



**Joash v Menengai Oil Refineries Limited (Cause 178 of 2015)
[2023] KEELRC 6 (KLR) (17 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 6 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 178 OF 2015
HS WASILWA, J
JANUARY 17, 2023**

BETWEEN

JONAS OMUSUNGU JOASH CLAIMANT

AND

MENENGAI OIL REFINERIES LIMITED RESPONDENT

JUDGMENT

1. This claim was instituted by a claim dated June 15, 2015 seeking for compensation for alleged unfair termination. The Claimant sought for the following reliefs;-
 - a One-month salary in lieu of notice of Kshs 12500.
 - b Normal overtime of Kshs 727,160.75.
 - c Leave for one year (2013-2014) of Kshs 8,750.
 - d Underpayments for the year between May 1, 2010 to April 30, 2011 of Kshs 2,701.80.
 - e Compensation under section 49(1)(c) of the *Employment Act* of Kshs 150,000.

Claimant's Case.

2. The summary of this case is that the Claimant was employed by the Respondent on August 1, 2008 as a turn boy allegedly working from 5am to 8am each day for six days every week.
3. He avers that he worked for the Respondent earning his basic salary with house allowance however between May 1, 2010 and April 30, 2011, for 12 months he was paid a total pay of Kshs 7,205 instead of Kshs 7430.15 as provided for under legal notice number 98 of May 1, 2010.
4. It is his case that he enjoyed all his leave days save for the leave for the year 2013-2014 which he was not granted or compensated for.



5. The circumstances leading to his termination is that on October 11, 2014 at around 7:30 pm, he arrived at the Respondent's premises together with the driver from a journey and since it was cold due to heavy downpour he alighted from the lorry and stepped out to look for a cup of tea leaving the driver to pack the car. The next day on reporting to work he was met with a letter alleging that he arrived at the premises the previous night drunk.
6. He contends that he was not given a chance to defend himself as he was not summoned for any disciplinary hearing before the said termination.
7. During hearing the Claimant adopted his witness statement dated February 2, 2017 which reiterated the claim. He adopted his bundle of documents filed together with the claim
8. Upon cross examination by Orare Advocate, he testified that he was employed in 2008 and dismissed in 2014. He testified that in January, 2011 he was paid Kshs 6,324 and house allowance of Kshs. 905 while the driver who was his head was paid Kshs, 4,904 and claimed that he had a lot of work to do.

Respondent's case.

9. The Respondent entered appearance and filed a response to claim on February 1, 2016 denying the entire claim and instead stated that Claimant was terminated following several warning letters which he failed to make amends and work according to the directions given by the Respondent. He added that the Claimant was the author of his own misfortune.
10. During hearing, Peter Kenenge Muchibi, the Respondent's Human Resource officer, testified as RW-1 and adopted his witness statement of 9.2.2016, which he averred that the termination of the Claimant was lawfully done. He adopted the bundle of documents dated October 7, 2021. In addition, he testified that the Claimant was paid overtime for all the days he worked overtime and produced sample payslips for January, 2014, showing overtime pay of Kshs 1672. With regard to leave pay for the year 2013 and 2014, the witness testified that the pay slip of October, 2014 shows he was paid leave of Kshs 10,068. Additionally that he was given leave advance of Kshs, 5,500 in November, 2013 and paid Bonus each December.
11. Upon cross examination by Juma Advocate, the witness testified that the Respondent terminated the Claimant for reporting to work while drunk. He testified that the Claimant was referred to the office but instead chose to leave and never reported back to employment. He admitted not subjecting the Claimant to any disciplinary hearing. He testified further that the Claimant normally worked from 8am to 5pm and on few days that he worked overtime he was compensated for the same and are reflected in the payslips produced as exhibits.

Claimant's Submissions.

12. The Claimant submitted on three issue; whether the Claimant was unlawfully terminated, whether he is entitled to the reliefs sought and whether the costs should be awarded.
13. On the first issue it as submitted that the Claimant was terminated without notice, explanation and hearing contrary to the express provision of Section 41, 43 and 45 of the *Employment Act* as read with provisions of Articles 41 and 47 of the *Constitution*. To support his case, he cited the case of *Rashid Jeneby V Prime Bank Limited* [2015] eKLR where the Court held that;

“Section 43 of the *Employment Act*, 2007 requires an employer to prove a valid reason for terminating the employment of an employee. In this regard, the burden placed on the



employer is to demonstrate, on a balance of probability, the existence of a valid reason that would move a reasonable employer to terminate employment.”

14. The Claimant also relied on the case of *Sikuku Nzuvi Ngii v Gacal Merchants Ltd* [2015] eKLR where it was Makau J held that;

“Under section 41 of the *Employment Act*, before an employer dismisses an employee for misconduct under section 44 (3) and (4) of the Act, he must explain to the employee the reason for the intended dismissal in a language the employee understands. That during such explanation, the employee has the right of being accompanied by a fellow employee or shop floor union representative of his choice. That the employee and his companion must be given a chance to tender their views for consideration before the decision is reached. In this case, that procedure was not followed and on a balance of probability, that default rendered the termination unfair.”

15. Also in the case of *Moses Daniel Kyalo V Treadsetters Tyres Limited* [2019] eKLR Where Makau J held that;

“In my view, it is immaterial that the employee had absconded and failed to notify the employer his whereabouts. The employer knew his address for service and that is why it was possible to serve him with the termination before he reappeared to the office as per the testimony of the Rw1. It is now trite that the failure to accord the employee a hearing as provided by section 41 of the *Employment Act*, like in this case, renders the termination unfair even if there was a valid reason for the termination.”

16. Based on the above case law, it was submitted that the facts as placed before Court demonstrate that indeed the Claimant was unfairly terminated and the allegation that the Respondent issued the Claimant with several warning letter was not backed up with any evidence.

17. On the reliefs sought, the Claimant reiterated that he worked from 5am to 8pm six days of the week and at times spend the night on a safari, working several hours on overtime which were never compensated contrary to provision of section 27 (1) of the *Employment Act*. He thus urged this Court to allow the claim as particularized in the memorandum of claim.

18. On costs, the Claimant cited the case of *Joseph Oduor Anode V Kenya Red Cross Society* [2012] eKLR and argued that costs follow event and prayed to be awarded costs for this case.

Respondent’s Submissions.

19. The Respondent submitted on three issue also; whether the Claimant was unlawfully terminated from employment, whether the Claimant is entitled to the reliefs sought and who should bear the costs.

20. On the first issue it was submitted that the Claimant reported to work drunk and upon being summoned to give an explanation he fled out of the premises and never reported back to the office, which actions violated the provision of section 44(4)(c) of the *Employment Act*, warranting termination, therefore that the termination was justified. It was argued that the Claimant was served with termination letter dated March 4, 2015. To support the argument that the termination was justified, the Respondent cited the Canadian case of *Mckinley Vs BC Tel*, (2001) 2 SCR 161 [CanLii] where the Court held that;-

“When examining whether an employee’s misconduct – including dishonest misconduct – justifies his or her dismissal, Courts have often considered the context of the alleged



insubordination. Within this analysis, a finding of misconduct does not, by itself, give rise to just cause. Rather, the question to be addressed is whether, in the circumstances, the behaviour was such that the employment relationship could no longer viably subsist... to summarize, this first line of case law establishes that the question whether dishonesty provides just cause for summary dismissal is a matter to be decided by the trier of fact, and to be addressed through an analysis of the particular circumstances surrounding the employee's behaviour. In this respect, Courts have held that factors such as the nature and degree of the misconduct, and whether it violates the "essential conditions" of the employment contract or breaches an employer's faith in an employee, must be considered in drawing factual conclusions as to the existence of just cause."

21. On the relief sought, it was submitted that the Claimant was paid one-month salary in lieu of notice as such the prayer for Notice pay is not due. On compensation for alleged unfair termination, the Respondent submitted that the termination was justified since the Claimant breached his employment contract and section 44 of the *employment Act* by reporting to work while drunk. On overtime and leave pay, the Respondent submitted that the Claimant was duly paid as demonstrated by evidence before Court, moreover that the Claimant was paid Bonus allowance each year demonstrating that indeed he was duly compensated for the work done.
22. On costs, the Respondent agreed with the Claimant that costs follow event and cited the case of *Orix Oil(Kenya) Limited V Paul Kabuu & 2 others* [2014] eKLR where the Court was of the view that costs may not be awarded to the winning party in circumstances where a good reason is given by the other party emanating from the conduct of the winning party.
23. I have examined all evidence and submissions of the parties herein.
24. The Respondents have averred that the Claimant was dismissed for coming to work drunk.
25. The Respondents have averred that the Claimant had been warned severally about the said behavior and he didn't heed. No such warning letters have been exhibited before this Court.
26. The Respondents also admitted that the Claimant was never subjected to any disciplinary hearing.
27. The essence of this evidence from the Respondent is that the Claimant was condemned unheard 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 person, if any, chosen by the employee within subsection (1), make".



28. The Claimant was further condemned without proof that there were valid reasons to warrant his dismissal contrary to Section 43 of Employment Act which states as follows;-

“43.

Proof of reason for termination

- 1 In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
- 2 The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”

29. 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”.

30. The Claimant having been dismissed without any hearing and without valid reasons, I find the dismissal unfair and unjustified and I declare it so.

31. In terms of remedies I find for the Claimant and I award him as follows;

1. 1 Month’s salary in lieu of notice = 12,500/=
 2. Underpayments of salary as pleaded 2,701.80/=
 3. Compensation for the unfair and unlawful termination equivalent to 10 months salary
= 12,500 x 10 = 125,000/=
- Total Awarded = 140,201.80/=
- Less statutory deductions
4. 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 17TH DAY OF JANUARY, 2023.

HON LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Orare for Respondent – present

Juma for Claimant – present

Court Assistant – Fred

