



REPUBLIC OF KENYA



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**Igunza v Badar Hardware Limited (Employment and Labour Relations Appeal
E073 of 2021) [2024] KEELRC 2458 (KLR) (11 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2458 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
EMPLOYMENT AND LABOUR RELATIONS APPEAL E073 OF 2021**

M MBARŪ, J

OCTOBER 11, 2024

BETWEEN

SAMUEL IGUNZA APPELLANT

AND

BADAR HARDWARE LIMITED RESPONDENT

*(Being an appeal from the judgment of Hon. Lesoitia Saitabau
delivered on 29 September 2021 in Mombasa Cause No.244 of 2020)*

JUDGMENT

1. The appeal herein arises from the judgment delivered on 29 September 2021 in Mombasa Cause No.244 of 2020 and the appellant is seeking orders that the judgment be set aside and the claim allowed with costs.
2. The background to this appeal is a claim filed by the appellant before the trial court that on 15 August 2018, he was employed by the respondent as a truck driver at a wage of Ksh.23, 949 which increased to Ksh.35, 000 as of January 2020. On 15 January 2020, the appellant went on his annual leave as usual and was due to resume work on 8 February 2020 when he was told that his employment was terminated and to clear with the respondent. He cleared and was issued a Certificate of Service on 12 February 2020 indicating that he had resigned from duty which was not true. This resulted in unfair termination of employment without notice or proper cause or payment of terminal dues. The appellant claimed the following dues;
 - a. Notice pay Ksh.35,000;
 - b. Salary for January 2020 Ksh.35,000;
 - c. 12 months compensation Ksh.420,000;
 - d. 2 years' service pay Ksh.35,000;



- e. Costs of the suit.
3. In response, the respondent's case is that the appellant was employed as a truck driver assigned to prime mover registration no. KBU 964M plying Mombasa – Kampala conveying clinker. While on duty on 8 January 2020, the appellant diverted from an approved voyage plan and diverted from the main road to an interior marram road a distance of approximately 10 Kilometers in complete and total violation of company policy and safety instructions. The appellant made the diversion without the employer's authority and endangered his well-being and that of the employer's property by diverting from the voyage plan and carrying unauthorized passengers in the process in gross violation of the company safety policy. The respondent gave the appellant leave pending further investigations from 15 January 2020 and was expected to show up for the disciplinary hearing on 8 February 2020 but he failed to turn up. Failure to attend a disciplinary hearing on 8 February 2020 was in breach of duty which necessitated the issuance of notice terminating employment under Section 44 of the Employment Act. The respondent denied any liability or the claims made.
 4. In the judgment of the trial court delivered on 29 September 2021, the trial court dismissed the appellant's case on the basis that the respondent complied with the provisions of Section 41 of the Employment Act hence there was no unfair termination of employment, notice pay was not justified and the claim for service pay and salary due for January were already addressed.
 5. Dissatisfied with the judgment, the appellant's appeal is on eight (8) grounds that the trial court failed to take into account the evidence before it and that there was no invitation to a disciplinary on 15 January 2020 or prove that the appellant refused to attend any disciplinary hearing on 8 February 2020 as alleged. The appellant's case is that no disciplinary minutes were filed by the respondent to confirm that there were disciplinary proceedings. This lapse resulted in the breach of Sections 41 and 45 of the Employment Act leading to unfair termination of employment and the appeal should be allowed as prayed.
 6. Both parties attended and agreed to address the appeal by way of written submissions.
 7. The appellant submitted that termination of employment was without due process. Upon the appellant taking annual leave on 15 January 2020 he resumed duty on 8 February 2020 and no invitation to attend a disciplinary hearing was issued. The allegations that employment was terminated due to the appellant failing to attend the disciplinary hearing as directed by the employer had no legal basis or factual. Section 41 of the Employment Act requires the employer to issue the employee with notice to attend a disciplinary hearing which was not the case here. In the case of Wanyera v Central Isiolo Investment Limited Appeal E002 of 2023 and in the case of George Musabali v G4S Security Services Limited [2016] eKLR the court held that where the employer contravenes the provisions of Section 41 of the Employment Act, termination of employment is unfair. The claims made by the appellant should be allowed with costs.
 8. The respondent submitted that the appellant was terminated from his employment on 10 February 2020 for breach of safety policy and diverting from the voyage plan of the employer while driving a prime mover and trailer in his custody. Through a show cause letter dated 15 January 2020, the appellant was invited to attend a disciplinary hearing and sent on annual leave to allow for investigations. The trial court analyzed the evidence and made a proper finding that there was due process and termination of employment justified.
 9. In the case of Mary Kitsao Ngowa & 36 others v Krystalline Limited [2015] eKLR the court held that termination of employment is justified where there are valid and genuine reasons. In the case of Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR the court held that when



the employee is given notice to attend a disciplinary hearing and fails to do so, he cannot blame the employer.

10. In this case, there were justified grounds leading to termination of employment and hence, notice pay and compensation are not due. The salary for January 2020 was paid in full and the claim for service pay is not justified since the respondent remitted all statutory dues.

Determination

11. This is a first appeal. The court must review the entire record, analyse the evidence and make its conclusions. However, take into account that the trial court had the opportunity to hear the parties in evidence.
12. The heart of the appeal is the question of the motions of the disciplinary hearing leading to termination of employment.
13. On his part, the appellant asserts that on 15 January 2020, he was sent on his annual leave and was due to resume work on 8 February 2020 when he was issued with a notice terminating his employment. He cleared and was issued with a Certificate of Service on 12 February 2020 indicating that he had resigned from his employment.
14. On its part, the respondent asserts that the appellant was issued with a notice to show cause on 15 January 2020 and sent on annual leave to allow for investigations. He was invited to attend a disciplinary hearing on 8 February 2020 but he failed to turn up leading to termination of employment. The termination of employment was justified since he had committed acts in breach of the employer's policy by diverting from the voyage plan and carrying unauthorized passengers as well as failing to attend the disciplinary hearing.
15. The leave form filed by the appellant is to the effect that his annual leave was unconditional. It was to run from 15 January 2020 to 7 February 2020 and the expected reporting date was 8 February 2020.
16. There is approval by the respondent through its officers, Hassan for the head of the department and Victor for human resources both on 15 January 2020.
17. The appellant filed his Certificate of Service issued by the respondent. The following issues emerge;
 - a. Date of separation, 7 February 2020;
 - b. Reasons for separation, resignation.
 - c. Date of issue, 12 February 2020.
18. In the bundle filed by the respondent, they attached a letter dated 15 January 2020 for an annual leave disciplinary hearing. This was the notice sending the appellant on compulsory leave and the allegations made against him outlined. The notice also indicated that;

You are advised to report back on 8th February 2020 to the human resources office at exactly 1000hrs for Disciplinary Toolbox hearing failure to which a decision will be made with or without you by the committee.

There is a handwritten note that "Sign leave form as attached."

There are obvious disparities.



19. The notice dated 15 January 2020 and a disciplinary hearing is not received by the appellant. His acknowledgement of the compulsory leave is regulated under Section 28 of the [Employment Act](#) while notice to attend the disciplinary hearing is regulated under Section 41 thereof.
20. Whereas taking of annual leave is not contested, notice to attend the disciplinary hearing is contested. Under the provisions of Section 41 of the [Employment Act](#), the employer should issue notice to the employee and also secure his right to attend with another employer of his choice. The notice filed by the respondent dated 15 January 2020 does not meet this threshold;
 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. ...

Even in a case where the appellant was issued with this notice, which fact is contested, the respondent did not comply with the mandatory provisions thereof. In the case of *Five Forty Aviation Limited v Erwan Lanoe* [2019] eKLR the Court of Appeal held that before termination of employment, the employer is bound under the mandatory provisions of Section 41 of the Act. To urge the court that the employee failed to attend the disciplinary hearing without proving that the notice due under Section 41 of the [Employment Act](#) was issued is unfair labour practices. This position is reiterated in the case of *Oyombe v Eco Bank Limited* [2022] KECA 540 (KLR) where the court outlined the various elements to be addressed by the employer before termination of employment.
21. The other disparity that arises from the records filed by the appellant and the respondent is the Certificate of Service. This is a record issued under the provisions of Section 51 of the Employment Act. The employer is required to confirm the date when employment commenced and ceased. The contents thereof implicate other procedures and benefits due to the employee and hence, any wrong information therefrom, the employer commits an employment offence under Section 51(4) of the [Employment Act](#);
 - (4) An employer who wilfully or by neglect fails to give an employee a certificate of service in accordance with subsection (1), or who in a certificate of service includes a statement which he knows to be false, commits an offence and shall on conviction be liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding six months or to both.

Giving false information relating to employment particulars is punishable.
22. In this case, the annual leave sheet signed by the appellant required him to resume work on 8 February 2020. The Certificate of Service indicates that employment ceased on 7 February 2020 a day before the alleged scheduled disciplinary hearing and date of return to work.
23. The other issue noted under the Certificate of Service is the reasons leading to termination of employment. The respondent as the employer indicated there was a resignation. The response is that the appellant engaged in gross misconduct leading to a notice of summary dismissal issued on 10 February 2020.
24. These disparities noted, the trial court erred in not going through the record before it and making a finding that there was a lapse in the due process resulting in unlawful termination of employment.



There is no letter submitted to demonstrate any resignation on the part of the appellant. Such a record does not exist.

A correct Certificate of Service should be issued

25. In the case of *Power Group Technologies Ltd v Kibugi* [2021] KECA 62 (KLR) the court held that even where the employer has a valid and justified cause to terminate employment, the employee must be taken through the due process of the law. The employee must be invited to attend before the employer in the presence of another employee of his choice to allow him to make his representation. Otherwise, to proceed and terminate employment results in unfair termination of employment. In the case of *Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others* [2019] eKLR the court held that where there is no due process, the employee is entitled to notice pay and compensation.

The claim for notice pay is justified at Ksh.35, 000.

26. On the compensation claim, in assessing what is payable, the court is required to look at the work records filed by the employer under Section 45 of the *Employment Act*. Save for want of due process, the appellant has not contested that on 8 January 2020 while driving a prime mover registration Number KBU 964M plying Mombasa – Kampala conveying clinker he diverted from an approved voyage plan and diverted from the road for about 10 kilometres while carrying unauthorized passenger hence in breach of the policy and violation of safety instructions and placing the property to the respondent at risk. He did not address such a matter.

27. The violations of Sections 41 and 51(4) of the *Employment Act* on the part of the respondent, taken into account, the gross misconduct noted, the court finds an award of damages for three (3) justified. On the wage of Ksh., 35,000 compensation is awarded at Ksh. 105,000.

28. On the claim for service pay, on the evidence that the appellant was registered with NSSF and NHIF, the respondent complied with the provisions of Section 35 (6) of the *Employment Act*.

There is evidence that the salary for January 2020 was paid in full.

29. On costs, the appeal is partially successful and the appellant is entitled to 50% of his costs for this appeal. For the lower court, each party is to bear its costs.

According, the judgement in Mombasa Cause No.244 of 2020 is hereby reviewed in the following terms;

- a. A declaration that employment was terminated unlawfully and unfairly;
- b. Compensation awarded at Ksh.105,000;
- c. Notice pay Ksh.35,000;
- d. 50% costs of the Appeal and for the trial court, each party bears its costs.
- e. The respondent to issue the appellant with a correct Certificate of Service.

DELIVERED IN OPEN COURT AT MOMBASA ON THIS 11 DAY OF OCTOBER 2024.

M. MBARŪ

JUDGE

