



Mbwika v Samrudha Resources Kenya Limited (Employment and Labour Relations Cause E086 of 2021) [2024] KEELRC 2820 (KLR) (8 November 2024) (Judgment)

Neutral citation: [2024] KEELRC 2820 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E086 OF 2021
AN MWAURE, J
NOVEMBER 8, 2024**

BETWEEN

LAZARUS KILONZO MBWIKA CLAIMANT

AND

SAMRUDHA RESOURCES KENYA LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed a Statement of Claim dated 10th October, 2020.

Claimant's case

2. The Claimant avers he was employed by the Respondent on permanent basis earning a monthly salary of Kshs.11,200/=.
3. The Claimant avers that he was a diligent and committed employee to the Respondent as he discharged his duties assigned to him.
4. The Claimant avers that on 29th February 2019, he was involved in a work-related injury at the Respondent's establishment where a battery exploded, resulting in an injury to his left eye.
5. The Claimant avers that on diagnosis, it was found out that he had LE Traumatic vitreous haemorrhage, LE Choroidal rupture with macula scar, and LE Rhegmatogenous retinal detachment.
6. The Claimant further avers the outcome of the diagnosis was that his left eye remained at Hand Movement (HM) due to the extensive scarring at the macula caused by the traumatic choroidal rupture.
7. The Claimant avers that the Respondent failed to report the accident to the Director of Occupational Safety and Health which is a requirement under Section 21 of the *Occupational Safety and Health Act* (OSHA) which mandated employers to report any accident that happens to their workplace within 7 days from the date of occurrence.



8. The Claimant avers that he reported the work-related accident to the Ministry of Labour, who issued the Respondent with a letter and a DOSH form requiring them to formally report the accident.
9. The Claimant avers that he was summarily dismissed by the respondent for reporting the accident to the Ministry of Labour.
10. The Claimant avers that his employment was unfairly terminated as the respondent did not follow the laid down procedure for termination provided under the Employment Laws or give him the opportunity to be heard.
11. The Claimant avers that he was not compensated for the work-related injury considering the fact he is still going for medical check-up due to the gravity of the injury.
12. The Claimant prays for:
 - a. A declaration that the conduct of the Respondent in terminating the Claimant's employment amounted to a violation of the Claimant's constitutional rights and particularly Article 41(1) of *the Constitution* of Kenya
 - b. A declaration that the termination of the Claimant's Employment was wrongful, unfair and/or unlawful and contrary to section 45 of the *Employment Act*
 - c. A declaration that the Claimant is entitled to be compensated for:
 - i. Violation of his constitutional rights as envisaged under Article 23(3) and 41 (1) of *the Constitution*
 - ii. Violation of his employment, legal and contractual rights
 - iii. Medical bills that he incurred; and
 - iv. Injury to the Claimant on account of the Respondent's breaches.
 - d. An order that the Claimant be awarded damages for wrongful termination
 - e. Interest on (d) above at commercial rates
 - f. Costs of this suit
 - g. Any other relief that the Honourable Court may deem just to grant.
13. The Respondent did not enter appearance even after being served on several occasions.

Claimant's case

14. The claimant (CW1) adopted his witness statement dated 10th October as his evidence in chief together with his exhibits marked as exhibits 1 to 6 respectively.
15. CW1 testified after the accident, he got treated and reported to the health and safety office.
16. CW1 testified that he was told to go home and the Respondent did not call him back or call for a disciplinary hearing.
17. CW1 testified that he was not unable to go on leave from 2018 to 2020 and he was not issued a certificate of service.
18. CW1 testified that he prays for his dues as per his claim.



Claimant's submissions

19. The Claimant submitted that his termination was both unfair and unlawful because he did not receive any notice of termination, nor was he issued a show cause letter or invited to a disciplinary hearing. He also submitted that he did not receive documentation regarding his termination or a certificate of service. According to the Claimant, his termination was a result of injuries sustained at work, rather than any misconduct on his part.
20. The Claimant submitted that the Respondent did not issue any reason for his termination.
21. The Claimant relied on Sections 41(1) and 43(1) & 2 of the *Employment Act* to provide for procedural fairness and substantive justification. The Claimant also relied on section 45(1) to (4) of the *Employment Act* which provides for unfair termination.
22. The Claimant submitted that although the Respondent was served with the pleadings, it failed to enter appearance and failed to file a defence and cited the case of Job Onyikwa V Expressions Flora Limited [2015] eKLR where the court held that the dismissal was procedurally and substantively unfair as there was no evidence to prove the same from the respondent.
23. The Claimant submitted that he is entitled to the relief sought in the Statement of Claim citing the cases of Elizabeth Kioko V Beyene Haire Warde & another [2018] eKLR and Boniface Ndwiga Mbogo V Jamleck Mwaniki [2016] eKLR in support of that proposition.
24. The Claimant submitted that costs follow the event in accordance with Section 27 of the *Civil Procedure Act* and relied on the case of Peter Muriuki Ngure V Equity Bank (K) Ltd [2018] eKLR in support of that proposition.

Analysis and determination

25. The main issue for determination is whether the claims before this Honourable Court is merited.
26. It is trite law that whoever alleges must prove as per Sections 107 and 108 of the *Evidence Act* Chapter 80 Laws of Kenya. In Rift Valley Railways (K) Limited V Kiya Kalakhe Boru [2015] KECA 900 (KLR) the Court of Appeal held that it is settled in law that who alleges must prove and this burden only shifts after such 'proving'.
27. In this instant case, the Claimant filed this suit and served the Respondent who failed to enter appearance and filed a defence. The Claimant was injured in the line of work and the Respondent failed to report the matter in accordance with Section 21 of the *Occupational Safety and Health Act* Chapter 263A Laws of Kenya provides as follows:
 1. An employer or self-employed person shall notify the area occupational safety and health officer of any accident, dangerous occurrence, or occupational poisoning which has occurred at the workplace.
 2. Where an accident in a workplace causes the death of a person therein, the employer or self-employed person shall—
 - (a) inform the area occupational safety and health officer within twenty-four hours of the occurrence of the accident; and
 - (b) send a written notice of the accident in the prescribed form to the area occupational safety and health officer within seven days of the occurrence of the accident.



3. Where an accident in a workplace causes non-fatal injuries to a person therein, the employer shall send to the area occupational safety and health officer, a written notice of the accident in the prescribed form within seven days of the occurrence of the accident.
 4. In the case of death due to a workplace accident, non-fatal injuries arising from a workplace accident, an occupational disease or a dangerous occurrence at the workplace, involving a self-employed person incapable of submitting notification, such notification shall be submitted to the area occupational safety and health officer by the occupier.
 5. An employer shall cause all workplace injuries to be entered in the general register specified in Section 122.
 6. Where a person injured in an accident dies after the accident is notified under this section, the employer shall send a notice of the death in writing, to the area occupational safety and health officer as soon as he is informed of the death.
 7. Where an accident to which this section applies occurs to an employee and the occupier of the workplace is not the employer of the person injured or killed, the employer of that employee, shall immediately report the accident to the occupier or, the Director and the area occupational safety and health officer.
 8. The provisions of this section shall extend and apply to the dangerous occurrences specified in the First Schedule.
 9. The Cabinet Secretary may, on the advice of the Council, by notice in the Gazette amend the First Schedule.
 10. A person who fails to notify an accident or a dangerous occurrence as required under this section commits an offence and shall on conviction be liable to a fine not exceeding two hundred thousand shillings or to imprisonment for a term not exceeding six months or to both.
28. The Respondent was required to report the accident but failed to do so as it is provided in the law.
29. The Respondent did not follow due process and failed to give a valid reason for terminating the Claimant. The court is supported by the case of *Mary Chemweno V Kenya Pipeline Company Limited (2017) eKLR* the court explained what amounts to wrongful, unfair, and unlawful dismissal or termination.

In the above case the court held: -

“Invariably therefore before an employer can exercise their rights to terminate the contract of an employee there must be valid reason or reasons that touch on grounds of misconduct, poor performance or physical incapacity.

Once this is established the employee must be issued with a notice and given a chance to be heard and then a sanction decided by the respondent based on the representation made by the affected employee.”

30. Persuaded by the pleadings and precedents, the court holds the respondent terminated the claimant unfairly and he is awarded the prayers sought above as follows:-
- a. Prayer b is proved and claimant is awarded five (5) months equivalent of his salary as compensation for unfair termination amounting to Kshs.56,000/=.



- b. The constitutional violations are not proved but Claimant is entitled to compensation for injuries suffered. The same to be determined by Directorate of Occupational Safety and Health services within forty-five (45) days.
 - c. Proven medical expenses to be paid.
 - d. Costs to be paid to the Claimant.
 - e. Interest on all the above at 14% per annum from date of judgment till full payment.
31. Mention on 15th January 2025 to confirm full settlement after directions of the director of Occupational Safety and Health.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 8TH DAY OF NOVEMBER 2024.

ANNA NGIBUINI MWAURE

JUDGE

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.

ANNA NGIBUINI MWAURE

JUDGE

