



**Kamande v H Young & Company [East Africa] Limited (Cause 902 of 2017)
[2024] KEELRC 13395 (KLR) (13 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13395 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 902 OF 2017
K OCHARO, J
DECEMBER 13, 2024**

BETWEEN

ELIUD KAMANDE CLAIMANT

AND

H YOUNG & COMPANY [EAST AFRICA] LIMITED RESPONDENT

JUDGMENT

1. Stating that at all material times he was an employee of the Respondent and charging that the latter terminated his employment unfairly, the Claimant through a Memorandum of Claim dated 27th April 2016, sued the former seeking the following reliefs and orders:
 - a. Damages for unlawful termination of employment.
 - b. Issuance of a certificate of service by the Respondent.
 - c. Gratuity for the period worked at the rate of 15% of the annual salary.
 - d. Interest and costs.
2. The Respondent entered appearance and subsequently filed a Memorandum of Response dated 28th June 2017. It denied the Claimant's claim and entitlement to the reliefs sought.
3. When the matter came up for the hearing of the Parties' respective cases, they adopted the contents of their witness statements filed herein as part of their evidence in chief, and the documents filed under their list of documents as their documentary evidence.

The Claimant's Case

4. It was the Claimant's case that he first came into the employment of the Respondent in March 2014, as a Truck Mixer Driver.



5. On 17th December 2016, the Respondent terminated his employment unilaterally without, any prior warning, justifiable cause and in complete disregard of procedural fairness.
6. Prior to the termination of his employment, he wasn't invited to any disciplinary hearing or accorded an opportunity to defend himself against any allegations that the Respondent might have had against him.
7. At the time of separation, a monthly gross salary was KSHS. 48, 246.
8. Cross examined by the Respondent's Counsel, the Claimant stated his payslip for November 2016, is a testament to his salary, KSHS. 48,246. The amount was inclusive of overtime earned during the relevant period of the payslip. Excluding overtime, his basic pay was KSHS. 37, 131, plus house allowance of KSHS. 7,428, therefore a gross amount of KSHS. 44,557.
9. He testified further that his employment was terminated by the Respondent through a letter dated 17th December 2016. The letter did set out the reason for termination, siphoning fuel from Motor vehicle KAK 220 Q, which he had been allocated to drive during the material time.
10. He further testified that Respondent's assertion that its Human Resource Manager called him to a meeting whereby he admitted to having committed the infraction wasn't true.
11. At the termination of his employment, his salary for the days worked in December 2017 was not paid. Further, he was not paid any terminal dues.
12. In his evidence under re-examination, the Claimant denied that he ever siphoned fuel from the Respondent's motor vehicle.

Respondent's Case

13. At the hearing, the Respondent called one witness, Maurice Kongo its Administration Manager to testify in support of its case. The witness urged the Court to adopt the contents of his witness statement as his evidence in chief and admit the documents that the Respondent filed herein as its documentary evidence. They were so adopted and admitted, respectively.
14. He stated that at all material times, the Claimant was in the employment of the Respondent as a truck mixer driver, having been employed on 12th March 2014 on a basic salary of KSHS. 31,252, plus a house allowance of KSHS. 6250, and a travelling allowance of KSHS. 1500.
15. On 16th December 2016, the Respondent was made aware that one of its trucks, registration No. KAK 220Q was seen alongside the road with the driver siphoning fuel from it and selling the same to people. Pressed for an explanation, the Claimant admitted the misconduct.
16. Subsequently, by Claimant was called for a disciplinary hearing where he admitted the misconduct. As a result, the Respondent took a decision to summarily dismiss him from employment. He was issued with a summary dismissal letter dated 17th December 2016.
17. After the decision, the Respondent computed the Claimant's terminal benefits inclusive of the days worked in December 2016 and paid him a sum of KSHS. 37, 131.00. It also calculated his earned but unutilised leave days compensation at KSHS. 14,545.
18. Cross examined by Counsel for the Claimant, the witness testified that the Claimant was dismissed for stealing the Respondent's fuel. Though the witness didn't personally witness the stealing, he could tell from the pictures taken of the incident that the Claimant was involved. The Claimant admitted that he had misconducted himself by siphoning the fuel, and sought forgiveness.



19. The Claimant confirmed the authenticity of the pictures concerning the incident. Cross examined further regarding the photos, the witness stated that they neither showed the number of the motor vehicle nor the Claimant's face.
20. He asserted that he issued a show cause letter to the Claimant, and verbally invited him for a disciplinary hearing.
21. In his evidence under re-examination, the witness testified that, the fact that, the Claimant admitted the accusation against him and, there were photos supporting the accusation, informed the Respondent's decision to dismiss him from employment.

The Claimant's Submissions

22. The Claimant distilled the following issues for determination thus;
 - i. Whether the termination of the Claimant's employment was unlawful and or unfair.
 - ii. Whether the reliefs sought should be granted.
23. On the first issue, the Claimant submitted that in order to determine whether or not an employee's employment was fair, the Court must consider the procedure adopted by the employer leading to the decision to terminate and the reason[s] for the termination. This is a statutory requirement under section 43 and 47 [5] of the *Employment Act*.
24. It was argued that the Respondent failed to discharge its burden under Section 43 of the *Employment Act*. It relied on social media pictures to conclude that the Claimant was guilty of gross misconduct. The Respondent didn't place forth sufficient evidence linking the Claimant to the alleged theft. The photos that it relied upon didn't show the Registration number of the motor vehicle or the face of the Claimant. The Respondent did not present any witness who witnessed the alleged siphoning. In these circumstances, the Respondent acted unreasonably to dismiss the Claimant.
25. On procedural fairness, the Claimant testified that Section 45 of the *Employment Act* commands that no employer shall terminate an employee's employment unfairly. Section 45[2] sets the foundation for adoption of fair procedure in matters termination of an employee's employment or summary dismissal of an employee from employment.
26. Section 41 of the *Employment Act* provides a mandatory procedure to be adhered to by an employer contemplating termination of an employee's employment. Non-adherence to the procedure legally renders the termination or dismissal unfair. To support this submission, reliance was placed on the case of Postal Corporation of Kenya vs- Tanui [2019] eKLR. The Respondent didn't adhere to the statutory procedure. It didn't accord the Claimant an opportunity to be heard.
27. On the reliefs sought, the Claimant submitted that he is entitled to notice pay under section 36 of the Act, as his employment was terminated without notice as contemplated under section 35 of the Act.
28. Under section 35[5], the Claimant is entitled to service pay for every year worked. Further, having proved that he was unfairly dismissed, he should be availed the compensatory relief contemplated under section 49[1][c] of the *Employment Act*, twelve months' gross salary.

Respondent's Submissions.

29. The Respondent maintained the issues identified by the Claimant in his submissions as the issues for determination in this matter. It submitted that fairness of termination of an employee's employment encompasses the aspects of procedural fairness and substantive justification. Under section 45 of the



- Employment Act, termination of employment is unfair if the statutory procedure contemplated under the Act isn't adhered to and or if the reason[s] for the termination isn't fair and valid. Reliance was placed on the case of Pius Machafu Isundu v Lavington Security Guards Limited [2017] eKLR.
30. It was further submitted that under section 47[5], the employee bears the burden of proving that an unfair dismissal or wrongful termination occurred. The employer needs only to prove the reasons for termination. To support this point reliance was placed on the Court of Appeal decision in the Pius Machafu case[supra].
 31. The Claimant was accused of stealing fuel from the Respondent's vehicle, an act which was criminal in nature. Under section 44 of the Employment Act, theft of an employer's property by an employee, will rightfully attract a summary dismissal against the employee. As such, the Respondent had a valid and fair reason to terminate the Claimant's employment. To buttress this submission, the Respondent urged this court to be persuaded by the decision in Naqvi Syed Qmar versus Paramount Bank Limited & another [2015] eKLR.
 32. The Court should note that the Claimant was caught on camera siphoning the fuel. Any reasonable employer in the circumstances of a matter like are in instant matter, could have done what the Respondent did, dismiss the employee involved.
 33. On procedural fairness, Counsel submitted that in compliance with the dictates of section 41 of the Employment Act, the Respondent invited the Claimant for a disciplinary hearing in which he admitted to the fuel siphoning. Upon the admission, the Respondent summarily dismissed him from employment.
 34. On the reliefs sought, it was submitted the Claimant having failed to make a case that the dismissal was unfair, and the Respondent having managed to demonstrate that it fairly and legally summarily dismissed him, the Claimant cannot be availed notice pay, considering the provisions of section 44 of the Act.
 35. Equally the compensatory relief sought pursuant to the provisions of section 49[1][c] cannot no be available to him.
 36. The Respondent urged the Court to be cautious not to unjustifiably enrich the Claimant by making an award that he doesn't deserve in the circumstances of this matter.
 37. The payment of gratuity by an employee is gratis. It is on the basis of the practice of an employer or agreed under the contract. To support this point, the case of Bamburi Cement Limited vs- William Kilonzi[2016] eKLR was cited. The Claimant didn't establish the contractual or practice basis for his claim for gratuity.
 38. The Claimant was procedurally and justifiably summarily dismissed from employment.

Analysis and Determination.

39. From the pleadings by the parties herein, the evidence placed before this Court and their Counsels' respective submissions, the following issues present themselves for determination;
 - [a]. Was the termination of the Claimant procedurally and substantively fair?
 - [b]. Is the Claimant entitled to the reliefs sought or any of them?



Was the termination of the Claimant's employment procedurally and substantively fair?

40. Section 41 of the *Employment Act*, 2007, supplies the statutory procedure that must be followed whenever the employer contemplates terminating an employee's employment or summarily dismissing an employee from employment. The duty to prove that the dismissal was effected in conformity with the procedure lay on the Respondent.
41. The provision requires the employer to make known to the employee the grounds stirring the contemplation, allow the employee to make representations on the grounds, and consider the representations before taking a decision on the grounds. I have carefully considered the evidence presented by the Respondent and hesitate not to conclude that no part of it was geared towards enabling the Respondent to discharge the burden of proving procedural fairness.
42. Its witness did testify under cross examination that he issued the Claimant with a show cause notice, and invited him orally for a disciplinary hearing. I have gone through the documents presented in evidence by the Respondent none of them appears to be a show cause letter/notice. I hold that the witness was not candid to this court when he testified that he issued a show cause notice.
43. The Respondent's witness's assertion that he orally invited the Claimant for a disciplinary hearing was in my view, a bald assertion. The witness deliberately mentions not when the invitation was extended and or the date when the alleged disciplinary hearing took place. There isn't any documentary evidence for instance in the form of minutes to demonstrate that there was a disciplinary hearing.
44. One of the components of the procedure contemplated in section 41, is notification to the affected employee, the grounds the basis for the employer's contemplated action. Per the provision, the notification shall be in writing. The Respondent didn't present any written notification as evidence.
45. I am not persuaded by the Respondent's position and its Counsel's submission that the Claimant was invited to a disciplinary hearing where he admitted the accusation[s] that was levelled against him. As a result, the summary dismissal against the Claimant was wrongful as it was procedurally unfair.
46. I now turn to consider whether the summary dismissal was substantively fair. Section 43 of the *Employment Act* places a duty upon the employer in a dispute regarding the termination of an employee's employment or summary dismissal of an employee from his or her employment to prove the reason[s] for the termination or summary dismissal.
47. However, it is worth noting that the legal burden placed on the employer under the stated provision is interwoven tightly with another under section 45[2] of the Act, to prove that the reason[s] for the termination or summary dismissal was valid and fair. A failure to discharge any or both of the burdens renders the termination or summary dismissal unfair.
48. A valid and fair reason could be one that will legitimately form a basis for the termination or summary dismissal. It must genuinely exist. In the instant matter, the summary dismissal letter dated 17th December 2016, on the reason for dismissal stated:

“On Friday 16th December 2016, you were caught stealing fuel via pictures on social media on vehicle KAK 220Q. Additionally, you accepted the allegations.....”
49. In my view, the Respondent's witness's evidence was sketchy on the reason for the termination. The Claimant denied having attended any meeting wherein he admitted the theft. Given this, a reasonable employer asserting as the Respondent was, could be expected to place forth evidence to demonstrate that indeed there was the meeting and the admission. The Respondent didn't. When was the alleged



meeting held? On what road was the vehicle at the time of the alleged incident? are pivotal questions that remained unanswered by the Respondent.

50. In his evidence under cross examination the witness admitted that from the photos that the Respondent relied on to dismiss the Claimant from employment, one cannot tell the number of the registration numbers of the motor vehicle or identify his face. Employing the reasonableness test espoused in the British Leyland UK Limited vs- Swift [1981] IRLR, cited in the case of Gladys Boss Shollei & Another [2014] eKLR, I hold that no reasonable employer could dismiss an employee in the circumstances of the alleged Facebook pictures.
51. By reason of the premises, I am convinced that the Respondent didn't prove that the reason for the summary dismissal was valid and fair. As a result, I conclude that the summary dismissal was without substantive justification.

Is the Claimant entitled to the reliefs sought or any of them?

52. Section 49[1][c] of the *Employment Act* bestows this Court with the authority to grant a compensatory relief in claims for unfair and wrongful termination of an employee's employment or dismissal of an employee from employment. The award is discretionary, the extent thereof to. All dependent on the circumstances of each case. I have considered the circumstances under which the Respondent got rid of the Claimant, which in my view pass for an unfair labour practice, the deviation from what the law expected of it, and the length of time he was in the Respondent's employment, and conclude that he is entitled to the compensatory relief under the stated provision and to an extent of 4 months' gross salary.
53. Section 51 of the *Employment Act* places an obligation on the employer to issue his or her employee whose employment has come to termination with a certificate of service. It matters not under what circumstances it so came. The Respondent admitted that it has not released the certificate to the Claimant. I direct that the same be released to him within 30 days of the date of this Judgement.
54. The Claimant sought for gratuity for the period he worked for the Respondent. As correctly submitted by Counsel for the Respondent, gratuity in its nature is a contractual benefit or one given as a matter of practice within the workplace. Unlike service pay, it isn't statutory. See also the case of Bamburi Cement Limited vs-William Kilonzi[2016]eKLR. The Claimant didn't present any evidence to the effect that under his employment contract he was entitled to gratuity or that at the Respondent's, he was entitled to the same out of a practice obtaining. I decline to grant the relief.
55. In the upshot, I enter judgment in favour of the Claimant in the following terms.
- I. A declaration that the dismissal of the Claimant from employment was both procedurally and substantively unfair.
 - II. Compensation for unfair termination..... KShs. 178,180.
 - III. Certificate of service to issue within 30 days of today.
 - IV. Costs of this suit.
 - V. Interest at Court rates on [ii above from the date of this judgment, till full payment.

READ SIGNED AND DELIVERED THIS 13TH DAY OF DECEMBER 2024.

OCHARO KEBIRA

JUDGE.



In presence of

..... for the Claimant.

.....for the Respondent.

