



**Mwasame v Indus Energy Limited (Cause 1572 of 2017)
[2024] KEELRC 2615 (KLR) (18 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2615 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1572 OF 2017
K OCHARO, J
OCTOBER 18, 2024**

BETWEEN

LEONARD WAFULA MWASAME CLAIMANT

AND

INDUS ENERGY LIMITED RESPONDENT

JUDGMENT

Introduction

1. In his Statement of Claim dated 4th AUGUST 2017, the Claimant contends that at all material times, he was an employee of the Respondent and whose employment was summarily terminated on the 28th of November 2014. Contending that the summary dismissal was unfair and unlawful, he seeks the following reliefs against the Respondent; compensation for unpaid overtime; notice pay; compensation for earned but untaken leave days; bribe paid to Kenya Revenue Officers; and compensation for unfair dismissal.
2. The Respondent resisted the Claimant's claim through a Reply to the Statement of Claim, filed herein on the 27th of August 2017. The Respondent denied the Claimant's claim in toto and his entitlement to the reliefs sought.
3. In conformity with the directions of this Court given after the full hearing of the parties' respective cases, both parties have filed their written submissions.

Claimant's case

4. At the hearing, the Claimant urged this Court to adopt his witness statement dated 4th August 2017 as his evidence in chief. Without objection from the Respondent, he tendered in evidence all the documents filed under the list of documents dated 4th August 2017.



5. The Claimant's case is that he was employed by the Respondent on 15th June 2012, as a Petrol station Pump Attendant, at a monthly salary of Kenya Shillings 12, 659, which later on was increased to 15, 694.
6. He states that on 20th October 2014, while on duty with James Theuri Wangechi, a petrol pump attendant who was newly employed, two men in a RAV 4 motor vehicle fueled the vehicle at the pump that Mr. Theuri was attending. He failed to issue them with an ETR receipt for tax purposes. Later, the two came to the station claiming to be Kenya Revenue Authority Officers, and that the pump attendant had committed an offence for not issuing the receipt. When they were ushered into the station manager's office, they expressed the gravity of the offence and demanded a KSHS. 50,000 bribe. This amount was negotiated downwards, and the Respondent gave out, KSHS. 30,000.
7. Later and to his surprise, the Respondent demanded that he refund the thirty thousand. The Respondent's direction was anchored on the fact that on the material day, he was the most experienced pump attendant at the station.
8. The Claimant alleged that on the 28th of November 2014, the Respondent dismissed him from employment unfairly. He was neither given a termination notice nor paid his terminal dues.
9. He further asserted that throughout the time he served the Respondent, he worked daily for seven hours, overtime. Therefore, he should be compensated for the overtime for the 28 months, KSHS. 409, 875. Further, at separation, he had 11 earned but unutilized leave days.
10. Cross-examined by Counsel for the Respondent, the Claimant admitted that as of the date of his dismissal from employment, he owed the Respondent, KSHS. 21,900.
11. In his experience, incurring shortages while serving as a pump attendant, was common. Sometimes customers could fuel and speed off without paying for the fuel drawn. Any incident concerning shortage could be reported to the Manager, and a record kept.
12. He reiterated that the Kenya Revenue Officers were served by Mr. Theuri. When they were being so served, he was at the pump he was attending that day.
13. The Claimant states that he witnessed the Manager give the bribe. In fact, part of the money that was given- KSHS. 19000, was withdrawn from him, as the manager had KSHS. 11,000 only, then.
14. The dismissal letter indicated the reason for the Respondent's action, failing to drop Kshs. 7000 into the safe. The Claimant testified that the KSHS. 7000 was not so dropped as he had a shortage equivalent to the amount. He informed the manager of the shortage and asked that he be allowed to liquidate the same in instalments. The amount he admits owing, is inclusive of this figure.
15. The letter of appointment, clause 9 thereof, specifically set out conducts on his part, that could attract the sanction of termination of employment.

Respondent's case

16. The Respondent presented one witness, Mr. Kaileh to testify on its behalf. The witness asserted that he is currently employed in Mombasa after shutting down his business. The witness stated that at all material times, the Claimant was an employee of the Respondent.
17. The witness stated that there isn't a time when a bribe, Kshs. 30,000 was given, as the Claimant alleged. Further, no direction was ever given that he would refund this alleged amount.



18. The Claimant was dismissed from employment on the reason of gross misconduct. He fundamentally breached the terms of his contract. He; was on many occasions absent from work without authority; had perpetual shortages in his weekly sales; failed to account for his sales as required while undertaking his duties and willfully neglected to perform his duties. The Claimant admitted these infractions in writing.
19. He stated further that it is common practice in the petrol station industry for the day shift to run from 7: 30 am to 4: 30 pm while the night shift did from 4.30 pm to 7.30 pm. During the night shifts, the employees could interchangeably be allowed to sleep for 6 hours. As such, the Claimant cannot assert that he worked overtime.
20. Cross-examined by Counsel for the Respondent, the witness testified that the Respondent had a cloaking in and out register for its employees.
21. He admitted that he wasn't the supervisor of the Claimant. The Respondent had two supervisors charged with the responsibility.
22. In its Counterclaim, the Respondent has sought against the Claimant a sum of Kshs. 51,900, made up as, KSHS. 30,000 a loan that was advanced to the latter, and Kshs, 21,900. He admitted that the Respondent didn't place forth as evidence, any document to support the claim for KSHS. 30,000.
23. On the alleged many warnings, the witness stated that he had no answer to the question on it.
24. During night shifts, there could be two or three workers at the station.
25. The witness testified that he didn't seek any explanations from the Claimant before dismissing him from employment.
26. The Claimant was not Mr. Theuri's supervisor. The KSHS. 30,000 wasn't any other person's liability. It was his, emanating from "shortages."
27. In his evidence in re-examination, the witness testified that whenever the Claimant was on the night shift, his resting time was from 11: 00 PM to 4: 30 am.

Analysis and Determination

28. I have carefully considered the pleadings, the evidence and submissions by both parties, and the following issues emerge for determination: -
 - a. Was the dismissal of the Claimant from employment fair?
 - b. Whether the Claimant is entitled to the reliefs sought.
 - c. Whether the Respondent's Counterclaim is merited.

a. Was the dismissal of the Claimant from employment fair?

29. As rightly submitted by the Respondent, whenever a court is invited to interrogate the question of fairness in the termination of an employee's employment or summary dismissal of an employee from employment, its starting point in the discharge of the task must be an analysis of whether the employee [Claimant] has prima facie established that his employment was terminated, or that he was summarily



dismissed, unfairly or wrongfully, for this is consistent with Section 47 (5) of the [Employment Act 2007](#) which provides that: -

“(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

30. For some time, the interpretation of this provision of the law was blurry and confusing, however, it is now trite that it places distinct legal burdens at two centres. Firstly, the Claimant is charged with the legal burden to prove the two aspects hereinabove mentioned. However, it is worth noting that all that is required of him is to demonstrate prima facie, that there was termination of his employment and that the same was unfair or wrongful. Secondly, it is only after the Claimant has discharged the onus, that the legal burden shifts to the Respondent [employer] to discharge the legal burden under section 43 [prove reasons for the termination], section 45[to prove that the reason[s] for the termination was valid and fair], and section 41[prove that the cannons of procedural fairness were adhered to. See Pius Machafu Isindu vs- Lavington Security Guards [2017] eKLR.
31. I have carefully considered; the fact that the termination is not contested; the Claimant’s assertion that the termination lacked procedural and substantive fairness; and the Respondent’s reaction to the assertion, and conclude that the former has prima facie established that the termination was procedurally and substantively unfair.
32. Section 41 of the [Employment Act](#), places a duty upon the employer to demonstrate that the termination of an employee’s employment, was procedurally fair. Under the provision, an employer contemplating terminating an employee’s employment or summarily dismissing an employee from employment must demonstrate that prior to the dismissal, the employee; was notified of the intention and the grounds the basis of the intention; was given an adequate opportunity to prepare and make a representation on the grounds; and the employer considered the representation before making the decision to terminate or summarily dismiss.
33. The Court of Appeal in Chairman Board of Directors (National Water Conservation and Pipeline Corporation) v Meshack M. Saboke & 2 others [2019] eKLR while citing with approval the case of Janet Nyandiko versus Kenya Commercial Bank Limited [2017] eKLR stated: -

“The parameters for determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to dismiss the employee; the communication of that decision to the employee and the handling of any appeal against the decision. Also, not to be overlooked is the conduct and capability of the employee up to the date of termination, the extent to which the employer has complied with the procedural requirements under section 41, the previous practice of the employer in dealing with the type of circumstances which led to the termination and the existence of any warning letters issued by the employer to the employee.

Section 41 of the Act, enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands the reasons for which the employer is considering to terminate the employee’s employment with



them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of his own choice, and to hear and consider any representations which the employee may advance in response to allegations levelled against him by the employer.”

34. The Claimant contended that his dismissal was procedurally unfair. The Respondent didn't adhere to the mandatory dictates of procedural fairness set out in the above-stated section. Though the Respondent had asserted in its pleadings that there was adherence, its witness in his evidence under cross-examination admitted that the Claimant was not allowed to give any explanations before his dismissal. In my considered view, the Respondent failed to prove the presence of the three pivotal components of procedural fairness, notification, hearing and consideration in the process that led to the dismissal of the Claimant.
35. I now turn to the aspect of substantive justification. The question that springs up is, did the Respondent place forth sufficient evidence to establish the reasons for the dismissal [Section 43], did it demonstrate that the reason[s] was fair and valid [section 45[2]? Shortly hereinafter, I will demonstrate that the answer to these questions should be in the negative, with reasons.
36. The Respondent asserted that the reasons for the dismissal of the Claimant were set out in the summary dismissal letter of 28th November 2014. The letter reads in part;

“You are well aware that on several occasions, your conduct has been found wanting and you have been given several warnings verbally, and in written form. Most recently on 16th November 2014, you failed to drop Kenya Shillings seven thousand [7000] vide drops 46-49. We have waited for you to submit this cash to the company but you have failed to do so. Besides being against company policy, this behaviour also shows your conduct is unsatisfactory and that you are yet to learn from your mistakes in spite of several warnings.”
37. The reasons for the summary dismissal of the Claimant to me appear as; the alleged infractions that led to the issuance of several warnings; and the failure to drop Kshs. 700,000. Duty lay on the Respondent to place forth evidence to demonstrate that the reasons were valid and fair.
38. An omnibus ground, cannot be considered a valid ground for summary dismissal of an employee from employment. In the manner the above-stated letter was coached and, considering the total circumstances of this matter, more specifically the Respondent's witness's evidence on the alleged warnings, one cannot be able to decipher what the wanting conduct on the part of the Claimant was, to be the basis for the summary dismissal without considering the alleged written warnings, if such ever existed. The Respondent didn't present before this Court, the written warnings, and indeed, its witness made an admission on this. With this, the only safe conclusion shall be that the Respondent failed to demonstrate that the omnibus reason, was a reason that could legitimately be a basis for summarily dismissing an employee from employment.
39. The Respondent further asserted that the Claimant was dismissed because he failed to drop KSHS. 7000 into the safe. The Claimant contended that he didn't. The failure resulted from a shortage that he incurred in the course of his duty. The incident was reported to the manager, who booked its occurrence in the Respondent's records. The Respondent didn't present any evidence for instance to show that; the shortage was a result of the Claimant's negligence; it wasn't there at all, or the shortage was by design, to discount the Claimant's assertion.
40. The Claimant explained that shortages could happen for various reasons including customers speeding away without paying for the drawn fuel. In practice, the Respondent could treat the amounts as a loan



and allow repayment thereof in instalments. The evidence regarding the practice was not challenged. To depart from an organizational practice without justification, to the detriment of an employee as was in the instant matter, cannot meet any other description other than as an act devoid of equity and justice.

41. In the upshot, this Court concludes that the summary dismissal against the Claimant was substantively unfair.

(b) Whether the Claimant is entitled to the reliefs sought.

42. The Claimant seeks inter alia damages for unfair and unlawful termination, equivalent to 12 months gross pay.
43. Under Section 49(1)(c) of the *Employment Act* 2007, this Court has the power to award compensation up to a maximum of 12 months' gross salary, however, the power is discretionarily exercised depending on the peculiar circumstances to each case.
44. I have carefully considered how the Claimant was summarily dismissed from employment, the casual disregard of requirements of procedural fairness under Section 41 of the *Employment Act* and edicts of substantive fairness, by the Respondent, his length of service for the Respondent, and conclude that he is entitled to 3 months' gross salary as compensation.
45. The Claimant's employment was terminable under section 35 of the *Employment Act*, by a twenty eight days' notice. Having held that the summary dismissal was wrongful and unfair, and noting that the notice was not issued or payment in lieu thereof made, I am convinced to grant the relief under this head.
46. The Claimant asserted that at separation he had 11 earned but untaken leave days. I have carefully considered the Respondent's witness's evidence, and conclude that it didn't dislodge the Claimant's on his entitlement to this relief sought. In my view, the evidence was a general denial.

(c) Is the Respondent's counterclaim merited?

47. The Claimant admitted that he owes the Respondent the sum of Kshs. 21,900. I grant the Respondent this sum on the admission.
48. The Respondent sought for a further sum of Kshs. 30,000 terming the same as a loan that it advanced the Claimant. The Claimant denied this figure. This being a special damage, the Respondent needed to prove the same specifically. He didn't. Its witness admitted that the Respondent had nothing from where it could be discerned that the Claimant either applied for the loan or was advanced the loan. As a result, I decline to award this figure.
49. The Respondent's Counterclaim only succeeds to the extent of the admission mentioned hereinabove.
50. In the upshot, Judgment is hereby entered for the Claimant in the following terms: -
- a. A declaration that he was summarily dismissed from employment unfairly.
 - b. Compensation pursuant to the provisions of Section 49[1][c] of the *Employment Act*, three months' gross salary, KSHS. 47, 082.
 - c. One month's salary in lieu of notices KSHS. 15, 694.
 - d. Compensation for earned but untaken leave days, KSHS. 8, 220.
 - e. Interest on (b) [c] and [d] above at Court rates from the date of judgment until payment in full.



- f. The Respondent shall get the admitted sum of KSHS. 21,900, the same shall be lessened from the amount awarded to the Claimant hereinabove.
- g. Each party is to bear its costs.

READ, DELIVERED AND SIGNED THIS 18th DAY OF OCTOBER 2024

OCHARO KEBIRA

JUDGE

In the presence of:

Mr. Wachira for the Claimant

Mr. Nganga for the Respondent

