concluded that the Respondent didn't conform to the requirements of procedural fairness.
 35. By letters dated 14th December 2015, and 2nd February 2016, the Respondent invited the 4th and 1st Claimants to disciplinary hearings, slated for 22nd December 2015 and 4th February 2016, respectively. The two Claimants acknowledged in the memorandum of claim that they attended the hearing.
 36. They contended that they asked for documents that could aid them to advance their defence during the hearing but the Respondent failed to supply them with the same.



37. The Respondent did not present any evidence to rebut this assertion. As a result, I am persuaded that they did ask for the documents and that the same was not given to them. Therefore, they were not adequately enabled to defend themselves.
38. Consequently, I hold that the Claimants were not accorded a fair hearing. That dismissal was procedurally unfair.
39. Hereinabove I did state that under Section 43 of the Act, the duty lies on an employer in a dispute as is the instant one to prove the reason[s] for the termination, therefore, that was substantive justification. I have carefully considered the dismissal letters that were issued against the Claimants and note that therein the Respondent did not put forth the reason(s) for their dismissal.
40. In the absence of evidence by the Respondent, it is not possible for one to identify the reasons(s) for the dismissal and interrogate whether they were fair and valid under section 45 (2) of the Act.
41. Legal burdens can only be discharged by production of sufficient evidence, to prove the matter or facts that need(s) to be proved by the party charged with the burden of proof. As the Respondent did not present any evidence to prove the reason(s) for the termination as required under Section 43 of the Act, and that therefore the reason(s) was valid and fair, I come to the inevitable conclusion that the dismissal of the Claimants from their employment was substantively unfair.

Whether the Claimants are entitled to the reliefs sought

42. Each Claimant sought compensation for wrongful dismissal, twelve months' gross salary. Section 49 (1)(c) of the Employment Act, bestows upon this court the authority to make a compensatory award for an employee who has successfully challenged the unfairness in his or her employer's decision to terminate his or her employment or dismiss him or her summarily from employment. However, it is pertinent to point out that the authority is discretionarily exercised, depending on the circumstances of each case.
43. I have carefully considered how the Claimants were dismissed from employment; the Respondent's failure to conform to the requirements of procedural and substantive fairness, the length of service rendered to the Respondent by the Claimants (all of them for more than 8 years); and the fact that it was not proved in any way that the Claimants contributed to the dismissal, and come to the conclusion that they are entitled to the compensatory relief, each to an extent five months of their gross salaries.
44. I decline their claims for compensation for earned but unutilized leave days and overtime compensation. These claims were just thrown to court. No sufficient evidence was put forth to demonstrate how much exactly was owed by the Respondent under those heads, and the formula used in arriving at the figures they stated to be owed. Put in another way, the claims were not proved.
45. I have carefully considered the Claimants' respective letters of appointment, and note that clause 6 thereof provided for "Remuneration". The clause specifically provided for their gross salary, basic salary, housing allowance and staff allowance. I have further considered the payslips presented herein by the Claimants in evidence, and note that in alignment with the contractual stipulation mentioned, they bear an item for "House rent". As a result of these premises, I find their claim for house allowance wholly wanting in merit. I reject the same.
46. In my view, the Claimants' contracts of service were terminable under section 35 of the Employment Act, by a twenty-eight days' notice. Undeniably, there were no termination notices issued to the Claimants. Having found that the summary dismissal was both procedurally and substantively unfair, I hold that they are entitled to notice pay under section 36 of the Employment Act.



47. In the upshot, Judgment is hereby entered in favour of the Claimants in the following terms;
- a. A declaration that their dismissal from employment was unfair.
 - b. Compensation pursuant to the provisions of section 49(1) (c) of the Employment Act,
 - i. 1st Claimant - Kevin Shikanga - Kshs.24,816x5 = 124,080.
 - ii. 2nd Claimant - Simon N. Githongori - (14,962x5) = Kshs.74,810.
 - iii. 3rd Claimant - Godfrey Maingi - (Kshs.21,124x5) = KShs.105,620.
 - iv. 4th Claimant - John Kariuki - (Kshs.14,775x5) = Kshs.73,875.
 - c. Notice pay, one month's salary in lieu of notice.
 - i. 1st Claimant - Kevin Shikanga - Kshs. 24,816.
 - ii. 2nd Claimant - Simon N. Githongori - Kshs. 14,962.
 - iii. 3rd Claimant - Godfrey Maingi - KShs.21,124.00
 - iv. 4th Claimant - John Kariuki - KShs. 14,775.
 - d. Interest on the sums awarded above at court rates from the date of this judgment till full payment.
 - e. Costs of this suit.
 - f. The Respondent is to issue the Claimant certificates of service within 30 days of today.

READ, DELIVERED AND SIGNED THIS 24TH DAY OF SEPTEMBER, 2024.

OCHARO KEBIRA

JUDGE

In the presence of:

Mr. Omwanza for the Claimants

No appearance 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.

OCHARO KEBIRA

JUDGE

