



**Osoro v General Industries Ltd (Cause 1135 of 2018)  
[2023] KEELRC 267 (KLR) (2 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 267 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1135 OF 2018  
AN MWAURE, J  
FEBRUARY 2, 2023**

**BETWEEN**

**JARED OSORO ..... CLAIMANT**

**AND**

**GENERAL INDUSTRIES LTD ..... RESPONDENT**

**JUDGMENT**

1. The Claimant filed the statement of claim dated the July 2, 2018 claiming unfair and unlawful termination of employment. The Claimant avers that on or about November 1, 2012, the Respondent offered him employment for a three months period where he was attached to the production department in which position he offered exemplary services.

**Claimant’s Case**

2. The Claimant states that due to his excellent performance at the workplace his 3 months contract was extended to 6 months. The contract was periodically renewed until he was unlawfully terminated on 2<sup>nd</sup> July 2017 without any reason whatsoever.
3. Claimant further avers that it was also an express term of the contract between the Respondent and Claimant that either party could terminate the contract of employment after issuing a one-month notice and further that the Respondent would summarily dismiss the Claimant herein only on the grounds stipulated in the contract of employment.
4. The Claimant states that on the 2<sup>nd</sup> day of July 2017 the Respondent without any lawful cause and in violation of *the Constitution* of Kenya 2010 and without regard to proper procedures of the *Employment Act* herein summarily dismissed the Claimant. He was earning a consolidated sum of ksh 10,954/=.



5. It is averred that the termination was unlawful, unfair, and contrary to the principles of natural justice as notice was not accorded to the Claimant as required by the law, the Respondent did not give the Claimant a chance to explain himself, the Claimant was summarily dismissed contrary to the terms of employment contract, the Claimant was dismissed on strange and dubious grounds not known in law and terminating the Claimant's employment with no reason whatsoever.
6. The Claimant is seeking the following remedies from Court;
  - a. Declaration that the termination of the Claimant's employment by the Respondent was unlawful, unprocedural, discriminatory, unfair and contrary to the law.
  - b. A declaration that the Claimant is entitled to a certificate of service
  - c. Compensation for unlawful and unfair termination amounting to twelve 12 months' salary i.e Ksh 10,954 x 12 = 131, 448/=
  - d. Compensation of ksh 53,674.60 being unpaid leave
  - e. One month salary in lieu of notice in ksh 10954/=
  - f. Severance pay in ksh 32, 862 computed as 547.7 x 15 x 4
  - g. An order for costs of this claim
  - h. Interests at court rates for prayers (c (d) and (e) above
  - i. Any other relief the honourable court may deem appropriate and necessary to grant.

### **Respondent's Claim**

7. The Respondent in the response says that it issued termination notice on the 2<sup>nd</sup> June to take effect on the July 2, 2017. There was strenuous relationship that the Claimant had facilitated pursuant to his adamant refusal to withdraw civil suit 5181 of 2016 whereas the company had arranged with insurance to compensate his personal injury which led to unnecessary litigation costs, discomfort among employees and loss of reputation.
8. The Respondent says that the Claimant absconded work without notice, the Claimant status was uncertain whilst the Claimant was pursuing his previous claim and the Claimant served with half-heartedness and was subject to many warnings thus occasioning the Respondent financial losses.
9. The Respondent says the claim is being relitigated in a bid to get a second bite at the cherry as the Claimant had already reported the matter to the County Labour office where the County labour office advised that he be paid his one-month notice pay plus an extra month as gratuity which the Respondent complied with.
10. The Claimant was earning a monthly salary of ksh 10,954 which salary was the prevailing minimum wage and the Gazette Notice No 107 was published in late July 2017, by which time Jared had already left their employment.

### **Claimant's Evidence**

11. Claimant witness Jared Osoro gave sworn testimony and adopted his witness statement dated 2/7/2018 as his evidence in chief. He also produced a list of documents dated 2/7/2018 as exhibits in the case. He said he was terminated but was not notified that he would be terminated. He had no discipline issues and was not given an opportunity to defend himself. He further told court that there



was no attempt to settle the matter out of court which matter was a civil matter filed by the Claimant for injury compensation.

12. In cross-examination, he said that there was a termination notice he signed. He also said that he had other two cases of injury and for termination. He said that he was injured and went to the insurance and was told to take report but was not paid. On re-examination he said that he never signed a discharge voucher stating that he had no claim against the Respondent and further he says the Respondent had urged him to withdraw the injury compensation case in order to continue working. He also said that he was told he would be paid if he withdrew the case.

### **Respondent's Evidence**

13. Respondent witness Samuel Kiira gave sworn testimony and said that he is the HR Manager of the Respondent and he adopted the witness statement dated June 11, 2021 as his evidence in chief. He also produced a list of documents dated June 13, 2022 in court.
14. He informed the court that the Claimant got injured at work and was treated at company's expense. He further said that the matter was reported to the Director of occupational safety and health services. He was assessed and was offered 5% and was referred to insurance. The insurance requested he withdraw the matter for compensation but was under pressure from his advocate not to withdraw. He said that this created a strained relationship with the employer and so a decision was made to release him from employment.
15. On cross-examination the witness said that the Claimant was terminated on 2<sup>nd</sup> June 2017. He said that he was terminated because of filing a case in bad faith against the Respondent when the matter was being handled out of court and before the process could be completed. He further said that the accident occurred on the 16/6/2014 and Claimant filed case in the year 2016 August. The Claimant was terminated one year after filing case in the year 2017.

### **Claimants Submissions**

16. The Claimant submitted that it would be absurd and indeed a mockery of justice that filing of a case before court of law would be tantamount to be an indiscipline case within the employment matters warranting a dismissal. The Claimant submits that there was no valid reason issued by the Respondent to warrant the Claimant's termination. The Claimant further submitted that at the end of the day if there were to be compensation the same would be effected by the Respondent's insurer and there is no prejudice that the Respondent stood to suffer with the existence of the compensation suit in the subordinate court.
17. The Claimant relied on the case of *H. Young (EA) Ltd versus Samuel Gikunda Mbiuki* (2020) where the court held that:

“Flowing from the above mandatory provisions of the law, termination of an employee's contract of service does not pass the test of fairness unless the employer establishes by evidence that it was done on the basis of valid and fair reasons and upon following a fair procedure. In Pius Machafu Isindu versus Lavington Security Guards Limited (2017) eKLR the Court of Appeal held that:

“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 of termination/dismissal, prove the reasons are valid and fair, prove the reasons



are justified among other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.

18. It has been demonstrated in this that there was no valid reason to effect termination of the Claimant's employment and the reasons advanced by the Respondent were unfair, ambiguous and untenable in law.
19. The Claimant submits that he testified that he was never accorded a chance to be heard. He was never issued with a show cause letter or subjected to any disciplinary hearing. He says even the Respondent's witness confirmed that the Claimant was not called for a disciplinary hearing. The Claimant relied on the case of *Walter Anuro versus Teachers Service Commission (2013) eKLR* where the court observed that; 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. The Claimant submitted that the Claimant's termination herein failed both on the substantive and procedural fairness.

### **Respondents Submissions**

20. The Respondent urged the Court to ignore the duplicitous motives of the Claimant in various fora and in cross-examination rejected that he appended his signature on the termination notice. The Respondent urged the court to be persuaded by the decision of the Court in *Independent Electoral and Boundaries Commission and Another versus Stephen Mutinda Mule and 3 others* eKLR where the court quoting the decision of the Nigeria in *Adetoun Oladeji (Nig) Ltd versus Nigeria Breweries Plc S.C 91/2002* where it was held that:

“It is now very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings or put in another way, which is at variance with the averments of pleadings goes to no issue and must be disregarded”.

21. The Respondent also urged the court to appreciate the efforts made by the Respondent in settling the claim by the Claimant and the fact that it was not necessary to file the injury compensation suit in court.

### **Decision**

22. The issues for determination are
  1. Whether the Respondent presented a valid reason for terminating the Claimant from employment.
  2. The other issue is whether the Claimant is entitled to the reliefs sought.
23. The termination letter issued to the Claimant by the Respondent and dated 2<sup>nd</sup> June 2017 the reason given for the termination was put as follows “you filled a case in bad faith, a case against the company whilst still employed by the company”.
24. It is mandatory that before any employer dismisses an employee from employment he must give a valid reason for doing so.
25. Section 45(1) of *Employment Act* 2007 gives very clear direction for termination of an employee. It provides that no employer shall terminate the employment of an employee unfairly. Sub section 2 of



section 45 of the [Employment Act](#) provide 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 employees conduct, capacity or compatibility; or
  - ii. (ii) based on the operational requirements of the employer; and
- (c) that the employment was terminated in accordance with fair procedure.

26. The termination in this case appears to be in the ambit of summary dismissal even though the Claimant was also issued with a one month notice. Nevertheless even if one is issued with a notice it is provided that a valid reason for termination shall be given. The court is guided by the judgment of the case of [Kenfreight E. A. Limited vs Benson K. Nguti](#) (2016) eKLR Civil Appeal No 31 of 2015 where court held:

“Apart from issuing proper notice according to the contract of payment in lieu of notice as provided, an employee is duty bound to explain to an employee in the presence of another employee or a union official in a language the employee understands the reason or reasons for which the employer was considering termination of the contract. In addition an employee was entitled to be heard and representations if any considered by an employer before the decision to terminate his contract of service was taken.”

27. The Claimant was basically terminated for filing a suit for compensation for injury which occurred on 30<sup>th</sup> May 2014. By the time he filed the civil suit on May 17, 2016 two years later he had not been paid his damages. He was terminated in June 2017 (three years after the accident).

28. The Respondent had no good reason to terminate the Claimant for filing a suit for compensation. [The constitution](#) of Kenya 2010 articles 41 and 50 of [the constitution](#) clearly provide that every person has a right to be heard and to have access to justice. It cannot be by any fig of imagination be said that filing a suit against an employer is an act of gross misconduct calling for summary dismissal or for disciplinary action to be taken against an employee.

29. The Claimant had waited for his compensation for two years before he instituted the civil suit for his legal dues. The Respondent claims they were to settle the case. There is no evidence tendered before the court that the Claimant was informed he would be paid or evidence of such payment.

30. The court takes judicial notice that there is a time limitation in which to file a suit for compensation which is three years. If the Claimant sat and waited for his compensation he could as well have found himself locked out of the seat of justice by time. There is no reason to prevent an employee from filing a suit for compensation.

31. The Respondent could merely have compromised the suit by offering the Claimant the compensation and the Claimant would have been obliged to withdraw the suit. As it were the court holds the reason given for terminating the Claimant from employment was not a valid reason. As provided in the case of [Walter Onuro Ogal vs Teachers Service Commission](#) 2013 eKLR for a case to pass fairness test there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for termination while procedural fairness addresses the procedure adopted by the employer in effecting termination.”



32. The Respondent in this case clearly failed in substantive justification. As for procedural fairness this is provided in section 41 of the employment act 2007. section 41(1) reads:

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.

33. The Respondent in this case merely issued the Claimant a termination notice of one month and gave him a reason for termination which was filing a civil suit against the Respondent while still in employment. The Claimant was not given an opportunity to explain himself as required under section 41 of the Employment Act in the presence of a fellow worker or a shop floor union representative. Clearly the Respondent flouted the procedural fairness test as well.

34. In view of the foregoing it is clear the Respondent failed to prove he terminated the Claimant fairly. In the premise the court declares the Claimants' termination of employment was therefore unlawful, unfair and un procedural.

35. The court rules the Claimant is entitled to compensation as hereunder:-

1. Compensation for unlawful and unfair termination at 12 months salary 10,954x12= 131,448/-.
2. The prayer for unpaid leave is not specifically proved and being what court would consider a special damage prayer it is declined.
3. One month salary in lieu of notice is specifically declined as Respondent gave Claimant notice.
4. Severance pay is declined as this is not a redundancy separation.
5. Costs are awarded to the Claimant plus interest at court rates from date of judgment until full payment.

Final award is Kshs 131,448/-.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 2ND DAY OF FEBRUARY 2023.**

**ANNA N. MWAURE**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 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.

**ANNA N. MWAURE**

**JUDGE**

