



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwetu v Pressmaster Ltd (Cause 736 of 2017)  
[2023] KEELRC 185 (KLR) (30 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 185 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE 736 OF 2017**

**BOM MANANI, J**

**JANUARY 30, 2023**

**BETWEEN**

**EDWARD SILA MWETU ..... CLAIMANT**

**AND**

**PRESSMASTER LTD ..... RESPONDENT**

**JUDGMENT**

1. This is a claim for unfair termination. The Claimant, who until January 19, 2016 was an employee of the Respondent, was terminated from employment for allegedly failing to heed lawful instructions by his supervisor. The Claimant asserts that the termination was unfair. Consequently, he has filed this cause to seek for, inter alia, compensation for wrongful termination.
2. The claim is resisted by the Respondent. According to the Respondent, the Claimant was terminated for lawful cause. Further, the Claimant was afforded the opportunity for a hearing before he was terminated. As a result, the separation of the parties was in accordance with the applicable law.

**Claimant's Case**

3. According to the Claimant, he was employed by the Respondent in the year 2011 as a turn-boy. His work involved delivering merchandise to the Respondent's clients.
4. On January 18, 2016 at around midday, the Claimant was tasked to deliver goods to one of the Respondent's clients along Mombasa road within Nairobi. The client's office is said to be approximately three (3) kilometers from where the Respondent's business premises are situated.
5. The delivery was done using one of the Respondent's delivery vans. The van had both a driver and the Claimant as the loader.
6. Upon delivery of the merchandise, the Claimant alleges that they set off for the Respondent's offices. However, they had to use a different route because of the dual carriageway nature of Mombasa road



which permits exits only from designated points. This necessitated that they cover a longer distance even though the distance between the client's and Respondent's premises was approximately three (3) kilometers.

7. According to the Claimant, their departure from the delivery point back to the Respondent's premises coincided with their lunch hour. Consequently, they stopped by an eatery along the way for lunch. After the meal, they drove back to the Respondent's premises.
8. On arrival at the Respondent's premises around 2.00 pm the Claimant's supervisor demanded that the Claimant explain why he had failed to pick his telephone calls and where they had been. It is the Claimant's evidence that he was asked to report to the human resource office after the afternoon deliveries where he was apparently issued with a notice to show cause. He alleges that the letter to show cause was issued to him around 5.00 pm and required his response before leaving duty the same day. In the Claimant's view, the time accorded to him to respond to the notice to show cause was inadequate.
9. It is the Claimant's case that the human resource officer asked him to report to the office the following day. That the Claimant and driver reported to the human resource office as instructed only for the Claimant to be issued with a letter terminating his contract of service.
10. It is the Claimant's case that he was not afforded a hearing before the decision to terminate his services. He also asserts that he was not issued with the requisite notice to terminate.
11. The Claimant avers that he was not paid his terminal benefits upon his termination from employment. He also alleges that he was not issued with a Certificate of Service. The Claimant therefore prays for the various reliefs set out in the Memorandum of Claim.

### **Respondent's Case**

12. In response to the Claimant's assertions, the Respondent's witness admits that the Claimant was an employee of the Respondent. That the Claimant had been continually hired on one year renewable contracts the last of which was to run between September 1, 2015 and August 31, 2016.
13. The Respondent states that on the material day, the Claimant was asked to make deliveries to the Respondent's client within three (3) kilometers of the Respondent's premises. It is the Respondent's case that the Claimant was expected back to the Respondent's premises by 1.00 pm on that day. However, there was unexplained delay in the Claimant and his driver reporting back to the office prompting the Respondent's witness to call the Claimant to explain their whereabouts. That the Claimant neither answered the supervisor's telephone call nor called back.
14. The Respondent's witness indicates that surveillance of the movement of the delivery van used by the Claimant showed that it had been driven some seven (7) kilometers away from the delivery point where the Claimant had been sent. Further, the vehicle was on the wrong route.
15. The Respondent avers that upon their arrival, the Claimant's supervisor demanded that the Claimant and driver explain the aforesaid events. That the Claimant was however unapologetic for his acts of insubordination. That the Claimant stated that he did not pick or return his supervisor's telephone calls because he suspected that the supervisor would quarrel him as he had often done.
16. The Respondent states that owing to the Claimant's misconduct, he was issued with a letter requiring him to explain why disciplinary action should not be taken against him for using an unauthorized route and failing to pick or return his supervisor's telephone calls. This letter was issued on the afternoon of January 18, 2016 and required the Claimant to give his response by close of business the same day.



17. The Respondent states that the Claimant gave a response to the letter in which he indicated that the decision not to pick his supervisor's telephone calls was deliberate in order to avoid being quarreled. According to the Respondent's witness, the Claimant's behavior amounted to misconduct within the meaning of section 44 of the *Employment Act*.
18. It is the Respondent's position that the Claimant's response to the notice to show cause was wanting. Consequently, on January 19, 2016 a decision was taken to terminate his contract of service.
19. In his evidence in court, the Respondent's witness stated that the Claimant was asked to report to the Respondent's office the following day, January 19, 2016. That he was to appear before a disciplinary panel to hear his case. That however, the Claimant failed to appear before the panel. That he was terminated on January 19, 2016.
20. It is the Respondent's case that the Claimant was afforded an opportunity to be heard. That there were also valid reasons to terminate his services.

### **Issues for Determination**

21. From the pleadings and evidence tendered by the parties, there is no dispute that the Claimant was an employee of the Respondent at the time the cause of action in this case arose. What is contested is whether termination of the contract of employment between the parties was lawful. I will therefore address the following issues:-
  - a. Whether termination of the contract of employment between the Claimant and Respondent was fair and lawful.
  - b. Whether the parties are entitled to the reliefs sought in their pleadings.

### **Analysis and Determination**

22. Under sections 41 and of the *Employment Act* (EA), an employer is entitled to terminate the services of an employee on grounds of gross misconduct, physical incapacity or poor performance. However, before he takes this decision, the employer is obligated by section 41 of the EA to: notify the employee of the accusation against him in a language that the employee understands; allow the employee the opportunity to offer his defense to the accusation; and promptly notify the employee of the decision taken on the matter. The employer is duty bound to notify the employee of the charges against him in the presence of a fellow employee or union representative if the employee elects.
23. Under section 43 of the EA, the duty to justify termination of a contract of service lies with the employer. Although section 47 of the EA requires the employee to establish that termination of the contract was unlawful, he is only required to establish a prima facie case in this respect. The overall burden of justifying the validity of the decision to end the employer-employee relation rests with the employer.
24. In order to justify termination of a contract of service, the employer is required to demonstrate that: he had a valid reason to terminate the employee's services; and he observed due process in processing the employee's release. Where the employer is unable to prove these two ingredients, the decision to terminate the contract of service of an employee will, by virtue of section 45 of the EA, be deemed unlawful.
25. That this is the legal position in respect for termination of employment on grounds of poor performance, misconduct or physical incapacity has been affirmed in a series of judicial decisions. These include *National Bank of Kenya v Samuel Nguru Mutonya [2019] eKLR*, and *Chairman Board of*



26. The evidence on record shows that the Claimant was issued with a letter dated January 18, 2016 requiring him to justify why disciplinary action should not be taken against him for using a different route and refusing to answer his supervisor's telephone call. According to the letter, the Claimant had up to 5 pm that day to give his explanation. The Claimant indicates that this letter was given to him around 5 pm of the same day. The Respondent has not denied this assertion by the Claimant. In any event, the letter refers to an infraction that the Claimant is said to have committed at 2.30 pm the very same day. Inevitably, the letter must have been prepared and served on the Claimant beyond 2.30 pm.
27. The Claimant asserts that he was asked to report to the Human Resource office of the Respondent on the morning of the following day. That when he reported, he was handed the letter of termination around 10.00 am without the benefit of being heard on the accusations against him.
28. The Respondent denies this version of the Claimant's evidence. It is the Respondent's case that the Claimant was granted a chance to be heard but failed to take advantage of it.
29. Although the Respondent asserts that the Claimant was invited to a disciplinary committee meeting on January 19, 2019, there is no evidence that such invite was given to the Claimant. There is also no evidence that a disciplinary meeting was in fact held on January 19, 2019 which the Claimant failed to attend as asserted by the Respondent's witness.
30. It is incredible that whilst the Respondent states that the Claimant was handed the letter of termination on January 19, 2019, the Respondent's witness states that the very same Claimant failed to show up for a disciplinary session convened for the same day. It is not possible that the Claimant was both present and absent from the Respondent's premises at the same time.
31. But even if it is true that the Claimant was granted the opportunity to be heard on January 19, 2019 as claimed, it appears to me that this did not afford him sufficient time to prepare for his defense. The offense for which the Claimant was to face the disciplinary panel had allegedly happened in the afternoon of the previous day, hardly twelve (12) hours earlier. How was he to have assembled his witnesses if any and prepared for a defense between 5 00 pm the previous day and 10.00 am the following day?
32. The manner in which the Respondent handled the disciplinary process was rather formalistic and only geared towards paying lip service to the requirements of the law. In *Benjamin Mwendwa Ndauti & 4 others v East African Portland Cement Company [2016] eKLR*, Wasilwa J while rejecting the proposition that two days were adequate to prepare for a defense in an employment dispute expressed herself in the following manners:-

“I do agree with the Claimants. Reasonable time should have been accorded to them to prepare for their defense and be ready to defend themselves and in this case reasonable time would in my view be at least seven days.”
33. I do not suggest that the Claimant required seven (7) days to prepare his defense. However, he certainly was entitled to reasonable time to do so. I do not think that the twelve (12) or so hours that the Claimant had, most of which ran overnight, were enough time for him to prepare himself for the hearing.
34. I agree with the Respondent's counsel that being a purely administrative procedure, a disciplinary hearing need not be conducted in any particular format. However, the hearing, whether oral or documentary, must be conducted in a manner that is verifiable by an independent third party.



This is particularly important for the employer as the duty to prove that the employee was offered an opportunity to defend himself rests with the employer. For the avoidance of doubt, I do not understand the decision by the Court of Appeal in *Kenya Revenue Authority v Menginya Salim Murgani [2010] eKLR* as stating otherwise.

35. There is no evidence that the Respondent heard the Claimant after the Claimant responded to the letter issued to him on January 18, 2016. It is important to point out that the employer's notice to show cause letter and the employee's response to it do not dispense with the need to convene a disciplinary session if the employer has not been satisfied with the employee's response and proposes to terminate the contract of service. The employee is entitled to be afforded a chance to be heard at a disciplinary session. There is no evidence that the Respondent went beyond the notice to show cause stage to invite the Claimant for a disciplinary session.
36. The Respondent may have had a valid complaint against the Claimant. However, the Respondent was obligated by law to ensure that the employment contract was terminated in accordance with fair procedure. This was not done. Accordingly, I declare that the Claimant's employment contract was unfairly terminated.
37. The other issue for determination relates to the reliefs to be granted to the parties. I reckon that the Claimant was serving under a one year contract and had just about seven (7) months to the expiry of his term. I however take cognizance of the fact that the Claimant had served the Respondent for more than four (4) years. This is notwithstanding that the Claimant's service over the years was premised on distinct one year contracts.
38. Apart from the isolated and disputed incident on March 19, 2015, there is no evidence that the Claimant had been subjected to any other disciplinary process for the duration of his service to the Respondent. It appears to me that he served the Respondent with diligence. Taking all these factors into account and having regard to the manner in which his services were terminated, I award the Claimant compensation for wrongful termination equivalent to his salary for six (6) months. This totals Kshs 82,992/=.
39. I also award the Claimant salary for the eighteen days worked in January 2016. I reject the Respondent's assertion that salary for days worked should exclude rest days. These days are ordinarily included in the computation of an employee's monthly salary. The sum awarded under this head is Kshs 8,300/=.
40. The Respondent concedes that the Claimant was entitled to pro rata leave of nine (9) days when he left employment. The Respondent placed this figure at Kshs 3,803/=. I award this sum as conceded by the Respondent.
41. The Claimant has also prayed for salary in lieu of notice. There is evidence that the Respondent terminated the Claimant without notice. In any event, the Respondent had conceded this claim in its computation of the Claimant's dues vide its letter of February 18, 2016. Accordingly, I enter judgment for the Claimant for Kshs 13,832/= being one month's salary in lieu of notice.
42. I award the Claimant interest on the aforesaid sums at court rates to run from the date of institution of the case till payment in full.
43. I award the Claimant costs of the suit.
44. I order that the Respondent issues the Claimant with a Certificate of Service in terms of section 51 of the *Employment Act*.
45. The award above is subject to the applicable statutory deductions.



### **Summary of the Award**

- a. It is declared that the Respondent's decision to terminate the Claimant's contract of service was unfair.
- b. The Claimant is awarded Kshs 82,992 as compensation for unfair termination.
- c. The Claimant is awarded Kshs 8,300 as salary for the eighteen days worked in January 2016.
- d. The Claimant is awarded Kshs 3,803 to cover accrued pro rata leave.
- e. The Claimant is awarded Kshs 13,382 in lieu of notice to terminate.
- f. The Claimant is awarded interest on the aforesaid sums at court rates to run from the date of institution of the case till payment in full.
- g. The Claimant is awarded costs of the suit.
- h. I order that the Respondent issues the Claimant with a Certificate of Service in terms of section 51 of the *Employment Act*.
- i. The award above is subject to the applicable statutory deductions.

**DATED, SIGNED AND DELIVERED ON THE 30<sup>TH</sup> DAY OF JANUARY 2023**

**B O M MANANI**

**JUDGE**

**In the presence of:**

..... for the Claimant

.....for the Respondent

**ORDER**

In light of the directions issued on July 12, 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**B O M MANANI**

