



REPUBLIC OF KENYA



KENYA LAW
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**Nzioki v Safaricom PLC (Cause E252 of 2021)
[2023] KEELRC 722 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 722 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E252 OF 2021
BOM MANANI, J
MARCH 23, 2023**

BETWEEN

PETER KILONZO NZIOKI CLAIMANT

AND

SAFARICOM PLC RESPONDENT

JUDGMENT

1. The claimant was an employee of the respondent until November 24, 2020 when his contract of employment was terminated. The claimant contends that the decision to terminate his contract of service was without valid reason. He has therefore moved this court seeking various reliefs which include a declaration that the decision by the respondent to terminate the aforesaid contract between the parties was unfair and unlawful.
2. The respondent denies that it unfairly terminated the claimant's employment. It is the respondent's contention that the claimant's employment was validly terminated after he caused a fatal road accident whilst driving the respondent's motor vehicle under the influence of alcohol contrary to the respondent's policies.

Claimant's Case

3. The claimant has pleaded that he was employed by the respondent around September 22, 2008. From the record, it appears that he was first engaged on pre-employment training between August 2008 and early November 2008 before he was issued with a letter of confirmation of employment dated November 3, 2008. His position in the respondent organization was that of Customer Care Representative.
4. On October 12, 2020, the claimant was involved in a road traffic accident along the Mombasa-Malindi highway when the vehicle he was driving hit a pedestrian who was crossing the road. The



claimant confirms that the vehicle belonged to the respondent. The claimant states that the victim was pronounced dead on arrival at the hospital.

5. The claimant states that following the accident, he was subjected to a medical examination the same day. Apparently, the results of the test revealed that he had some traces of alcohol in his blood. Based on these results, the Respondent issued the claimant with a letter dated October 27, 2020 requiring him to explain why he should not be disciplined for driving a company vehicle whilst under the influence of alcohol thereby causing a fatal road accident.
6. On October 30, 2020, the claimant responded to the respondent's aforesaid letter. He denied driving whilst under the influence of alcohol. The claimant gave a history of his meals prior to the fateful incident. In his narration, the claimant suggested that he had not consumed any alcoholic beverage for close to four (4) days before the date of the accident. He asserted that the last time he took an alcoholic drink was on October 8, 2020.
7. According to the claimant, the acceptable levels of alcohol in one's blood that would not pose a danger to driving are no more than 0.8 units. At 11.80 mg/dl indicated in the test outcome which according to the claimant represents more than 0.11 units of alcohol in one's blood, one would be incoherent and evidently staggering.
8. The claimant's position is that he was fit to drive on the fateful day. He denies having been driving under the influence of alcohol that fateful morning.

Respondent's Case

9. On the other hand, the respondent's position is that the claimant was subjected to a medical test the afternoon of October 12, 2020. That the test confirmed that the claimant had traces of alcohol in his blood.
10. In view of these results, the respondent was not satisfied with the claimant's explanation about the possible cause of the accident. As a result, the matter was escalated to a Disciplinary Committee to determine whether the claimant should be disciplined for the infraction under inquiry.
11. It is the respondent's case that during the disciplinary hearing, the claimant was unable to convince the Disciplinary Panel that he was innocent of the accusations leveled against him. The respondent contends that during the session the claimant conceded that the medical test on him indicated that he had 11.80 mg/dl of alcohol in his blood.
12. The respondent states that its policies prohibit its employees from driving company vehicles whilst under the influence of alcohol. That in view of the medical results on the alcohol levels in the claimant's blood, he had flouted the company rules and policies on safe driving of company vehicles and hence the decision to terminate his contract of service.

Issues of Determination

13. The parties are in agreement that they had an ongoing employment relation at the time that the cause of action in the suit arose. It is therefore unnecessary to spend time inquiring into this aspect of the case. I understand the parties as contesting only two matters: whether termination of the contract of service between them was lawful; and whether they are entitled to the reliefs that they seek in their respective pleadings. Therefore, I will only address these two matters in the decision.



Analysis

14. According to the letter of termination dated November 24, 2020, the claimant's employment was terminated on account of gross misconduct. It is indicated that on October 12, 2020 the claimant drove the respondent's vehicle whilst under the influence of alcohol in contravention of the respondent's policies thereby causing a fatal accident.
15. I have scrutinized the evidence on record on the subject. Both parties produced the contract of service that was issued to the claimant on November 11, 2008 but which is dated November 3, 2008. The second last clause in the letter incorporates into the claimant's contract the respondent's Staff Hand Book and other company policies that may be published from time to time. The claimant executed the contract signifying his intention to be bound by it.
16. Once an employer's policy documents are incorporated into an employee's contract of employment, they become part of the terms and conditions of the employee's contract. That this is the legal position has been confirmed in a number of judicial pronouncements (see for instance *Mbarak Abdulqadir Abdalla v County Government of Lamu & County Public Service Board, Lamu County* [2022] eKLR).
17. In the supplementary list of documents dated January 20, 2022, the respondent produced its Fleet and Travel Management Policy. The policy has various provisions on substance abuse and driving.
18. Clause 4.2.9.3 of the policy provides as follows:-

"Drivers must not be under the influence of alcohol or drugs or any other substance or medication that could impair their ability to drive."
19. Clause 4.5.2 of the policy provides as follows:-

"Never work or drive under the influence of substances (alcohol or drugs) which are illegal or in excess of legal levels or where this impairs ability to operate a motor vehicle."
20. Clause 4.5.3 of the policy provides as follows:-

"Failure to observe the absolute road safety rules will lead to disciplinary action."
21. By reason of the second last clause of the claimant's letter of appointment, these regulations in the respondent's Fleet and Travel Management Policy were incorporated into the claimant's contract. He was thereby prohibited from driving the respondent's vehicles whilst under the influence of alcohol or on medication or other substances that could impair his ability to drive.
22. In the respondent's list and bundle of documents dated September 3, 2021, the respondent produced its Human Resource and Procedure Manual (HR Manual). Clause 5.17 of the document addresses the aspect of transport in the respondent organization. It provides in part as follows:-

"The company provides pool vehicles to its employees for business use. Use of pool vehicles must have prior agreement of the department managers. Non-compliance of the policies stipulating the proper usage of these facilities (Car Policy) constitutes gross misconduct."
23. Similarly, by reason of the second last clause in the letter of appointment of the claimant, this clause in the HR Manual became part of terms and conditions of employment. Accordingly, the claimant is affected by the clause on transport in the HR Manual.



24. As pointed out earlier, the ground for terminating the claimant's contract of employment is said to have been gross misconduct. The misconduct that the claimant is accused of is the alleged act of driving the respondent's motor vehicle whilst under the influence of alcohol thereby causing a fatal accident.
25. The respondent's fleet policy prohibits the respondent's employees from driving its vehicles while under the influence of alcohol, drugs or other substances that impairs their ability to drive. The transport clause in the respondent's HR Manual, declares the use of the respondent's vehicles by the respondent's employees in contravention of its policies as gross misconduct. Therefore, it is clear to my mind that driving the respondent's vehicles whilst under the influence of alcohol would constitute gross misconduct. It is also clear to my mind that this prohibition had been brought to the claimant's attention as the aforesaid instruments were expressly incorporated into his employment contract.
26. The critical question in this case is whether on the fateful day, the claimant was driving the respondent's vehicle in contravention of the policies that I have referred to above. If the answer to the question is in the affirmative, then the respondent was justified to terminate the claimant's contract.
27. The respondent contends that the alcohol test done on the claimant on the material date disclosed that his blood alcohol level was high. The test alluded to suggests that the level was at 11.80 mg/dl making it unsafe for the claimant to drive. The fact that the claimant disregarded his state of inebriation and proceeded to drive causing a fatal accident was an act of gross misconduct on his part in contravention of the policies referred to earlier.
28. On his part the claimant denies that he was drunk on the fateful day. He asserts that the last time he took an alcoholic drink was about four days before the date the accident occurred when he took half a glass of fruit wine.
29. The claimant has challenged the accuracy of the alcohol test run on him by Aga Khan Hospital on the day of the accident. According to the report produced in evidence and appearing as document one (1) on the claimant's list of documents dated May 26, 2022, the alcohol level in the claimant's blood was 11.80 mg/dl. However, the report is silent on whether the claimant's urine sample tested positive for alcohol. The claimant argues that if the test results on his blood showed that he had ingested alcohol, the urine test should have yielded corresponding results.
30. The claimant further argues that immediately after the accident, he was allowed to drive the victim to hospital. According to the claimant, the fact that the police allowed him to drive meant that he was not drunk.
31. I have considered the standpoints by parties on this issue. The question whether the claimant's blood contained traces of alcohol can only be determined based on expert medical evidence. The only evidence before the Disciplinary Committee and court on the issue is the report by the Aga Khan Hospital dated October 12, 2020. This report was produced in evidence by the claimant. The report shows that the claimant's blood sample showed he had 11.80 mg/dl of alcohol in his blood on the afternoon of the day the accident occurred.
32. The claimant's testimony is that he had not taken an alcoholic drink for close to four days before the fateful day. He denies taking any alcoholic drink even after the accident.
33. The medical evidence from Aga Khan Hospital which is not countered by alternative medical opinion implies that the claimant had traces of alcohol in his body on the date of the accident. In the absence of contrary medical evidence, it is reasonable to infer that the alcohol in the claimant's blood was ingested either before or on the date the accident occurred.



34. The claimant contests the admissibility into evidence of the medical report on account of a disclaimer in the document. Yet, it is him who presented the report as an exhibit.
35. The disclaimer in the report is to the effect that the document may not be used for employment testing or other medical legal purposes. The court is unable to discern the reason for the disclaimer. Whatever the reason, the court is satisfied that the report meets the evidentiary threshold of an instrument that speaks to a disputed fact in the proceedings. As long as it is relevant, it can be relied on to determine the disputed fact.
36. In the disciplinary session, the claimant indicated that blood alcohol level for an individual who is driving should not exceed 0.8 units. In answer to the question whether the medical test on him from Aga Khan Hospital showed that he had exceeded this limit, the claimant responded in the affirmative.
37. However, he disputed the accuracy of the report. He argued that had his blood contained 11.80 mg/dl alcohol as alleged in the report, he would have been evidently incoherent. The claimant further argued that if the results of the test that was conducted several hours after the accident yielded results of 11.80 mg/dl alcohol content in his blood that would logically imply that he had a much higher alcohol concentration at the time of the accident. In his view, if this was the case, it would have been visible to the naked eye. Yet, those at the scene, including the police and the respondent's security team did not detect any signs of inebriation in the claimant. In effect, the claimant was challenging the credibility of the medical opinion.
38. It is doubtful that it was open to the claimant to challenge the accuracy of the report in the manner that he did. In the court's view, if he intended to dent the credibility of the report, the claimant ought to have obtained an independent medical opinion on the matter. In the absence of contradictory medical evidence, the court takes the position expressed in the report by the Aga Khan Hospital as the correct one.
39. The fact that the claimant was allowed to drive the victim to hospital is not evidence that he was alcohol free. Neither does the failure by the police to charge him with the offense of drunken driving grant the claimant a clean bill of health. As indicated earlier, the only acceptable contrasting evidence on the claimant's alcoholic state would have been medical evidence.
40. There was another attack on the medical report relating to the date it was printed. The report has an entry showing that it was printed on 11.06.20. Yet the claimant's blood and urine samples were taken on October 12, 2020. In response to the apparent discrepancy, the respondent's witness explained that the entry meant that the report was printed on November 6, 2020: not June 11, 2020 as suggested by the claimant.
41. I do not think that much turns on this entry. It may either be an inverted entry as suggested by the respondent's witness or just a data entry error. What is material, in my view, is that the claimant admits that he indeed went for the alcohol test at Aga Khan Hospital on October 12, 2020 and his blood and urine samples were taken. This concession provides the basis for holding the medical report as authentic the apparent discrepancies in data entries notwithstanding.
42. The respondent's Disciplinary Committee relied on the findings in the report to reach the conclusion that the claimant was under the influence of alcohol at the time of the suit accident. That his blood alcohol measured 11.80 mg/dl which were above the safe limit for people intending to drive as conceded by the claimant before the Disciplinary Committee.
43. In my view, the respondent's Disciplinary Committee had sufficient material before it to arrive at the conclusion that at the time of the accident, the claimant was under the influence of alcohol whose level



rendered it unsafe for him to drive. The committee was therefore entitled to reach the conclusion that the claimant's conduct, in the circumstances violated the respondent's policies and amounted to gross misconduct.

44. This finding was in tandem with the dictates of section 43(2) of the *Employment Act* on the employer's duty to establish valid grounds for termination of an employee's contract of service before rendering the decision to terminate. In making such determination, the employer is allowed to rely on facts which caused him entertain a genuine belief that a ground for termination of the contract had arisen. The section provides as follows:-

“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.”

45. In my view, based on the medical evidence that was placed before the respondent's Disciplinary Committee, there was reasonable basis for the committee to genuinely believe that the claimant had caused the accident because of driving whilst in a state of inebriation that had impaired his ability to make proper judgment regarding safety on the road. The committee was entitled, on the basis of the material before it to hold that the claimant had, in the circumstances, violated the policy regulations referred to earlier.
46. The law is clear that overindulgence in alcohol or substance abuse during work hours which renders an employee incapable of making rational decisions is a legitimate reason for an employer to consider terminating such employee's employment. Whilst mere indulgence in alcohol which does not compromise an employee's productivity and rationality may not be a good reason to terminate a contract of service, the court will not stand in the way of an employer to discipline an employee who has engaged in consumption of inebriating substances in contravention of express policy directions issued by the employer and which the employee is shown to have been aware of. This is particularly so where it is clear that the employee's actions have exposed both him and third parties to the risk of harm. (See *AVC Management Company Ltd t/a Mnarani Club v Washe* (Employment and Labour Relations Appeal 03 of 2022) [2022] KEELRC 4153 (KLR)). Having regard to the foregoing, I find that the respondent had valid reason to relieve the claimant of his employment.
47. The next question for resolution relates to the procedure that was followed in terminating the claimant's employment. Not much was raised in the pleadings regarding this aspect of the case.
48. However, it is important to point out that the record shows that the claimant was issued with a notice to show cause on October 27, 2020 requiring him to explain the events of October 12, 2020. There is evidence that the claimant reacted to the respondent's letter aforesaid through his letter of October 30, 2020. There is evidence that the claimant was invited for a disciplinary hearing on November 17, 2020. This was done through the Respondent's letter of November 12, 2020.
49. Both letters of October 27, 2020 and November 12, 2020 indicate the charge against the claimant as one of driving the respondent's vehicle on October 12, 2020 whilst under the influence of alcohol. The letters indicate that as a result of the claimant's action, a fatal accident occurred on the material date.
50. The letter of November 12, 2020 affirmed the claimant's right to state his case on the appointed date. It also notified him of his right to be accompanied by a workmate of his choice.
51. The record shows that a disciplinary session was conducted on November 17, 2020. The claimant was heard.



52. Thereafter, a decision to terminate the claimant's employment was arrived at. The decision was communicated to him through the respondent's letter dated November 24, 2020. The letter was delivered to the claimant on November 26, 2020.
53. This was followed by the claimant's appeal on November 30, 2020. The respondent's decision on the appeal was communicated to the claimant through the letter dated December 14, 2020.
54. The claimant has raised concern with the fact that he was not involved in the investigations that led to the disciplinary case against him. However, there is evidence that he was questioned and required to record a statement before he was asked to appear before the Disciplinary Committee. In my view, these steps that preceded the disciplinary hearing were part of the investigations into the matter. There is evidence that the claimant did participate in them to the extent that he was questioned and allowed to record a statement about the incident in the form of a response to the notice to show cause.
55. The claimant also challenges the validity of the minutes of the Disciplinary Committee. It is his case that the minutes have some gaps and were not signed. In the claimant's view, this implies that the procedure leading to his termination was flawed.
56. I do not agree with the claimant's view in this respect. Unless there is a substantial flaw in the conduct of the proceedings, the mere failure to sign the minutes of the disciplinary session cannot operate to invalidate the decision of the Disciplinary Committee.
57. From the pleadings presented by the claimant, the validity of the process leading to his termination was not directly attacked save to the extent that the claimant was allegedly not given the opportunity to satisfactorily table his evidence. That being the position, it is doubtful that the claimant can attack the process from the witness box (or through submissions by counsel) on grounds other than those that have been pleaded without first amending his pleadings.

Determination

58. In the ultimate, I find that the decision to terminate the claimant's contract of service was properly arrived at. There is evidence that the respondent not only had a valid reason to terminate the claimant's employment but also followed the procedure that is prescribed in law in arriving at the decision.
59. Consequently, I find that the claimant's case lacks merit. Accordingly, the case is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED ON THE 23RD DAY OF MARCH, 2023

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant

.....for the Respondent

ORDER

In light of the directions issued on July 12, 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the *ELRC Procedure Rules* which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

