



**Badokufa v Unicool International (Cause 1581 of 2017)  
[2024] KEELRC 13416 (KLR) (13 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13416 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1581 OF 2017  
K OCHARO, J  
DECEMBER 13, 2024**

**BETWEEN**

**RASTUS ESIGURI BADOKUFA ..... CLAIMANT**

**AND**

**UNICOOL INTERNATIONAL ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. Under a letter of appointment dated 2<sup>nd</sup> June 2013 the Claimant came into the employment of the Respondent as an Accountant. After successfully serving a probationary period in the first 90 calendar days, he was confirmed into employment vide the Respondent's letter dated 18<sup>th</sup> September, 2013. After about thirteen months of service to his employer, the Respondent, the employee-employer relationship between them encountered headwinds. His employment was terminated on 12<sup>th</sup> August 2014.
2. Charging that the termination was unfair, the Claimant sued the Respondent herein through a Memorandum of Claim dated 10<sup>th</sup> August, 2017 and amended on 31<sup>st</sup> August 2017 seeking: -
  - a. A declaration that the termination of the Claimant's employment without pay was unfair and unlawful,
  - b. The Respondent be and is hereby ordered to pay the Claimant withheld salary from January 2017 to date sum of 240,000 immediately.
  - c. The prolonged suspension of the Claimant without pay amounted to constructive dismissal hence unfair and unlawful.
  - d. A declaration that the Respondent's letter dated 12<sup>th</sup> August, 2014 terminating the Claimant's employment was unlawful.



- e. The Respondent be ordered to reinstate the Claimant and treat him in all respects as if his employment had never been terminated; or
  - f. The Respondent re-engage the Claimant in work comparable to that which the Claimant was employed in prior to his dismissal, or other reasonably suitable work, at the same wage.
- In the alternative to the demand for reinstatement, payment of;
- I. Terminal dues enumerated under paragraph 10 of the amended Memorandum of Claim,
  - II. Interest on sums in paragraph 10[i]-[v] at Court rates.
  - III. The Respondent do issue the Claimant with a certificate of costs.
  - IV. The Respondent be ordered to pay costs of this suit.
3. In response to the Memorandum of Claim, the Respondent filed a Response dated 16<sup>th</sup> October 2017, denying the Claimant’s cause of action against it and entitlement to the reliefs sought.

**Claimant’s case**

- 4. At the hearing, the Claimant adopted his witness statement herein filed as his evidence in chief. The Claimant stated that he was first employed by the Respondent as an Accountant on 2<sup>nd</sup> June 2013, at a monthly salary of KSHS. 100,000.
- 5. Without any reason on 12<sup>th</sup> August, 2014 through a letter of the even date, the Respondent terminated his employment. In the termination letter the Respondent expressed that it was to pay him salary, one month’s salary in lieu of notice, and compensation for unutilized leave days. However, without any reasonable and justifiable excuse, the Respondent ignored and or neglected to pay.
- 6. The Respondent didn’t undertake any disciplinary hearing against him. He was not allowed an opportunity to defend himself against any accusations that the Respondent might have had against him.
- 7. Following the Respondent’s actions and more specifically terminating his employment without according him a hearing caused him immense mental anguish.
- 8. Cross examined by Counsel for the Respondent, the Claimant testified his letter of appointment did set out his responsibilities and duties. He was supposed to be in charge of all accounting and financial management. This included making proper VAT returns.
- 9. He further testified that the termination letter didn’t give reasons for the termination of his employment. The reason set out therein, “loss of confidence of ability to work” could not be a sufficient reason for termination of employment without further substantiation. The Respondent never gave him any warning on the alleged inability to work. The warning letters dated 31<sup>st</sup> July 2013, and 1<sup>st</sup> August 2014 were not served on him.
- 10. He was in charge of debtors’ ledger, and Ndola energy project in Zambia. The Respondent’s allegation that it wasn’t able to recover eleven million from this project was not true. There was an issue with the charges raised. The problem wasn’t a result of any inability on his part to prepare proper documents.
- 11. The Respondent didn’t pay him for the days he worked in August 2014.
- 12. He testified that he was discriminated on account of age. At the time of the termination of his employment, he was 62 years. At that time, he was earning more than the Managing Director.



## **Respondent's case**

13. The Respondent presented one witness John Omare, its external auditor to testify on its behalf. The witness testified that the Respondent contracted him in 2015 to audit its accounts for the period 2013-2014. Subsequently, he gave them a report/opinion dated 22<sup>nd</sup> December 2021. The report was filed before this Court on 17<sup>th</sup> January 2022.
14. The audit revealed that statutory taxes were not being computed and remitted to the relevant Government Agencies. Further, reconciliation of accounts wasn't being done. At one instance, this caused the Respondent company to lose a lot of money.
15. The Responsibility of doing accounts is ordinarily the Directors. However, normally it is delegated to the accountant who is the key person to prepare and maintain accounts records.
16. The witness testified further that in the process of the audit, he came across two warning letters dated 13<sup>th</sup> July 2013 and 1<sup>st</sup> August 2014 that were addressed to the Claimant.
17. Cross examined by the Claimant's Counsel, the witness stated that he was appointed by the Respondent's CEO, to conduct the audit. The accounts documents to enable the exercise were released to him by the Accountant who was then in office but not the Claimant.
18. Bank statements for reconciliation purposes could only be given to the owners of the account[s] by the Bank[s]. They couldn't be released to a third party without the authority of the owner[s]. The Claimant wasn't an authorized signatory to the Respondents' accounts.
19. The witness admitted that from where he stood, he wasn't able to tell whether the Claimant was at all material times given documents to enable him undertake reconciliations. Further, whether the two warning letters were ever served on him.

## **Analysis and Determination.**

20. I have carefully considered the pleadings, oral and documentary evidence, and the submissions filed, by both parties and the following issues emerge for determination: -
  - a. Was the summary dismissal against the Claimant unfair?
  - b. Was the Claimant discriminated against?
  - c. Is the Claimant entitled to the reliefs sought in his Memorandum of Claim?

### **Was the Summary dismissal against the Claimant unfair?**

21. Inarguably, the employer-employee relationship between the Claimant and the Respondent was brought to an end by the latter, through its letter dated 12<sup>th</sup> August, 2014. His services were terminated effective the date of the letter. Under clause 8[b] of the Claimant's contract of employment, his employment was terminable by a 30 calendar days' notice. No doubt, the termination occurred in the manner described under section 44[1] of the *Employment Act*, i.e. without the contractual notice. As such, the Claimant was summarily dismissed from employment.
22. The tone of the Claimant's pleadings and evidence is to the effect that the summary dismissal was without any substantive justification and procedural fairness.



23. Section 44 of the *Employment Act* 2007 contains provisions on summary dismissal. It states that:

“ 44. Summary dismissal

- (1) Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.
- (2) Subject to the provisions of this section, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.
- (3) Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.
- (4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:—
  - (a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;
  - (b) during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly;
  - (c) an employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;
  - (d) an employee uses abusive or insulting language, or behaves in a manner insulting to his employer or to a person placed in authority over him by his employer;
  - (e) an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer;



- (f) in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or
- (g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.”

24. In order for the employer's decision to summarily dismiss his or her employee to be considered valid and fair, the employee's conduct, the basis for the dismissal must either be in the nature of those conducts or any of them appearing on the catalogue under sub-section 4, or any conduct whose gravity could be similar to the listed conduct[s]. Imperative to state that section 44[4] does not provide an exhaustive list of the employee's acts of commission and/or omission that can attract the sanction of summary dismissal. The test is the impact of the conduct on the employment relationship between the two. The conduct must be one that signifies that the employee has fundamentally breached his or her obligations under the contract, thereby repudiating the contract.
25. In a dispute regarding termination of an employee's employment, the employer is obligated under section 43 of the *Employment Act* to prove the reason[s] for the termination. Where the employer fails to do so, the termination shall be deemed unfair by dint of the provisions of section 45 of the Act.
26. Besides the termination letter, there wasn't any other evidence from which one can discern the reason that the Respondent premised its decision on, to summarily dismiss the Claimant. The reason for the summary dismissal was given in the said letter, thus;
- “..... Management no longer has confidence in your ability to perform your duties to the level of diligence required and is left with no choice but to terminate your services forthwith in accordance to the termination clause in your contract.”
27. In my view, this reason as given was too vague and broad. An employer duly aware of the provisions of sections 43 and 45 of the *Employment Act*, that speak to substantive fairness in matters termination of employment cannot afford to communicate a reason[s] for termination, ambiguously, for in a dispute relating to fairness of the decision, the risk of the reason[s] being held not to be valid and fair becomes real.
28. As correctly stated by the Claimant the reason such as was advanced could only make sense if it was substantiated. Indeed, this Court hasn't lost sight of the fact that where a party is charged with a legal burden to prove a matter[s] or fact[s], such duty can only be discharged by presentation of sufficient evidence by the party.
29. I have carefully considered the evidence by the Respondent's witness, and I am not hesitant to state that the evidence wasn't trained to prove the reason for the dismissal. I have really agonized over this, why didn't the Respondent present the CEO who authored the dismissal letter, or a person who was central in matters the dismissal to testify? Is it that the evidence of the CEO or such person wouldn't have been helpful to its case?



30. The Claim herein was filed on 11<sup>th</sup> August 2017, surprisingly the Respondent caused to be prepared a report dated 22<sup>nd</sup> December 2021 allegedly on the role of the Claimant during the period June 2013 -August 2014. Immense reliance was placed on the document by the Respondent in its defence. In my view, the preparation and presentation of the document during the pendency of this case and not before the decision to dismiss the Claimant, only brings out the Respondent as an employer who dismissed the employee [the claimant] without first conducting any investigations into any alleged infraction[s] or failure by him. Further, the document was an afterthought.
31. By reason of the premises foregoing I am not persuaded that the Respondent did prove the reason for the summary dismissal and or that there was a valid and fair reason for the same. The summary dismissal was substantively unfair.
32. I now turn to consider the aspect of procedural fairness in the termination of the Claimant's employment. Procedural fairness is a statutory prescript. Section 41 of the Act supplies the foundation and essence of procedural fairness in matters termination of an employee's employment. An employer contemplating terminating an employee's employment or summarily dismissing him or her must adhere to the procedure set out therein.
33. The onus to demonstrate that there was compliance with the procedure contemplated under section 41 of the *Employment Act*, is always on the employer. I have carefully considered the evidence by the Respondent's witness, and conclude that it does not in any sufficient manner or at all demonstrate that before reaching the decision to summarily dismiss the Claimant from his employment, he was notified of the grounds the basis upon which the Respondent was contemplating the summary dismissal; given an opportunity to make representations on the grounds; and that the Respondent made a conscious decision after consideration of the representations.
34. In the upshot, I conclude that the summary dismissal against the Claimant was not only substantively unjustified but also procedurally unfair.

#### **Was the Claimant discriminated against?**

35. The Claimant asserted that he was discriminated against on account of age. He neither pleaded with some degree of precision how he, was. Further, he didn't adduce sufficient evidence to establish this claim. I hereby reject the same.

#### **Is the Claimant entitled to the reliefs sought in his Memorandum of Claim?**

36. In the ordinary run of things, the Claimant's employment was one terminable by 30 days' notice under clause 8[b] of his contract of employment. Having found that the summary dismissal was unfair, and that the contractual notice wasn't issued, I am convinced that notice pay in lieu of notice is deserved. To fail to make the award would be tantamount to rewarding the Respondent for its misdoing.
37. Section 49 (1) (c) of the Act, bestows on this Court power to grant a compensatory relief in favour of an employee who has successfully assailed his or her employer's decision to terminate his or her employment or summarily dismiss him or her from employment. Exercise of the power is discretionary, influenced by the circumstances of each case. This Court has keenly and carefully considered the manner in which the Claimant was dismissed from employment, the casual disregard of the Respondent for the requirements of the law under sections 41, 43, and 45 of the *Employment Act*, and the length of period the Claimant served the Respondent, and the fact that it was not demonstrated to the satisfaction of this Court that the Claimant contributed to the dismissal, and conclude that he is entitled to the relief contemplated under the section and to the extent of seven[7] months' gross salary.



38. The Claimant was summarily dismissed from employment on 12<sup>th</sup> August, 2014. Ten years have since lapsed. It will be impracticable and contrary to the provisions of section 12 of the Employment and Labour Relations Act, to avail an order for reinstatement or re-engagement for the Claimant.
39. The Respondent didn't challenge the Claimant's claim for compensation for earned but unutilized leave days. In any event, the termination letter expressly indicated that the Respondent intended to make the payment.
40. Per Section 51 of the Act, the Claimant is entitled to a Certificate of Service.
41. In the upshot, Judgment is hereby entered for the Claimant in the following terms: -
- a. A declaration that the summary dismissal of the Claimant from his employment was substantively and procedurally unfair.
  - b. The Claimant be paid; -
    - i. Payment for leave days earned but unutilized ..... Kshs. 40,000.
    - ii. Salary for the 12 days worked in August 2014 Kshs. 40,000.00
    - iii. Compensation for unfair Termination (100,000/- x 7) Kshs. 700,000.00
    - iv. One month's salary in lieu of notice..... Kshs. 100,000.
  - c. Interest on (b) above at Court rates from the date of Judgment until payment in full.
  - d. The Respondent shall bear the costs of this suit.
  - e. The Respondent is ordered to issue the Claimant with a Certificate of Service within 30 days of this Judgment.

**READ, DELIVERED AND SIGNED THIS 13<sup>th</sup> DAY OF December 2024**

**OCHARO KEBIRA**

**JUDGE**

In the presence of:

Mr. Ongicho for the Claimant

Mr. Okeyo for Respondent

