



**Otieno v Toyota Kenya Limited (Cause E049 of 2021)
[2023] KEELRC 432 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 432 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E049 OF 2021
AK NZEI, J
FEBRUARY 16, 2023**

BETWEEN

EVANS SANDLY OTIENO CLAIMANT

AND

TOYOTA KENYA LIMITED RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent vide a Memorandum of Claim dated May 12, 2021 and pleaded that he, the Claimant, was employed by the Respondent as a Sales Executive and started working as such on November 1, 2010, earning a salary of Ksh 102,838 per month.
2. The Claimant further pleaded that he remained in employment for 10 years, during which period he was denied leave, and that in the event leave was allowed, the salary for the days allowed was always deducted.
3. It was the Claimant's further pleading:-
 - a. that in the year 2019, the Claimant was maliciously dragged to Court and charged with stealing, among other charges, in Mombasa Criminal Case No 1250 of 2019 (Republic v Evans Otieno).
 - b. that a ruling in the case was delivered on January 19, 2021 and the Claimant was found innocent and consequently acquitted.
 - c. that the Respondent has not given any reason for his termination, and that the Claimant was not given any opportunity to be heard and to call witnesses prior to termination of his services; and that the termination was unfair, unjustifiable and unlawful.



- d. that as a result of the unfair termination, the Claimant lost his source of income at a tender age and was embarrassed and his reputation injured, and efforts to secure another job have been in vain as no certificate of service was issued.
 - e. that the Claimant was contributing Ksh 5,000 per month towards school fees and that the Respondent had refused to refund his contributions, amounting to Ksh 25,000 at the time of termination.
 - f. that the Respondent terminated the Claimant's employment on February 4, 2020 without any prior notice and without according the Claimant audience to respond to issues underlying his termination.
4. The Claimant set out his claim against the Respondent as follows:-
- a. one month salary *in lieu of* notice.....Ksh 102,838.11
 - b. an equivalent of 12 months' salary for unlawful and wrongful termination @Ksh102,838x12 months.....Ksh1,234,056
 - c. salary arrears for 9 months @Ksh 102,838X9 months9225,542
 - d. unpaid leave days for 4 years @Ksh 71,986X4 yearsKsh 7287,944
 - e. paternity leave.....47,991.18
 - f. school fees savings.....Ksh 25,000
 - g. a certificate of service
 - h. a declaration that termination of the Claimant's employment was unfair.
5. The Claimant filed an Amended Memorandum of Claim, with the Court's leave, on May 13, 2022, pleading the date of termination of employment as February 4, 2020.
6. The Respondent is not shown to have filed an amended response to the amended claim. In the Memorandum of Reply filed on June 17, 2021 in response to the initial memorandum of claim, the Respondent denied the Claimant's claim and pleaded fair dismissal of the Claimant, and stated:-
- a. that there existed a contract of employment between the Claimant and the Respondent dated November 1, 2015, and that the Claimant was the Respondent's employee from the date of the said contract until 31st January 2020 when he was summarily dismissed.
 - b. that under Clause 12 of the Claimant's contract of employment, the Claimant was entitled to twenty four (24) working leave days annually, and that all unpaid contractual dues and benefits were calculated on 16th January 2020 and consequently paid to the Claimant.
 - c. that pursuant to numerous complaints by customers sometimes in 2019, to the effect that they had issued payments for Yamaha Motorcycles and were yet to receive the same, the Respondent carried out investigations and the total sum received by the Claimant from customers was Ksh 924,500.26.
 - d. that the Claimant accepted cash payment without consulting the head of his department, which was against the Respondent Company's policy, and issued false promises to customers.



- e. that part of the investigations commenced by the Respondent was reporting the matter to the police regarding the Claimant, and that the Claimant chose to abscond work.
 - f. that in exercise of its rights under the Employment Act and other laws, the Respondent summarily dismissed the Claimant for gross misconduct and criminal negligence and that criminal allegations were levelled against the Claimant.
 - g. that there was no amount owing to the Claimant with regard to school fees contributions and if there was, then the same was apportioned towards recovery of sums due from the Claimant to the Respondent.
 - h. that the Claimant voluntarily absconded work and went into hiding for six months, and later appeared in January 2020, attempting to sign into work, and that those acts amounted not only to gross misconduct, but negated the Claimant's claim for unpaid salary for twelve (12) months.
 - i. that the Respondent was entitled, under the law and contractually, to summarily dismiss the Claimant under both Clause 13.3 of the contract of employment and section 44 of the Employment Act, and that the dismissal was done fairly and in accordance with the law and operational requirements of the Respondent.
 - j. that the Claimant is not entitled to the reliefs sought as he was dismissed for fundamental breach of his terms of service.
7. When trial commenced on May 16, 2022, the Claimant adopted his written witness statement filed in Court on May 13, 2021 as his testimony. Further, the Claimant produced in evidence some eight documents listed on his list of documents dated May 12, 2021 and filed on May 13, 2021. Documents produced by the Claimant included demand notices dated March 4, 2020 and February 18, 2021 respectively, response to demand letters dated March 23, 2020 and February 23, 2021 respectively, summary dismissal letter dated January 31, 2020, the Court's Ruling in Mombasa CM's Court Criminal Case No 1250 of 2019 dated January 19, 2021 (Republic v Evans Otieno), and a bundle of copies of the Claimant's payslips
8. The Claimant further testified:-
- a. that he (the Claimant) did not absconded duty as alleged by the Respondent, but was told by the Respondent's Network Manager, Mr. Anderson, to be reporting to work until the criminal case against him was finalised, which the Claimant did.
 - b. that before finalisation of the criminal case, the Claimant went back to work but was verbally terminated.
 - c. that prior to this, the Respondent's said Network Manager (Mr. Anderson), asked the Claimant to write a resignation letter as a condition to abandonment by the Respondent of the criminal case facing the Claimant and to the Claimant accessing his pay(money). That the Claimant wrote a resignation letter (in July 2019) because he needed his dues.
 - d. that the Respondent wrote to the Claimant on January 15, 2019 and declined to accept the resignation, and indicated that they would await finalization of the criminal case against the Claimant.



- e. that on receiving the said letter, the Claimant went to the office the following day (being February 4, 2020), but was denied access to the Respondent's premises and told that he no longer had a job there and was not needed there.
 - f. that on March 18, 2020, the Claimant received a letter dated January 31, 2020 terminating his employment, and that the letter, posted by registered post, had a postage stamp for March 14, 2020 as the date when it was posted. The Claimant produced in evidence the postage cover/envelope, shown to have been posted by the Respondent on March 14, 2020.
 - g. that the termination letter accused the Claimant of absconding duty and of having a pending case whereby he was being accused of taking some money.
 - h. that the Claimant was not given a show cause letter, and was not given a hearing (before termination).
 - i. that the Claimant dealt with sales contracts. That a client signed such a document at the beginning of a transaction as a sign of commitment, and that such a document captured the customer's details and any sum paid, and was not proof of either sale or payment. That a customer could sign such a document and end up not doing any purchase.
9. The Claimant further testified:-
- a. that any payment by a customer was made to the cashier, and that the final document on any purchase was a receipt.
 - b. that there were four people involved in any transaction, that is the sales person, the Sales Manager, the Branch Manager and the Security Person.
 - c. that the Claimant was not involved in any investigation on any transaction done by him, and that no investigation report was availed to him.
 - d. that the criminal case terminated in favour of the Claimant as he was found not guilty.
 - e. that termination of the Claimant's employment was unfair, and that he was not given an opportunity to be heard.
10. Cross-examined and re-examined, the Claimant testified that his verbal termination came long before the termination letter, on February 4, 2020, whereas the termination letter dated January 31, 2020 was received by him on March 18, 2020.
11. The Respondent called two witnesses. The first witness, Amos Wafula (RW-1), told the Court that he was the Respondent's Security Manager based at Nairobi. He adopted his filed witness statement dated June 11, 2021 as his testimony. He also produced in evidence the documents listed on the Respondent's list of documents dated June 11, 2021 (eight documents), and on a further list of documents dated April 7, 2022 (eleven documents) in evidence, save for the document listed as item No 8 on the former list which had not been filed. The documents were marked as the Respondent's exhibit nos. 1-18 in the order of their listing.
12. The witness (RW-1) further testified:-
- a. that the Claimant was employed by the Respondent as a supervisor in the Respondent's Mombasa Branch, Yamaha Department, and dealt with customers who went there to buy.



- b. that on June 29, 2019, the witness (RW-1) was requested to go to the Respondent's Mombasa Branch and investigate two complains by two customers on delayed delivery of two units to them after paying cash to the Claimant.
 - c. that on reaching Mombasa, RW-1 found only one customer by the name Mustafa Farah, who had a sale agreement serial No 1256 for a total of Ksh 234,270, which had details of the customer and those of the Claimant as the Sales Supervisor.
 - d. that with support of the financial team, RW-1 checked and found that the money had not been received into the Respondent's account. That although the procedure was that all cash payments be made to the Respondent's cashier, the customer said that he paid to the Claimant.
 - e. that the second customer, whom the witness (RW-1) did not meet personally, had a sale agreement Serial No 1267 dated April 30, 2019 for Ksh 110,000, and that according to the sale agreement, the unit being sold was UE311-00-1936; and that when the witness checked in the Respondent's system, it was not reflecting, and there was no payment.
 - f. that the second transaction prompted the witness (RW1) to check the security register and he found that nine (9) new units had delivery notes, but had not been paid for, according to the Respondent's records.
 - g. that the witness (RW1) called the Claimant, who was said to be at Kilifi at the time, and that the Claimant was hesitant to go to the office.
 - h. that the matter was reported to the police, and the Claimant was arrested at Valencia Hotel's parking where he (the Claimant) had directed RW-1 to meet him. That the nine new units were of a total value of Ksh 924,500.
13. Cross-examined and re-examined, RW-1 testified:-
- a. that the only time that RW-1 interacted with the Claimant was when he (RW1) went to arrest him, and that the arrest gave rise to a criminal case; and that he (RW-1) was not aware of the Claimant having been subjected to a disciplinary proceeding.
 - b. that where a customer has cash to pay, he is taken to the cashier, who generates a receipt for the amount paid. That he (RW-1) was not the cashier, and was not present when the transactions in issue were transacted, and that the cashier had not recorded a statement.
 - c. that the witness (RW-1) had nothing to show that the nine (9) new motorcycle units had not been paid for, and that the cashier was best placed to answer to matters finance, as every customer is handled by the sales person and the cashier.
 - d. that the security person is involved at the point of the sale unit leaving the Respondent's premises, and that security guards were involved in the investigations.
 - e. that the witness (RW-1) had nothing to show that the sales person, the security guards and the cashier, were involved in the investigations.
 - f. that his (RW-1's) findings were based on interviews of the customers, the guards and perusal of documents.
14. The Respondent's second witness, William Wambugu (RW2), told the Court that he is the Respondent's Human Resource Manager. He adopted his filed witness statement dated June 14, 2021 as his testimony in chief. Cross examined, RW-2 testified:-



- a. that he joined the Respondent company on February 1, 2021, and was conversant with the case herein through perusal of documents.
 - b. that a customer is first issued with a sales quotation, which indicates the item and price, and that once the customer agrees to buy, he goes to the cashier, pays and gets a receipt. That the receipt is then given to the sales person for release of the item sold.
 - c. that the witness (RW-2) did not know how many stages were involved in a single sale transaction at Mombasa branch, that the Branch or Sales Manager were supposed to know.
 - d. that the summary dismissal letter dated March 31, 2020 accused the Claimant of absconding duty and theft of company money and property.
 - e. that the Claimant was not called for a disciplinary hearing because he absconded duty from July 2019 to January 2020.
 - f. that no show cause letter was issued to the Claimant because he had absconded duty.
 - g. that the Claimant was paid all his dues.
15. Having considered the pleadings filed and evidence adduced by both parties, issues that present for determination in my view, are as follows:-
- a. whether termination of the Claimant’s employment was unfair.
 - b. whether the Claimant is entitled to the reliefs sought.
16. On the first issue, the Claimant’s letter of summary dismissal from employment dated January 31, 2020 states, in part:-
- “we refer to investigations conducted at Mombasa Toyota following complaints by customers which revealed that in the course of your work as the Yamaha Sales Supervisor, you received various payments from customers totalling Ksh 924,500.26 for the purchase of Yamaha Motorcycles which amount you did not remit to the company and neither were the goods delivered to the customers. In addition to the theft of company monies and goods, we note that you have absconded from duty since July 1, 2019 to date.
- Your conduct above is unacceptable, contrary to the company values of integrity and honesty and amounts to gross misconduct...”
17. Section 41 of the *Employment Act 2007* sets out a mandatory procedure that must be adhered to by any employer considering termination of an employee’s employment on grounds of misconduct, poor performance or physical incapacity. The Section states as follows:-
- (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, the 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 ground of misconduct or poor performance, and the person, if any chosen by the employee within subsection (1) make.”

18. From the evidence presented by the Claimant, and as admitted by the Respondent’s witnesses, RW-1 and RW-2, the Respondent did not comply with the foregoing mandatory provisions of the statute before terminating the Claimant’s employment. The Respondent’s witnesses appeared to suggest that the reason why the foregoing mandatory procedure was not followed was because the Claimant had absconded duty. This narrative of the Claimant having absconded duty cannot, in my view, hold any ground because:-
- a. RW-2 testified that on June 29, 2019, the witness was requested by the Respondent’s management to go to the Respondent’s Mombasa branch and investigate some complaints involving the Claimant. RW-1’s visit to the Respondent’s Mombasa branch culminated in the arrest and arraignment of the Claimant in a criminal Court. The criminal proceedings, according to documents produced in Court by the Claimant, dragged on until January 19, 2021 when the Claimant was found innocent and subsequently acquitted by the Court under section 210 of the Criminal Procedure Code.
 - b. the Respondent, which is shown to have been the complainant in the criminal case against the Claimant Mombasa CM Criminal case No 1250 of 2019, could have easily effected personal service of a notice to show cause or show cause letter on the Claimant during the currency of the said proceedings.
 - c. according to documents produced in evidence by the Claimant, and to which the Respondent never objected, the Respondent is shown to have written to the Claimant on January 15, 2019 declining a resignation shown to have been tendered by the Claimant on July 1, 2019. There is on record unrebutted evidence to the effect that the Claimant received the said letter in February 2020, and that the Respondent had asked the Claimant to resign as a condition to accessing his money/dues and to not facing criminal charges. The Respondent did not tell the Court how it could respond to the Claimant’s letter said to be dated July 1, 2019 on January 15, 2019. The Respondent did not rebut the Claimant’s evidence that it had initially asked the Claimant to resign, before changing tune and declining to accept the resignation and pressing on with Criminal Charges against the claimant.
 - d. as the employer, the Respondent had the Claimant’s contacts, and did not tell the Court what action it took against the Claimant when he allegedly absconded duty. It is to be noted that absconding duty is a gross misconduct. The Respondent cannot allege not to have had the Claimant’s contact because when it send a letter of summary dismissal to the Claimant by registered post on March 14, 2020, the Claimant received it barely three days later, on March 18, 2020.
 - e. the Claimant’s evidence that he reported at his place of work weekly as directed by the Respondent’s Network Manager (Mr. Anderson), was neither challenged nor rebutted by the Respondent.
19. None compliance with the mandatory procedure set out in Section 41 of the Employment Act renders termination of an employee’s employment procedurally unfair pursuant to Section 45(1) of the Employment Act. The Court of Appeal stated as follows in the case of Kenfreight [e.a.] Limited v Benson K. Nguti [2016] eKLR:-

“apart from issuing a proper notice according to the contract (or payment in lieu of notice provided), an employer is duty bound to explain to an employee, in the presence of another



employee or union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition, an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service is taken....We come to the conclusion and find, in agreement with the trial Judge, that the termination of the Respondent's contract of service in the circumstances, was unfair, the payment in lieu of notice notwithstanding..."

20. Section 45(2) of the *Employment Act* provides: -

- “(2) A termination of employment by an employer 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.”

21. This Court recently stated as follows in the case of *Johnson Shijenje v Stephen Gikera & Punit Vadgama T/a Gikera & Vadgama Advocates* [2023] eKLR:-

- “17. Failure by an employer to comply with the mandatory procedure set out in Section 41 of the *Employment Act* in terminating an employee's employment renders the termination unfair pursuant to Section 45 of the Act, regardless of the allegations made by an employer against the employee. Such allegations can only be tested and their validity established during a hearing and/or disciplinary hearing during which the employee gets to be heard on the allegations before a decision to terminate his employment is reached.
19. In my view, Section 45(1) and (2) (a) are to be read together with Section 41, and matters stated in Section 45(2) are to be established during the hearing contemplated in Section 41(1) and (2). Those matters must be proved and/or established before termination, hence the necessity of a hearing before termination. Where a dispute arises after termination as to the validity or truth of matters on the basis of which an employee's employment was terminated, the Court will be interrogating the fairness of the termination vis-a-vis the facts presented during the disciplinary hearing, and will make a decision on whether or not the validity of those facts was proved before termination.
20. In my view, an employer cannot terminate an employee's employment without according the employee an opportunity to be heard on the allegations made against him, and then seek to prove those allegations after effecting the termination. The reasons for termination must be proved before termination. There cannot be proof without hearing the affected party, in this case the employee.”



22. Despite the foregoing, a few matters that came out from the evidence presented by the parties herein cannot escape this Court's comment. Whereas this Court was told that the Claimant was the Sales Supervisor, Yamaha Department in the Respondent's Mombasa branch, the Court was not told that he was the only sales person in that department. Further, the Court was not told whether delivery notes on the nine (9) new units mentioned in the Claimant's summary dismissal letter were issued without any payment receipt at all, and by whom. The two customers alleged to have paid cash to the Claimant were not called to record statements and to testify against the Claimant. The Respondent's Cashier was not called to testify on whether or not any money was paid to the Respondent regarding the questioned sales.
23. The Court was not told whether the Respondent made an effort to track down the alleged nine new units and to record evidence from the purchaser's thereof. The Respondent's witnesses testified that a sale transaction at the Respondent Company involved more than one person. Had the Respondent conducted proper investigations, it would, possibly, have unearthed the real culprits in the apparent criminal syndicate. As to whether those would have included the Claimant, it is not for this Court to guess. The Respondent did not hold any disciplinary proceedings, and the criminal Court found that the Claimant had no case to answer and proceeded to acquit him.
24. All that I can say is that in my view, the Respondent did not prove the validity of the reasons given for terminating the Claimant's employment, either before or after termination. The alleged reason for termination were never justified. To that extend, termination of the Claimant's employment was substantively unfair. The Court stated as follows in the case of Walter Ogal Anuro v Teachers Service Commission [2013] eKLR:-

“...for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”
25. It is my finding that termination of the Claimant's employment by the Respondent was procedurally and substantively unlawful, and therefore unfair, I so declare.
26. On the second issue, and having found that termination of the Claimant's employment was unfair, I award the Claimant the equivalent of eight months' salary being compensation for unfair termination of employment. That is Ksh 102,838.11X8 = 822,704.88. I also award the Claimant Ksh 102,838.11 being one month salary *in lieu of* notice as Section 35(1) of the Employment Act was not complied with.
27. The claim for nine month's salary arrears, being of the nature of special damages, was not specifically pleaded, was not proved, and is declined.
28. The claims for unpaid leave for four years, paternity leave and school fees savings were not specifically pleaded, were not proved, and are declined.
29. The claim for issuance of a Certificate of Service is merited and is allowed. Under Section 51 of the Employment Act, an employee whose employment is terminated is entitled to be issued with a Certificate of Service.
30. Finally, and having considered written submissions filed by Counsel for both parties, judgment is hereby entered for the Claimant against the Respondent for:-
 - a. The equivalent of eight months' salary being compensation for unfair termination of employment.....Ksh 822,704.88



- b. One month salary *in lieu of* notice.....Ksh 102,838.11
Ksh 925,542.99
31. The awarded sum shall be subject to statutory deductions pursuant to Section 49(2) of the [Employment Act](#).
32. The Respondent shall issue the Claimant with a Certificate of Service pursuant to Section 51 of the [Employment Act](#) within thirty days of this judgment.
33. The Claimant is awarded costs of the suit and interest at Court rates.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 16THFEBRUARY 2023

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

