



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Vuli v Chemigas Limited (Cause 10 of 2017)
[2023] KEELRC 309 (KLR) (8 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 309 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 10 OF 2017
JK GAKERI, J
FEBRUARY 8, 2023**

BETWEEN

KILONZO VULI CLAIMANT

AND

CHEMIGAS LIMITED RESPONDENT

JUDGMENT

1. The Claimant initiated this Claim by a Statement of Claim filed on January 9, 2017 alleging unlawful, unfair and wrongful termination of employment and non-payment of terminal dues and compensatory damages.
2. The Claimant avers that he was employed by the Respondent as a Sales Executive in May 1995 at a monthly salary of Kshs 56,443/= and no written contract was issued.
3. The Claimant further avers that he served the Respondent diligently working from 8 am – 5 pm on weekdays and 8.30 am to 2.00 pm on Saturdays.
4. That he was summarily dismissed on February 3, 2016 by the Managing Director allegedly for reporting at 2.05 pm on account of traffic and was not given an opportunity to defend himself.
5. It is the Claimant’s case that his termination from employment was malicious, the Respondent had no valid and fair reason and did not comply with the prescribed procedure.
6. The Claimant avers that he was not paid salary for 3 days from 1st to February 3, 2016 and was not given a certificate of service.
7. The Claimant prays for:-
 - a. A declaration that his dismissal was irregular, unlawful, wrongful, unprocedural and without justification.



- b. Terminal benefits and compensatory damages at Kshs 1,450,693.65.
- c. General damages for breach of contract and wrongful dismissal.
- d. Punitive damages for victimization by the Respondent.
- e. Interest on (b) and (d) above.
- f. Certificate of service.
- g. Costs of this suit.

Respondent's Case

8. The Respondent filed its response on February 3, 2017.
9. The Respondent admitted that the Claimant was its employee and was summarily dismissed as his conduct warranted, as he knowingly failed or refused to obey lawful and proper commands of the employer, absented himself without leave or lawful cause.
10. The Respondent denies owing the Claimant the amount claimed and avers that he was a registered member of the NSSF and thus not entitled to service pay.
11. The Respondent prays for dismissal of the suit with costs.
12. The Claimant filed a Reply to the Respondent's response rehashing the contents of the Memorandum of Claim.

Claimant's Evidence

13. The Claimant's written statement dated November 14, 2016 replicated the contents of the statement of claim.
14. On cross-examination, the witness confirmed that he was engaged in May 1995 but had no evidence on the matter as he was not given a written contract of service and had not provided payslips for other years other than 2015 and 2016.
15. The witness further confirmed that reporting time was 8.30 am and exit at 5.30 pm yet in his statement, the reporting time is different.
16. It was his testimony that a late comer would be blocked out and the same would be deducted from the salary and did not amount to gross misconduct.
17. It was his testimony that he received the letter of dismissal but did not acknowledge receipt. That it was handed over to him.
18. The witness denied having received any of the three warning letters. He confirmed that the company had a biometric system to monitor attendance.
19. Questioned on the records of attendance availed by the Respondent, the witness confirmed that from January 5, 2015 to January 27, 2015, he was late for 5 days, from 1st June to June 27, 2015, he was late for 140 minutes, June 27, 2015 to July 29, 2015, 260 minutes, July 28, 2015 to 2August 7, 2015, 230 minutes, September 29, 2015 to October 28, 2015, 120 minutes, October 28, 2015 to November 25, 2015, 120 minutes and January 4, 2016 to January 28, 2016, 140 minutes.
20. It was his testimony that records showed that he used to report to work late in 2015 and early 2016.



21. The witness contradicted his evidence himself by asserting that he was unaware whether lateness was a form of gross misconduct.
22. On re-examination, the witness testified that he was not given a contract of service and was unaware of who did the reports on attendance as he did not sign whenever he came late.

Respondent's evidence

23. RWI, Mr. Yusuf Khan confirmed that the Claimant's salary was Kshs 56,443/= per month. That the Claimant occasionally failed to heed instructions not to report to work late and was dismissed on 3rd February, 2016 for reporting to work late.
24. It was his testimony that the Respondent had a biometric system to check on reporting times.
25. On cross-examination, the witness stated that the Claimant was not taken through any internal disciplinary process nor issued with a notice to show cause. That although the warning letters had no acknowledgement by the Claimant, he received them and the letter of dismissal made no reference to the warning letters.
26. It was his further testimony that he had no evidence to show that dues were paid.
27. He confirmed receipt of the letter from the Ministry of Labour.
28. On re-examination, the witness testified that the Claimant routinely reported to work late as evidenced by attendance sheets on record.
29. Finally, the witness testified that the Claimant was a member of the NSSF and the reason for dismissal was valid.

Claimant's Submissions

30. According to the Claimant's counsel, the issues for determination are;
 - i. Whether termination of the Claimant's employment was unfair and wrongful.
 - ii. Whether the Claimant is entitled to the reliefs sought.
31. On the first issue, the provisions of Section 43 and 45 of the *Employment Act* as well as the decision in *David Kipkosgei Mutai v Green Palms Academy* (2014) eKLR were relied upon to urge that the Claimant's dismissal was unfair as he was late by 5 minutes only after the lunch break. That the dismissal was devoid of a valid and fair reason and reporting to work late was not a form of misconduct under Section 44 of the *Employment Act, 2007*. Moreover, the minutes by which an employee was late would be deducted from the salary.
32. As regards procedure, it was submitted that the Respondent did not comply with the provisions of Section 41 of the *Employment Act* which are mandatory and the termination of the Claimant's employment was devoid of a fair procedure.
33. As regards the remedies sought, it was urged that the Claimant had established entitlement to the reliefs as his termination was unfair and wrongful. That he was entitled to damages for the humiliation he was subjected to.



Respondent's Submissions

34. By November 21, 2022 when the court retired to prepare this judgement, the Respondent had not filed submissions.
35. Instructively, on October 31, 2022 when the parties were to confirm the filing of submissions after the hearing on September 27, 2022, the Respondent's counsel, Mr. Okeyo requested for 7 days to file submissions but did not comply with the directions of the court to file in 7 days.

Determination

36. After careful consideration of the pleadings, evidence, submissions and the law, the issues for determination are;
 - i. Whether termination of the Claimant's employment was unfair.
 - ii. Whether the Claimant is entitled to the reliefs sought.
37. On the first issue, while the Claimant submitted that the dismissal was unfair for want of valid reason and fair procedure, the Respondent maintained that it had a valid reason to do so.
38. Section 45 of the [Employment Act, 2007](#) is the bedrock of fair termination of an employment contract as it combines the attributes of a fair termination of a contract of service. It provides as follows;
 1. No employer shall terminate the employment of an employee unfairly.
 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 operational requirements of the employer; and
 - c. that the employment was terminated in accordance with fair procedure.
39. Other provisions of the [Employment Act](#) add to or supplement the attributes prescribed by Section 45 of the Act.
40. In [Pius Machafu Isindu v Lavington Security Guards Ltd](#) (2017) eKLR, the Court of Appeal stated as follows;

“There can be no doubt that the Act which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (Section 43); prove the reasons are valid and fair (Section 45); prove that the grounds are justified (Section 47(5)), amongst other provisions. A mandatory and elaborate process is then set up under Section 41 requiring notification and hearing before termination . . .”
41. In totality, the gamut of the statutory provisions germane to termination of employment or dismissal capture the two elements of a fair dismissal or termination of employment and courts have enforced these statutory provisions religiously.



42. The elements were aptly captured by Ndolo J. in *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR as follows;

“However, for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness.”

43. Similar sentiments were expressed by the Court of Appeal in *Naima Khamis v Oxford University Press (EA) Ltd* (2017) eKLR as well as *Kenafri Industries Ltd v John Gitonga Njeru* (2016) eKLR.

44. As elaborated by Ndolo J. in the *Walter Ogal Anuro's* case (*supra*), while substantive justification refers to the reason(s) for termination, procedural fairness is concerned with the process employed by the employer to conduct the termination of employment.

45. I will now proceed to apply the foregoing provisions and principles of law to the facts of the instant case.

Reasons for termination

46. While the Claimant urges that the Respondent had no valid reason to dismiss the Claimant, the Respondent submitted that it had justifiable reasons to do so.

47. The summary dismissal letter dated 3rd February, 2016 stated as follows;

“This is to notify you that you have seriously failed to obey instructions and neglected working hours as you have done today which is not acceptable.

We find this is serious gross misconduct and we summarily dismiss you with immediate effect . . .”

48. Evidently, the Claimant’s dismissal was on account of failing to report to work on time as instructed.

49. The Claimant testified that working hours were 8.00 am to 5.00 pm with lunch break from 1.00 pm to 2.00 pm.

50. On cross-examination, however, he stated that working hours were 8.30 to 5.30 pm but admitted that the Respondent had a biometric system which recorded reporting and exit times.

51. Evidence availed by the Respondent which the Claimant did not controvert revealed that in the month of January 2015, the Claimant was late for work for 230 minutes. Between June 27, 2015 and July 29, 2015, the Claimant reported to work late on 16 days out of 24 days.

52. In addition, between July 28, 2015 and August 27, 2015, the Claimant reported to work late on 12 days out of 27 days. And as the Claimant confirmed on cross-examination, he reported to work late as a routine.

53. Between June and July 2015, the Claimant was late for a total of 260 minutes over 4 hours; September to October 2015, 120 minutes and October to November 2015, 120 minutes.

54. The Claimant conceded on cross-examination that the records showed that he was a habitual late comer.

55. The Claimant’s allegation that he did not sign any document whenever he came late could not ameliorate the situation as he had already admitted that the Respondent had a biometric system.

56. Relatedly, the absence of signature does not of itself signify the non-receipt of a letter as alleged.



57. Similarly, although the Claimant denied having received the warning letters on record, it is evident that the Claimant had challenges with obeying instructions on working hours from as early as 2012. Although the Claimant reported early on several occasions, the employer was only concerned with late reporting since it had a prescribed working hours. Moreover, whereas reporting to the work place early is a matter of choice, observing working hours is a contractual and legal obligation on the part of the employee.
58. Contrary to the claimant’s counsel’s submission that reporting to work late was not categorised as gross misconduct under Section 44(4) of the *Employment Act*, the provision is not only permissive but inexhaustive.

It is emphatic that;

Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under sub-section (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section constitute justifiable or lawful grounds for the dismissal if . . .”

59. Significantly, Section 44(4)(e) of the Act refers to
- “an employee knowingly fails or refuses to obey a lawful and proper command which it was within the scope of his duty to obey . . .”
60. The Claimant was aware of the reporting times but appear to have ignored it wantonly.
61. Section 43(2) of the *Employment Act* provides that;
- 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.
62. The evidence on record leave no doubt that the Claimant was a habitual late comer to the work place and had been warned by the employer. Attendance records for 2015 and 2016 reveal that the Claimant reported to work late as a matter of routine while aware of the prescribed reporting time.
63. The Respondent appear to have reached the end of the tether and justifiably so.
64. For the foregoing reasons, it is the finding of the court that the Respondent has on a balance of probabilities demonstrated that it had a valid and fair reason to terminate the Claimant’s employment.

Procedure

65. As the Court of Appeal observed in *Pius Machafu Isindu v Lavington Security Guards Ltd* (*supra*), Section 41 of the *Employment Act* prescribes a mandatory and elaborate procedure to be complied with by the employer before an employee’s contract of service is terminated. The attendant procedural precepts have been articulated in several decisions by this court and the Court of Appeal.
66. In *Postal Corporation of Kenya v Andrew K. Tanui* (2019) eKLR, the Court of Appeal status thus;

“Four elements must thus be discernible for the procedure to pass muster:-



- i. an explanation of the grounds of termination in a language understood by the employee;
- ii. the reason for which the employer is considering termination;
- iii. entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination are made;
- iv. hearing and considering any representations made by the employee and the person chosen by the employee.”

67. In this case, the Respondent’s witness confirmed on cross-examination that the Claimant was not subjected to any internal disciplinary hearing.

68. In the absence of evidence to show that the provisions of Section 41 of the *Employment Act* were complied with, it is the finding of the court that Respondent has failed to establish that termination of the Claimant’s employment on 3rd February, 2016 was conducted in accordance with a fair procedure.

Reliefs

69. Having found that termination of the Claimant’s employment was unfair for want of procedural propriety, I now proceed to examine the appropriate reliefs;

- a. A declaration is hereby issued that termination of the Claimant’s employment by the Respondent was unfair and unlawful.
- b. As regards terminal dues, the court proceeds as follows;

i. Salary in lieu of notice, Kshs 56,443/=

70. Having found that termination of the Claimant’s employment was unfair and the Respondent failed to give the Claimant the requisite notice, the court awards Kshs 56,443/= as pay in lieu of notice. This award is justified on the premise that since the Claimant reported to work late as a matter of routine, the employer was unhappy with his conduct as evidenced by warning letters with the last dated 11th February, 2013. The Respondent had the opportunity to give the requisite notice or pay in lieu of notice. Three days salary for 1st – 3rd February, 2016, Kshs 6,512/=

71. Although RWI testified that all terminal dues were paid to the Claimant, he admitted on cross-examination that he had no evidence in support. The Claimant is awarded Kshs 6,512/= for the 3 days worked in February, 2016.

ii. Payment of untaken leave

72. Neither the written statement dated November 14, 2016 nor the oral evidence adduced in court made reference to untaken leave days and how many they were as well as when they accrued.

The prayer lacks particulars and is declined.

iii. Service pay, Kshs 683,828.70

73. RWI confirmed in evidence that the Claimant was a member of the National Social Security Fund (NSSF) and was thus unqualified to claim service pay.

74. Copies of the three payslips provided by the Claimant for November and December, 2015 and January 2016 show that the Respondent was deducting NSSF contributions from the Claimant’s salary.



75. The claim for service pay is unsustainable by virtue of Section 35(6)(d) of the Employment Act and is declined.

iv. Compensation for unfair termination Kshs 677,316/=

76. Having found that termination of the Claimant's employment was unfair for non-compliance with the provisions of the Employment Act, the Claimant is entitled to the relief provided under Section 49(1)(c) of the Employment Act.

77. In determining the quantum of compensation, the court has considered the following; The Claimant was an employee of the Respondent for about 19 years which is undoubtedly a long time. The Claimant substantially contributed to the termination of employment on 3rd February, 2016. The Claimant had at least three (3) previous warning letters dating as far back as 2011 on reporting to the work place late or failing to report altogether or absconding duty contrary to the averment that he served the Respondent diligently and with commitment. The Claimant did not appeal the Respondent's decision or indicate willingness to continue working for the Respondent.

78. In view of the above, the court is satisfied that the equivalent of two (2) month's salary is fair.

c. General damages for breach of contract

79. The Claimant laid neither a factual nor legal basis of entitlement to general damages for breach of the contract of employment.

The claim is declined.

d. Punitive damages for victimization

80. The Claimant adduced no shred of evidence of victimization by the Respondent. Neither the written statement nor the oral evidence led in court make reference to any alleged victimization and the form it took.

The prayer is hypothetical and is rejected.

e. Certificate of service

81. The Claimant is entitled to a certificate of service by dint of Section 51 of the Employment Act, 2007.

82. In the upshot, judgement is entered for the Claimant against the Respondent in the following terms;

- a. A declaration that the Claimant's dismissal from employment was unfair and unlawful.
- b. One month's salary in lieu of notice Kshs 56,443/=.
- c. Equivalent of two (2) month's compensation Kshs 112,886/=.
- d. Certificate of service to issue within 30 days.
- e. Costs of this suit.
- f. Interest at court rates from the date of judgement till payment in full.

83. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 8TH DAY OF FEBRUARY 2023



DR. JACOB GAKERI

JUDGE

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 March 15, 2020 and subsequent directions of April 21, 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 has 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.

DR. JACOB GAKERI

JUDGE

