



REPUBLIC OF KENYA



**Mbuvi v East African Packaging Industries Ltd (Cause 1087 of 2018)
[2023] KEELRC 771 (KLR) (28 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 771 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1087 OF 2018
JK GAKERI, J
MARCH 28, 2023**

BETWEEN

DICKSON M. MBUVI CLAIMANT

AND

EAST AFRICAN PACKAGING INDUSTRIES LTD RESPONDENT

JUDGMENT

1. The Claimant initiated this claim by a Statement of Claim filed on June 28, 2018 alleging unlawful summary dismissal by the Respondent.

Claimant's case

2. The Claimant avers that he joined the Respondent as an Assistant Machine Operator (Printer Slotter Folder Gluer) on December 1, 2003 and was confirmed on July 1, 2004 as a permanent and pensionable employee.
3. That owing to his exceptional performance, he rose through the ranks to become the Shift Supervisor Grade 3 at Kshs.86,875/= per month and received accolades from the Respondent.
4. The Claimant further avers that on May 25, 2018, he was invited for a disciplinary hearing scheduled for May 29, 2018 on the ground that he had produced 30,000 pieces of Kaguru Trays for Kakuzi Limited, which were allegedly rejected owing to their colour.
5. That he was not accorded an opportunity to defend himself and his employment was terminated on June 6, 2018 and the disciplinary proceedings were a disguise.
6. It is the Claimant's case that the actual order by Kakuzi Ltd was 19,575 of which 18,814 were produced, delivered and accepted by the client for full consideration.



7. The Claimant prays for;
 - i. One month's salary in lieu of notice Kshs.86,875/=
 - ii. 12 months' salary compensation Kshs.1,042,500/=
 - iii. Accrued leave days Kshs.16,706.73
 - iv. Gratuity at 30 days, each year for 15 years Kshs.1,216,250/=
 - v. Loss of benefits June 2018 to March 2032 Kshs.15,203,125/=
 - vi. Certificate of service.
 - vii. Costs of this claim plus interest.
 - viii. Any other relief that this court may deem fit and just to grant.

Respondent's case

8. In its Response to claim filed on July 23, 2018, the Respondent admits that the Claimant was its employee as averred at the salary indicated.
9. The Respondent avers that the 30,000 pieces of Kaguru Trays were rejected due to the colour shade and the Respondent suffered loss.
10. That the disciplinary hearing was conducted in accordance with the staff handbook and the termination of employment was consistent with the law.
11. That the Claimant neither faulted the process nor appealed the decision.
12. It is the Respondent's case that the 30,000 pieces of Kaguru Trays for Kakuzi Ltd were rejected because they were very dark and customer lost confidence in the Respondent.
13. That the Claimant performed his duties negligently, carelessly and improperly as a supervisor contrary to the contract of employment and company policy and the Respondent acted in accordance with the provisions of Section 44(4)(c) of the [Employment Act, 2007](#).
14. The Respondent denies owing the Claimant gratuity as it had a pension scheme and the Claimant was a member of the NSSF and the claim for loss of benefits was untenable.
15. The Respondent prays for the dismissal of the suit with costs.

Claimant's evidence

16. In his written statement adopted in court, the Claimant stated that when the order was placed on his desk, he consulted Mr. Mwai, the Quality Checker who confirmed that the ready made ink was in order.
17. He testified that before the events of May 24, 2018, he had a clean record.
18. On cross-examination, the Claimant testified that he received the letter of invitation for the disciplinary hearing dated May 25, 2018 but did not respond to it. That he carried documents to the hearing but did not produce them and objected at the hearing.
19. The witness confirmed that he had the right to appeal but did not do so. The witness confirmed that although he prayed for gratuity, it was not part of the contract of employment and he was a member of NSSF as evidenced by the payslip on record.



20. As regards the loss of benefits, the witness stated that he was a permanent and pensionable employee.
21. On re-examination, the witness maintained that he was not given time to defend himself and was reluctant to appeal to the person who had issued the dismissal letter.
22. He confirmed that the written statement made no reference to pending leave days.

Respondent's evidence

23. RWI, Tracy Shigoli confirmed on cross-examination that she had no evidence of the fact that any goods were rejected by Kakuzi Ltd.
24. That she had no evidence of the units produced on May 24, 2018 and no email communication was filed. That it was possible that Kakuzi Ltd wanted a sample only and the letter was dispatched before the sample was sent to the client.
25. The witness testified that the Claimant failed as the supervisor.
26. It was her testimony that the goods were rejected because of the colour and the colours were not on record for comparative purposes.
27. On re-examination, the witness testified that the right of appeal was accorded but the Claimant opted not to appeal.

Submissions

28. Counsel for the parties identified similar issues for determination on whether termination of the Claimant's employment was unlawful or unfair and entitlement to the reliefs sought.
29. As regards termination, while the Claimant's counsel relied on Section 43(1) of the [Employment Act, 2007](#) to underscore the burden of proof of the employer, and urge that the Respondent failed to prove that Kakuzi Ltd rejected the goods, the Respondent's counsel relied on Section 43(2) of the Act to urge that the Respondent had reason to terminate the Claimant's employment. Counsel further relied on the decision in *British Leyland UK Ltd V Swift (1981) I.R.L.R 91* to buttress the submission.
30. Counsel further submitted that the Claimant was negligent and careless.
31. The decision in *Idris Omar Abdi V Garissa Water and Sewerage Co. Ltd (2021) eKLR* was also cited to urge that for a termination of employment to pass muster, it must be substantively justifiable and procedurally fair to demonstrate that Claimant's dismissal was fair and consistent with the provisions of Section 44(4) of the [Employment Act, 2007](#).
32. The Claimant's counsel submitted that on September 17, 2018, one Mildred had informed Kakuzi Ltd that they would avail 5 samples on the following day but the Claimant was informed not to report to the work place on May 24, 2018.
33. It is unclear to the court why the dates are incongruous.
34. Counsel urged that the goods were indeed not rejected and the Respondent failed to rebut the delivery notes on record.
35. As regards the reliefs sought, while the Claimant's counsel submitted that the Claimant was entitled to all the reliefs sought for unlawful termination of employment, the Respondent's counsel urged that he was not as he was accorded the right to be heard as well as appeal, termination of employment was fair, adduced no evidence on leave days and the claims for gratuity and loss of benefits had no basis in law.



Determination

36. After careful consideration of the evidence adduced by the parties, submissions by counsel and the authorities relied upon, the issues that commend themselves for determination are;
- i. Whether termination of the Claimant's employment was unfair.
 - ii. Whether the Claimant is entitled to the reliefs sought.
37. As regards termination of employment, the [Employment Act, 2007](#) sets out detailed provisions on the respective duties of the parties in a claim of unfair termination of employment.
38. In *Pius Machafu Isindu V Lavington Security Guards Ltd (2017) eKLR*, the Court of Appeal crystallized the obligations of the employer 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.”
39. On the other hand, Section 47(5) of the [Employment Act](#) places the burden of proof that an unfair termination of employment or wrongful dismissal has occurred on the employee.
40. On its part, the Respondent submitted that the Claimant's employment was terminated because certain goods were rejected by Kakuzi Ltd which was occasioned by the Claimant's negligence, carelessness and improper performance of his duties as the Supervisor in the Production Department.
41. The Claimant maintained that no goods were rejected and produced copies of delivery notes dated May 28, 2018 and May 28, 2018 for 10,400 pieces and 8,414 pieces respectively delivered by one Mr. Kioko. The stamp on both documents is unclear but for the date and the name Kioko.
42. Similarly, the Claimant provided copies of the invoices of even date for the pieces supplied on May 26, 2018 and May 20, 2018 respectively.
43. The Respondent tendered no evidence in rebuttal of the Delivery Notes and Invoices nor demonstrate that infact the goods were rejected.
44. RWI was unambiguous that she had no evidence of the fact that any goods were rejected.
45. Other than the Respondent's inability to demonstrate that the alleged goods were rejected by Kakuzi Ltd, which should have been fairly straight forward, it was equally unable to prove the acts or omissions of negligence or carelessness on the part of the Claimant which culminated in the rejection of the goods.
46. In *Walter Ogal Anuro V Teachers Service Commission (2013) eKLR*, Ndolo J. held 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 to effect the termination.”



47. Similar sentiments were expressed in *Swaleh David V Premier Cookies Ltd* (2021) eKLR as well as *Naima Khamis V Oxford University Press (E.A) Ltd* (2017) eKLR.
48. It is common ground that the Claimant was employed by the Respondent on December 1, 2003 and rendered services continuously until June 6, 2018 when his employment was terminated allegedly for rejection of goods by Kakuzi Ltd, evidence of which was not availed to the court, nor the Claimant's negligence.
49. Puzzlingly, the Claimant was invited for a disciplinary hearing before samples of the products had been dispatched to Kakuzi Ltd and RWI confirmed as much. Strangely, the Respondent's witness admitted that she had no evidence of the number of pieces produced under the Claimant's watch on the night in question.
50. From the Respondent's oral testimony, it is unclear as to when the goods were delivered, rejected by Kakuzi Ltd and how many pieces were rejected and why.
51. The Respondent adduced no evidence on what was delivered to Kakuzi Ltd vis-à-vis what ought to have been delivered.
52. A rejection note or letter from Kakuzi Ltd would have easily cleared the issue.
53. For the foregoing reasons, it is the finding of the court that the Respondent has on a balance of probabilities failed to demonstrate that it had a fair and valid reason to terminate the Claimant's employment on June 6, 2018.
54. As regards the procedure employed, the Respondent maintains that it complied with the law in that by letter dated May 25, 2018, it invited the Claimant to a disciplinary hearing scheduled for May 29, 2018 and the agenda was the 30,000 pieces of Kaguru Trays rejected by Kakuzi Ltd due to the colour shade.
55. The letter informed the Claimant that he had the right to be accompanied by another employee of his choice.
56. The letter did not require the Claimant to prepare a written response and was thus not a notice to show cause.
57. It is unclear why the Respondent did not notify the Claimant that termination of his employment was being considered on various grounds for his response for purposes of determining whether or not his explanation was sufficient.
58. The Respondent appear to have decided that the Claimant was guilty as charged.
59. This view is reinforced by the fact that the Respondent availed no minutes of the purported disciplinary proceedings or disclose its membership. Minutes of the proceedings would have disclosed what transpired, how long the meeting was and what the Claimant actually stated.
60. The Claimant maintained that he was not given an opportunity to present his case including the documents he allegedly had.
61. The Claimant's statement is emphatic that when he tried to defend himself, the Operations Manager interrupted him stating that he was not ready to work with the Claimant, an allegation the Respondent did not controvert.
62. Relatedly, the Claimant testified that he was aware of the right of appeal but did not do so as he did not expect a different decision, perhaps because of what he had gone through.



63. In *Postal Corporation of Kenya V Andrew K. Tanui* (2019) eKLR, the Court of Appeal itemised the four elements which characterise procedural fairness under Section 41 of the [Employment Act, 2007](#) including; explanation of the grounds of termination in a language understood by the employee, reasons for which termination of employment was being considered, entitlement to the presence of a witness during the explanation and hearing and considering any representations made.
64. The Claimant vehemently contested the last element and the Respondent adduced no cogent evidence to demonstrate that it heard the Claimant's case and considered the same in the determination to terminate his employment on June 6, 2018.
65. Although the court is not persuaded that the absence of minutes perse would tender a termination of employment procedurally flawed, in the instant case, the Respondent tendered no evidence to prove that the absence of minutes notwithstanding, the Claimant was taken through a fair process and in particular, that the Claimant was accorded sufficient opportunity to present his case.
66. For the above stated reasons, the court is satisfied and finds that the Respondent has on a balance of probabilities failed to prove that the termination of the Claimant's employment was conducted in accordance with a fair procedure.
67. As regards the reliefs sought, the court proceeds as follows;

i. One month's salary in lieu of notice

68. The Respondent adduced no evidence of compliance with the provisions of Section 35 or 36 of the [Employment Act, 2007](#) as regards notice and as a consequence, the Claimant is awarded the equivalent of one month's salary in lieu of notice, Kshs.86,875.00.

ii. Accrued leave days

69. The Claimant tendered no evidence of the outstanding leave days. Neither the written statement nor the oral evidence adduced in court provided the relevant particulars including the number of days and when they accrued.

The prayer is declined.

iii. Gratuity at 30 days for 15 years

70. There is no gainsaying that a claim for gratuity must be founded on a provision of the contract of employment or the Collective Bargaining Agreement (CBA) and the Claimant provided none of the above to buttress the claim.
71. Similarly, the Claimant confirmed that the Respondent had a contributory pension scheme and he was a member of the NSSF.

The Claim was unsubstantiated and is declined.

iv. Loss of benefits/salary from June 2018 to March 2032 expected retirement (14 years 7 months)

72. This is a claim for anticipatory earnings which has neither statutory nor judicial anchorage as held in *D.K. Njagi Marete V Teachers Service Commission* (2021) eKLR.
73. More significantly, the incomplete letter of offer dated November 19, 2003 ought to have provided for termination of the employment contract by either party giving the other notice. The Claimant adduced no evidence that his contract of employment had no exit clause.



The prayer is declined.

v.12 months salary compensation

74. Having found that termination of the Claimant's employment was unfair for want of a substantive justification and procedural fairness, the Claimant is entitled to the relief provided by Section 49(1)(c) of the Employment Act, 2007 subject to compliance with the provisions of Section 49(4) of the Act.
75. In determining the quantum of compensation, the court has taken into consideration the fact that; The Claimant was an employee of the Respondent from December 1, 2003 to June 6, 2018, a duration of about 15 years 6 months which is a long period of time. The Claimant would appear to have been a diligent employee who served his employer faithfully as evidenced by the confirmation of employment in July 2004, promotion to Machine Operator in 2005, letter of appreciation dated June 10, 2004 as well as July 9, 2006, promotion letter dated March 14, 2007, promotion to Shift Supervisor on 18th March, 2016 and a salary review on December 13, 2016. The Claimant testified that he had no previous warning letter or misconduct, evidence the Respondent did not controvert. The Claimant did not demonstrate any wish to continue being an employee of the Respondent and did not appeal the decision to terminate his employment.

In the circumstances, the court is satisfied that the equivalent of 5 month's salary is fair, Kshs.434,375.00.

vi. Certificate of service

76. The Claimant is entitled to a certificate of service by dint of Section 51 of the Employment Act, 2007.
77. In conclusion, judgement is entered for the Claimant against the Respondent as follows;
- a. One month's salary in *lieu* of notice Kshs.86,875/=.
 - b. Equivalent of 5 months gross salary Kshs.434,375.00.
 - c. Certificate of service.
 - d. Costs of this suit.
 - e. Interest at court rates from date of judgement till payment in full.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 28TH DAY OF MARCH 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 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 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

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