



**Anyoka v Gilanis Supermarket Limited (Cause 162 of 2015)  
[2023] KEELRC 5 (KLR) (17 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 5 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
CAUSE 162 OF 2015  
HS WASILWA, J  
JANUARY 17, 2023**

**BETWEEN**

**EVANS O ANYOKA ..... CLAIMANT**

**AND**

**GILANIS SUPERMARKET LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant instituted this claim against the respondent vide a memorandum of claim dated May 15, 2015 seeking for compensation for alleged unfair dismissal and for payment of his terminal dues. In his claim he sought for the following reliefs;
  - a. A declaration that the claimant's dismissal from work was unfair and unlawful and therefore be reinstated with payment of his full salary to date.
  - b. If the reinstatement is not allowed;
    - i. Kshs 114,744 being twelve months' salary in form of damages.
    - ii. Kshs. 9,562 salary for August 2013.
    - iii. Kshs 9,562 pay in lieu of Notice.
    - iv. Kshs 9,562 leave earned but not given.

Claimant's case.

2. The claimant avers that he was employed by the respondent in the month of August, 2010 as a turn boy. That he worked for the respondent and in July or August, 2013, the claimant was sent to Trasmara to Collect bags of sugar and deliver to a customer in Kericho. That he went on board Motor vehicle KAX 230 L with the driver and collected the consignment as instructed. He avers that the truck was weighed



- at the weighbridge in Trasmara when Empty and upon loading it was weighed again to ascertain the kilograms of Sugar loaded then they proceeded to Kericho.
3. He stated that upon offloading the sugar at the customers' premises, the customer weighed each bag of sugar and discovered that some bags were of the right weight of 50 kgs others were less while others were more, all which were rejected by the customer. They immediately called their transport supervisor one Dan and notified him of the new development who instructed them to take the sugar to Nakuru Depot.
  4. On arrival at Nakuru warehouse, the said sugar was weighed one by one which issue remained the same with some bags of sugar weighing less than 50 Kgs, other over 50n Kgs while other were of the right weight. The claimant requested the respondent to weight the sugar when its inside the lorry as a consignment as was done in Trasmara but the respondent refused.
  5. The claimant was then arrested by the police and taken to Nakuru Police station where he was interrogated and detained till evening and released with orders not to report to work but to report daily at the station till investigations were completed and cleared to continue working. That he reported daily at the police station for 9 days then told by the police to go back to work.
  6. When he reported back to work he was met with a summary dismissal letter dated August 26, 2013 on grounds interalia that he had absconded duty for 9 days. This termination according to the claimant was not done in accordance with the law as he was not served with notice of termination, neither was he subject to the procedures of termination. Also that he was not paid his August salary when he had worked that month.
  7. The claimant summoned Francis Ngige as his witness, who testified as CW-1 and adopted his statement of November 18, 2021, which in summary stated he was the respondent's driver at all material times while the claimant was his turn boy. He denied ever working with a turn boy by the name Antony Ngugi and affirmed the he always worked with the claimant. He stated that before sugar is loaded, the empty lorry is weighed then the sugar is loaded then weighed again. He avers that they never weighed each bag when transporting sugar. He avers that the turn boy never stepped out of the vehicle during the journey until they reached their destination and therefore there was no siphoning of sugar on transit as alleged by the respondent.
  8. Upon cross examination, he testified that he was the driver of Gilanis and worked with the claimant as his turn boy using vehicle number KAX 230 N. He testified that on August 11, 2013 they were sent to Trasmara to transport sugar to a customer in Kericho and on reaching Kericho the customer weighed about 20 bags of sugar and noted the difference in weight and rejected the entire consignment prompting them to transport them to Nakuru warehouse for further direction. That they were arrested by police and interrogated only to be release the evening with instruction not to report back to work until investigations were completed. After 9 days they were allowed to report back to work and on arrival at the Respondent's premises they were dismissed without any notice or hearing. He added that they were not paid any terminal dues.
  9. On re-examination, he testified that he does not know Anthony Ngigi Ndugu and the report by the police did not mention him.
  10. The claimant testified as CW-2 and adopted his statement of November 5, 2021 and stated that he was sacked on allegation that they had stolen sugar when no sugar had been stolen. He avers that he was arrested together with the driver upon arrival at Nakuru and released in the evening with instruction to keep off work and report every morning at the police station until investigation were completed. He testified that the police gave them green light after 9 days and upon reporting back to work they



were dismissed without being paid terminal dues. He confirmed that the driver he worked with was one Francis Ngige.

11. Upon cross examination, he testified that he had another case of April 22, 2013 of stealing sugar which he admitted in a statement that he stole one bag of sugar and sold it at Kshs 4,800. He testified that the sugar they transported from Trasmara to a customer in Kericho was rejected because some weighed less than 50 Kgs. He maintained that he does not know anyone by the name Anthony Ngigi Ndungu. It was his case that they were arrested on arrival at Nakuru and taken by CID officers who interrogated them and released them with instruction not to report to work until investigations were completed.
12. On further cross examination he stated that when they were instructed to stay at home by the CID, they never clarified that position from the Respondent. On returning back to work after 9 days of reporting daily to the police station, they were fired by the Respondent without any pay. He avers that he worked for 12 days in the month of August, 2013 and at the time of termination he was earning Kshs 9, 562.
13. On re-examination he testified that in Trasmara the consignment of sugar was weighed as a whole but when it was returned back to the Respondent it weighed each bag of sugar which showed others were less than 50 Kgs while others were More than 50 Kgs.

#### Respondent's Case.

14. The Respondent entered appearance on July 1, 2015 and filed a response to claim on July 9, 2015 denying the entire claim on the basis that it does not disclose proper particulars of the claim or the cause of action.
15. It is averred that indeed the claimant was employed on the August 16, 2010 but that he was initially employed a general labourer.
16. The circumstances leading to the termination of the claimant was that the claimant was instructed to pick a consignment of sugar weighing 14,000kg, that is 280 bags each weighing 50 Kilograms, from Trasmara and deliver it to a customer in Kericho. However, the claimant in cahoots with others siphoned the sugar from the bags and stole 73. 8Kgs which fact was discovered by the respondent after weighing all the bags of sugar.
17. It is averred that the issue was reported to the police station who investigated the matter and collected statement from various persons including one Anthony Ngugi a turn boy who informed the police that the sugar was stolen by the claimant and sold on transit which loot they shared together with the claimant and other accomplices of the theft.
18. It is stated that the claimant upon being interrogated by the police, he was released on the same on free bond and therefore was to report back to work but that he did not reported back to work for 9 days. The absenteeism from work couple up with suspicion of stealing the sugar forced the respondent to dismiss the claimant from employment as their employment relationship was no longer tenable.
19. The respondent maintained that the reason for termination was for absconding duty without leave and on suspicion of theft.
20. It is averred that prior to the termination, the claimant had received various warning letters and notices to show cause on account of gross misconduct including on a similar issue of stealing sugar which he admitted and sought for apology which was granted. The respondent therefore avers that the claimant has been untrustworthy employee and it was time for him to part ways with the Respondent.



21. The respondent states further that after the termination, they tabulated the claimant's dues which he refused to collect despite being informed in person and through his advocates while responding to the demand letter.
22. In the set off, the respondent stated that in the event that damages will be awarded to the claimant, they are seeking a set of Kshs 34,424 for the loss of the said sugar.
23. The respondent summoned Wycliffe Ndinda, the Human Resource manager who adopted his witness statement dated November 22, 2017 and produced the documents save for document number 8 and 9. He testified that the claimant was fired because he was suspected of stealing. he stated that the claimant was arrested by police and taken to station but was to report back to work the next day only for him to disappear and resurfaced after 9 days. He stated that the claimant was given show cause letter. He further stated that the claimant had other issues of theft. On terminal dues he confirmed that the claimant has not been paid his terminal dues because he did not collect them.
24. On cross examination, the witness testified that the claimant was employed as a turn boy in Motor vehicle KAX 230L whose driver was Francis Ngige. He avers that vehicles are allocated on a daily basis. He testified that the sugar was weighed in the supermarket before dispatch and ordinarily the sugar ought to be 50Kgs or slightly more. He also stated that the sugar was re-weighed when delivered to Nakuru and it was discovered some bags were less than 50 Kgs, others were 50Kgs and others More than 50Kgs. He admitted that he does not have any report to show the siphoning of sugar. He further admitted that the sugar was weighed as a consignment in Trasmara before loading but did not have the total weight of the sugar.
25. Upon further cross examination he testified that Anthony Ngige was not in the vehicle on the material day. He stated that when the claimant was arrested he was taken by police and detained for 12 hours before he was release and informed to go back to work.

#### Claimant's Submissions.

26. The claimant submitted that the reason for termination was for deserting work for 9 days, improperly performing work and for committing a criminal offense, which allegations were not substantiated or justified. Further that the respondent failed to follow due procedure in terminating the services of the claimant.
27. It was argued that the sugar was weighed as a whole consignment before loading, a fact which was corroborated by all the witnesses including RW-1. Furthermore, that some sugar weighed more than 50 kilograms a fact which was admitted by the respondent, therefore informing the shortfall discovered when each of the bags was weighed by the respondent.
28. On allegation of deserting work, it was submitted by the claimant that the CID officer who arrested him on complaint of the respondent detained him till evening and released him on condition that he should stay away from the respondent's premises till investigation are completed and indeed after investigation, he was the same officer who gave him green light to go back to work explaining the reason why he did not report to work for the 9 days.
29. In conclusion, the claimant submitted that the legal requirement for dismissal of the claimant was unfair in circumstances and contrary to the provisions of section 41 and 43 of the *Employment Act*. The Claimant thus urged this Court to allow the claim as prayed together with costs and interest.

#### Respondent's Submissions.



30. The respondent on the other hand submitted on two issues; whether the termination was unfair and whether the claimant is entitled to the reliefs sought.
31. On the first issue, it was submitted that before an employee is terminated, the employee should meet both procedural and substantive fairness as enunciated under sections 41 and 43 of the [Employment Act](#).
32. On that note, the respondent submitted that the reason for termination was inter alia on suspicion of siphoning sugar from the consignment tasked to transport from Trasmara to Kericho. It was argued that the respondent on re-weighing the consignment discovered a shortage of 78.3 bags which they suspected the claimant to have siphoned it. Furthermore, that the claimant upon being interrogated by police absconded work for 9 days without leave giving the respondent more grounds to summarily dismiss him. Therefore, that the respondent had valid and justified reason to dismiss the claimant from employment. To support this argument, they relied on the case of [Kenfreight \(EA\) Limited v Benson K Nguti](#) [2016] eKLR and the case of [Cooperative Bank of Kenya Limited v Banking Insurance and Finance Union](#) [2017] eKLR.
33. The respondent submitted that the act of siphoning sugar and absenting oneself from work without permission are behaviors exhibited by rogue employee as held in [Judicial Service Commission v Gladys Boss Shollei and another](#) [2014] eKLR where the court held that;
- “From my own analysis of the record before us, I would very much doubt that there are many employers who, faced with conduct such as displayed by the 1st respondent, would have retained her in her position. I am not saying there would be none, only that such an employer would be a rarity indeed. As to the action of dismissing the 1st respondent, I find and hold that it was an eminently reasonable action to take by an employer. It probably would have been the only reasonable and responsible cause of action left open to the employer. The dismissal therefore passes with ease the test propounded by Lord Denning in the same British Leyland case (ibid.);“Was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might have reasonably dismissed him then the dismissal was fair.”
34. It was argued further that the respondent had reasonable and sufficient grounds to summarily dismiss the claimant due to his conduct. In any case that it is empowered under section 44 of the [Employment Act](#). In this they relied on the case of [Lynus Kiplimo Too v Moi Teaching and Referral Hospital](#) [2020] eKLR where the Court held that;
- “Further the reasons for which an employer terminates the employment of an employee are reasons which the employer genuinely believed to exist and which caused the employer to terminate the service of an employee. On the other hand, the burden of proof that an unfair termination has occurred is on the employee. The test is usually that of a reasonable employer. If a reasonable employer confronted with similar facts would consider termination as the most appropriate disciplinary measure to take in the circumstances the court will uphold the termination. It is not for the court to over analyze the reason or reasons for termination and substitute its own opinion with that of the employer.”
35. On procedural fairness, it was submitted that the respondent issued the claimant with a notice to show cause which the claimant refused to receive and therefore the hearing was aborted and the claimant was dismissed. It was argued that, the fact that the claimant refused to accept the notice to show cause



waived his right to attend disciplinary hearing and therefore cannot turn around later and blame the respondent for failure to subject him to disciplinary hearing.

36. In the reliefs sought, the respondent submitted that the claimant was dismissed based on justified reasons and therefore is not entitled to compensation for the termination. On August pay, the respondent argued that the claimant had served it for 10 days as such his pay for 10 days worked in the month of August, 2013 was calculated at Kshs 4,885 and on leave days, overtime and off days the same were calculated and added up with August paying bringing the grand total of the claimant's terminal dues of Kshs 18,068 which was duly paid to the claimant and therefore there is nothing in terms of terminal dues owing or due.
37. I have examined all evidence and submissions of the parties herein.
38. The claimant was dismissed summarily vide a letter dated August 26, 2013 on allegation of theft of sugar and absenteeism.
39. The respondents however admitted that the claimant was never subjected to any disciplinary hearing.
40. There is no evidence that the claimant was served with a show cause letter nor invited to any disciplinary hearing.
41. This is contrary to section 41 of the [Employment Act 2007](#) which states as follows;
  - 41 Notification and hearing before termination on grounds of misconduct(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)Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the Nakuru Cause No. 162 Of 2015Page | 18 person, if any, chosen by the employee within subsection (1), make”
42. Whereas the respondents aver that the claimant siphoned sugar thus reducing their weight and this was witnessed by an eye witness, the eye witness was also never called as a witness.
43. What remains is a mere allegation of the siphoning and no hearing concerning the absenteeism.
44. Section 45 (2) of the [Employment Act 2007](#) states as follows;
  - “ 45. (1).....
  - (2) A termination of employment is unfair if the employer fails to prove-
    - (a) that the reason for the termination is valid;
    - (b) that the reason for the termination is a fair reason-
      - (i) related to the employee's conduct, capacity or compatibility; or
      - (ii) based on the operational requirements of the employer; and
    - (c) that the employment was terminated in accordance with fair procedure”.



45. In view of the fact that the claimant was dismissed without any disciplinary hearing, I make a finding that his dismissal was unfair.
46. In terms of remedies, I enter Judgment for him as follows;
1. 1 Month's salary in lieu of notice = 9,562/=
  2. August 2013 salary 9,562/=
  3. 8 months salary as compensation for the unfair termination =  $8 \times 9,562 = 76,496/=$
  4. Leave earned & not taken = 9,562/=
- TOTAL = 105,182/=
- Less statutory deductions
5. The respondent will pay costs of this suit plus interest at court rates with effect from the date of this Judgment.

Dated and delivered in open Court this 17<sup>TH</sup> day of JANUARY, 2023.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Chelagat holding brief for Mboga for Claimant – present

No appearance for Respondent

Court Assistant – Fred

**NAKURU CAUSE NO. 162 OF 2015 Page | 4**

