



**Kisalu v Sunu’s Baby & Children Wear Limited (Cause 1891 of 2017)
[2023] KEELRC 378 (KLR) (10 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 378 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1891 OF 2017
SC RUTTO, J
FEBRUARY 10, 2023**

BETWEEN

JACKSON KISALU CLAIMANT

AND

SUNU’S BABY & CHILDREN WEAR LIMITED RESPONDENT

JUDGMENT

1. The claimant instituted the suit through a memorandum of claim dated September 21, 2017. He claims that he was employed by the respondent as a salesman in March, 2011 and was summarily dismissed on or about July 2, 2017 without any justification. The claimant has termed his termination as irregular and unlawful hence claims against the respondent the sum of kshs 244,258.00 being notice pay, compensatory damages for unfair termination and leave allowance in respect of 2017.
2. Upon being served with the claim, the respondent filed a memorandum of response, through which it has denied the claimant’s averments. The respondent avers that it did not dismiss the claimant and that he engaged in irregular, unprofessional and illegal activities to steal its commodities. That the claimant thereafter absconded duty and completely refused to report to work. That it further informed the claimant that it was ready and willing to follow direction that would be determined by the county labour officer but he refused and or completely declined to visit the county labour office for such directions. To this end, the respondent has asked the court to dismiss the suit with costs.
3. The matter proceeded for part hearing on May 25, 2022. Subsequently, it was adjourned for defense hearing which was slated for July 14, 2022. However, the respondent failed to make any appearance in court on the said date, hence the trial was marked as closed as the court noted that the hearing date was taken mutually.



Claimant's Case

4. The claimant testified in support of his case at the outset, sought to rely on his witness statement as well as the documents filed together with his claim to constitute his evidence in chief.
5. It was his testimony that he worked for the respondent for 6 years and during that period, he performed his duties diligently and honestly. That on July 2, 2017, he reported to work and performed his duties upto 2:00 pm since it was on a Sunday. That while leaving the respondent's premises, his manager by the name Mr Kamlesh Danani asked him to step aside as the other employees left the shop. That Mr Kamlesh who ordered him to strip naked, called him a thief and roughed him up. That he was surprised as it was the first time such a thing was happening to him. That he resisted the inhumane treatment and advised Mr Kamlesh to conduct a decent search if at all he suspected him. That nonetheless, he continued roughing him up until other employees intervened.
6. That Mr Kamlesh told him not to report to work again and that he could only pay him for the days worked. That he was surprised as there was no justification for his actions. That he went to work the following day but Mr Kamlesh asked him to leave as his employment with the respondent was over.
7. The claimant denied stealing or attempting to steal anything from his employer. He termed his dismissal as unfair and unlawful as he was neither given a notice to show cause nor the reasons for his termination. It was his further evidence that he was not given a letter of termination.
8. That further, he was not called to any police station to answer to any charges and was not charged in court. He further disowned the document annexed to the respondent's response, titled "disciplinary proceedings". It was his evidence that he was seeing the same for the first time in court.
9. The claimant closed his testimony by asking the court to allow his claim as prayed and to grant him compensation.

Respondent's Case

10. As stated herein, the respondent did not present oral evidence hence its case is as per its memorandum of response.

Submissions

11. The claimant submitted that his evidence was never rebutted or controverted. That further, there was no reason to terminate his employment and that he had proved his case on a balance of probabilities.
12. On its part, the respondent submitted that the claimant had failed to establish that there was an employer employee relationship between the parties. That the claimant never produced his contract of employment, pay slips or Mpesa or bank statement to prove his employment.
13. It was the respondent's further submission that the claimant initiated his summary dismissal by his own conduct as he was guilty of misconduct and was absent from work. That there was a genuine and valid reason to prove misconduct on the claimant's part hence his dismissal was justified. In support of its position, the respondent invited the court to consider the determination in the case of *Nzoia Sugar Company Limited v Collins Faugututi*, Civil Appeal No 7 of 1987.
14. That section 41(2) of the *Employment Act*, requires an employer to give the employee hearing on a short notice. That the proceedings in such a forum are not equivalent to those before a criminal court. The case of *George Musamali v G4S Security Services Kenya Ltd* [2016] eKLR was cited in support



of this argument. In further submission, the respondent stated that the claimant failed to attend or honour summons of the disciplinary proceedings.

Analysis And Determination

15. I have considered the issues raised in the pleadings, the evidence on record as well as the rival submissions and the following issues stand out for determination: -
- a) Was there an employment relationship between the claimant and the respondent?
 - b) If the answer to (a) is in the affirmative, was the claimant's termination from employment unfair and unlawful?
 - c) Is the claimant entitled to the reliefs sought?

Existence Of An Employment Relationship?

16. The respondent denied the existence of an employment relationship in its memorandum of response. It further submitted that the claimant had failed to prove the existence of an employment relationship.
17. The claimant exhibited copies of his staff identity card and salary voucher both of which bear the name of the respondent. It is essential to note that the respondent did not dispute issuing the said documents to the claimant.
18. What's more, the respondent set out in detail allegations of theft against the claimant and what it termed as being the reason why he had to leave its employment. In essence, it was making an admission that it had an employment relationship with the claimant hence was justified in dismissing him from its employment. It is for this reason that I do not quite get the gist of the respondent's contention.
19. In light of the claimant's exhibits, I am satisfied that he has proved on a balance of probabilities that he was employed by the respondent.
20. Having found as such, I now move to determine whether the claimant's termination was unfair and unlawful.

Unfair And Unlawful Termination?

21. Under the [Employment Act](#), 2007, an employer is required to prove that an employee's termination was not only fair substantively but also procedurally. Basically, this is the standard for determining whether an employee's termination was fair or not. In this regard, sections 43, 45 and 41 of the [Employment Act](#), are key and I will proceed to consider them hereinunder.
22. Substantive justification entails proof of the reasons which resulted in an employee's termination while procedural fairness relates to the process applied in terminating the employment of an employee. I will start by considering substantive justification.
23. Pursuant to section 43(1) of the [Employment Act](#), an employer is required to prove the reason or reasons for the termination, and where it fails to do so, such termination shall be deemed to have been unfair within the meaning of section 45.
24. Section 45 (2) (a) and (b) of the [Employment Act](#) provides that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and related to the employee's conduct, capacity or compatibility; or based on its operational requirements.



25. What this means is that the employer ought to prove that the reasons for terminating the employee pass the fairness and validity test. This can only be ascertained by the facts of each case and the evidence on record.
26. In the instant case, the respondent averred that it had a reason to terminate the claimant from employment as he stole its commodities and thereafter absconded duty. Despite its assertions, the respondent did not lead evidence in whatever form or manner to prove the reasons for which the claimant was terminated. In this regard, its allegations against the claimant were not substantiated as its version of events was not backed by evidence.
27. Further, its failure to call oral evidence did not help matters at all hence its case as presented through the memorandum of response could not be tested in cross examination.
28. The long and short of it is that the respondent failed to discharge its burden under sections 43(1) and 45(2) (a) & (b) of the Employment Act by proving that it had fair and valid reasons to terminate the employment relationship.
29. With regards the limb of procedural fairness, the same is to be found under section 45(2) (c) of the Employment Act. It provides that for termination to be fair, it ought to be in line with fair procedure. Section 41(1) of the Employment Act sets out the specific requirements of a fair hearing. This procedure entails notifying the employee of the allegations he or she is required to respond to and thereafter granting him or her the opportunity to make representations in response to the said allegations.
30. The respondent stated that it lodged a complaint with the county labour officer and the claimant was thereafter invited for a disciplinary hearing which he attended but declined to sign the statement. On his part, the claimant denied attending any disciplinary proceedings and as a matter of fact, disowned the document titled “disciplinary meeting” which was annexed to the respondent’s response.
31. As stated herein, the respondent did not call oral evidence hence its documents were not produced as exhibits before court. In this regard, the persons named as having witnessed the claimant’s refusal to sign the document were not called to testify.
32. On this score, I find useful guidance in the determination of the Court of Appeal in Kenneth Nyaga Mwigye v Austin Kiguta & 2 others [2015] eKLR where it was held that a document “marked for identification”, is of very little, if any, evidential value until it is formally produced.
33. In this case, the said document titled “disciplinary meeting” was neither marked for identification nor formally produced as an exhibit before court. As such, it was of no evidential value to the respondent and did not aid in proving that the claimant was indeed invited for a disciplinary meeting but refused to attend.
34. Therefore, it is my finding that the respondent failed to prove to the requisite standard that it subjected the claimant to a fair process prior to dismissing him from employment.
35. In the circumstances, I cannot help but find that the respondent is at fault for want of procedure.
36. The total sum of my findings is that the claimant’s termination was both unfair and unlawful in terms of sections 41, 43 and 45 of the Employment Act.

Appropriate Reliefs

37. Having found that the claimant’s termination was unfair and unlawful, the court awards him compensatory damages which is equivalent to six (6) months of his gross salary. This award takes into



account the length of the employment relationship between the parties as well as the circumstances leading to the claimant's termination from employment.

38. The claimant is further awarded one (1) month's salary in lieu of notice as his termination was unlawful.

Orders

39. In the end, I enter judgment in favour of the claimant against the respondent and he is awarded:

- (a) One month's salary in lieu of notice being the sum of Kshs 17,447.00.
- (b) Compensatory damages in the sum of Kshs 104,682.00, being equivalent to 6 months of his gross salary.
- (c) The total award is Kshs 122,129.00.
- (d) Interest on the amount in (c) at court rates from the date of judgement until payment in full.

40. The claimant shall also have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF FEBRUARY, 2023

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Mutemi

For the Respondent Ms. Mwangangi

Court Assistant Abdimalik Hussein

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

