



Bhundia v Chandarana Supermarket Ltd & another (Cause E279 of 2021) [2023] KEELRC 726 (KLR) (21 March 2023) (Judgment)

Neutral citation: [2023] KEELRC 726 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E279 OF 2021
JK GAKERI, J
MARCH 21, 2023

BETWEEN

ATUL VASHRAM BHUNDIA CLAIMANT

AND

CHANDARANA SUPERMARKET LTD 1ST RESPONDENT

CHANDARANA FOOD PLUS 2ND RESPONDENT

JUDGMENT

1. The Claimant initiated this claim by an Amended Statement of Claim dated 15th February, 2021 claiming terminal dues occasioned by constructive dismissal from employment by the Respondent.
2. The Claimant avers that he was employed by the Respondent as a Manager on 26th August, 2019 at a basic salary of Kshs.113,566/= per month and served diligently and faithfully and was never cited for misconduct. That his duties included collecting and recording cash received from cashiers and depositing it in a safe inside the cellar room, a duty he discharged with 5 other Managers. That he was on the night shift from 9.00 pm to 7.00 am.
3. The Claimant further avers that on the night of 15th March, 2020 while on duty, he received cash Kshs.255,655/= from a Cashier at Till No. 1 at 10.00 pm and at 1.00 am – 1.30am from the same cashier.
4. That he placed the cash in the safe drawers which contained a white cloth bag of float money and cash up money and the total sum was Kshs.295,595.00 and left in the morning of 16th March, 2020.
5. That the Operations Manager reported to work.
6. The Claimant avers that on the evening of 16th March, 2020, he reported to work and left in the morning of 17th March, 2020 without any incident.



7. That he was notified of the missing Kshs.295,595/= on 17th March, 2020 and reported to work where he found the Branch Manager, Mr. Patel who disclosed that the CCTV footage on the cellar room had been switched off as it reflected on the screen or was defective and did not capture activities on the night of 15th and 16th March, 2020.
8. That attempts to secure an appointment with Mr. Dipan, one of the Directors fell through and the CCTV cameras were fixed on 19th March, 2020.
9. It is the Claimant's case that he continued working at the receiving section having been demoted by the Branch Manager and was questioned by Security Personnel from Delta on 15th April, 2020.
10. The Claimant further avers that on 15th March, 2015, he realized that he had been removed from the main whatsapp group and ABC Managers group.
11. That on 16th April, 2020, the Branch Manager requested him to report to the Head Office where Mrs Jane Mwangi asked him to write a statement of what had transpired on the night of 15th/16th March, 2020 and was informed that the matter had been escalated to the Board which would communicate its findings in due course but the meantime he would proceed on compulsory leave without pay and was not paid the salary for March and 15 days in April 2020.
12. The Claimant further avers that on 2nd May, 2020, he was summoned to the Head Office and Mrs Jane Mwangi informed him that the Board of Directors had resolved to terminate the Claimant's employment for lack of trust.
13. That he refused to sign a discharge voucher for Kshs.79,120/= as full payment.
14. The Claimant avers that the alleged loss was crafted to force him out of employment, that the termination was procedurally defective and was not given a termination notice.
15. The Claimant prays for;
 - i. A declaration that the Respondent violated sections 5 and 10 of the Employment Act.
 - ii. A declaration that the Respondent constructively dismissed the Claimant.
 - iii. A declaration that the procedure used by the Respondent in discharging their mandate amounted to unfair termination.
 - iv. Salary for March 2020 Kshs.113,566/=.
 - v. Salary for 15 days of April 2020 Kshs.56,783/=.
 - vi. Leave allowance.
 - vii. 12 months compensation Kshs.1,362,792/=.
 - viii. Certificate of service.
 - ix. Exemplary and general damages.
 - x. Costs of this suit.

Respondent's case

16. By its Amended Memorandum of Respondent dated 28th May, 2021, the Respondent avers that the Claimant was employed by the Respondent as an Assistant Manager from 1st September, 2019 at a net salary of Kshs.79,120.00 per month.



17. The Respondent avers that by an email dated 18th March, 2020, it raised the issue that the Claimant had misplaced and/or lost the sum of Kshs.297,095/= which was collected at 1.40 am on 16th March, 2020 and the Claimant wrote a statement on the issue which was insufficient and was dismissed from employment on 30th April, 2020.
18. That it was the Claimant's duty to ensure collection and safe custody of the monies and he was the last person to handle the cash before its disappearance.
19. It is the Respondent's case that the Claimant was taken through a disciplinary process as by law prescribed and termination of employment was thus fair.
20. That it processed his dues but the Claimant refused to collect the same.
21. The Respondent denies that the Claimant was constructively dismissed or entitled to compensation and prays for dismissal of the suit with costs.

Claimant's evidence

22. The Claimant's written statement rehashes the contents of the Memorandum of Claim.
23. On cross-examination, the Claimant confirmed that he was employed as an Assistant Manager on 26th August, 2019 and was the receiving Manager under One Mrs Seema but was brought to the front shop in the 3rd Month to deal with cash, staff and complaints.
24. The Claimant admitted that he was on the night shift on 15th/16th March, 2020 and left when Mrs Seema reported.
25. He admitted having received Kshs.295,595.00 in two batches in the course of the night and was the only manager on duty at the time with 10 members of staff.
26. The witness confirmed that when he received the money, he signed and stamped and put it in the safe and kept the keys. That there was an exercise book to record the amount received.
27. That he recorded a statement on 17th April, 2020 which had a typing error on the date as the loss was made known to him on 17th not 16th March, 2020 and had given the keys to Seema.
28. That the loss was reported to Delta Security not the police on 15th April 2020.
29. The witness confirmed that he was neither invited nor participated in a disciplinary hearing and was not given a termination letter or certificate of service.

Respondent's evidence

30. In her oral evidence, RWI, Jane Mwangi stated that the Claimant was notified of the loss on 16th March, 2020.
31. On cross-examination, the witness confirmed that the Claimant's net salary was Kshs.85,000/=. The written statement had a different figure.
32. That although the Respondent had dispatched two copies of the employment contract to the Claimant, the Claimant did not return the signed copy.
33. It was her testimony that the loss was investigated though not reported to the police.
34. The witness testified that she called the Claimant for a disciplinary hearing but there was no committee and she had no supportive documentary evidence.



35. She testified that the CCTV in the strong room was not functional and the morning shift did not find the cash.
36. On re-examination, the witness testified that she issued a show cause letter to the Claimant in another disciplinary matter and he responded in writing and apologised and he was reprimanded.

Claimant's submissions

37. The Claimant's counsel addressed three issues, namely; termination of employment, reliefs and costs.
38. As to whether termination of Claimant's employment was unfair, counsel relied on Article 47 of the Constitution and Section 41 and 45 of the Employment Act, 2007 to urge that the termination was unfair as it did not pass the fairness test. The decisions in Walter Ogal Anuro V Teachers Service Commission (2013) eKLR and Pamela Nelima Lutta v Mumias Sugar Co. Ltd (2017) eKLR were relied upon to reinforce the submission.
39. Counsel submitted that the Respondent had no valid reason to terminate the Claimant's employment as no letter of termination or other document was provided as evidence of termination.
40. The Respondent's counsel relied on the sentiments of Nderi J. in Kennedy Maina Mirera V Barclays Bank of Kenya Ltd (2018) eKLR on the burden of proof on the employee to submit that Claimant was dismissed for gross misconduct after serving for only 9 months.
41. Counsel further submitted that Section 45(3) of the Employment Act disqualified the Claimant from complaining having served for only 9 months.
42. As to whether the Claimant was constructively dismissed as alleged by the Claimant's counsel, the Respondent's counsel relied on the sentiments of Radido J. in Joyce Sang V Sumaria Industries Ltd (2019) eKLR and Lord Denning MR in Western Excavating ECC Ltd V Sharp (1978) 2 WLR 344 to urge that the Respondent's conduct in this case would justify the Claimant leaving employment having accorded him a fair hearing and terminated his employment for gross misconduct.
43. As regards the reliefs sought, the Claimant's counsel urged that the Claimant was entitled to compensation as provided by Section 49(1)(c) of the Employment Act and the other reliefs as prayed for.
44. The Respondent's counsel submitted that the salary for March 2020 was paid, that he was not eligible for leave days and termination of employment was justified.
45. Reliance was made on the Court of Appeal decision in United States International University v Eric Rading Outa (2016) eKLR where the court interfered with a 12 month's salary award and substituted it with an award of 3 month's salary.
46. As regards exemplary and general damages, counsel for the Respondent urged that the Claimant had not demonstrated any of the circumstances outlined by Lord Devlin in Rookes V Bernard (1964) AC 1129.
47. Reliance was also made on the sentiments of the court in Bank of Baroda (K) Ltd V Timwood Products Ltd Civil App. No. 132 of 2001.

Determination

48. The issues for determination are;
 - i. Whether the Claimant has a cause of action against the Respondent.



- ii. Whether the Claimant was constructively dismissed by the Respondent.
 - iii. Whether termination of the Claimant's employment was unfair.
 - iv. Whether the Claimant is entitled to the reliefs sought.
49. As regards the 1st issue, counsel of the Respondent submitted that since the Claimant was an employee of the Respondent for 9 months only, he could not complain by virtue of Section 45(3) of the *Employment Act*, 2007.
50. Similarly, paragraph 3 of the Amended Memorandum of Response stated that this court had no jurisdiction to hear and determine this matter as the suit offended Section 45(3) of the *Employment Act*, 2007.
51. Counsel for the Claimant did not address this issue.
52. Section 45(3) of the *Employment Act*, 2007 provides as follows;
- An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.
53. Impliedly, employees who have not served continuously for at least 13 months have no right to complain if their employment is terminated unfairly.
54. The constitutionality of this provision was tested in *Samuel G. Momanyi V Attorney General & another* (2012) eKLR where Lenaola J (as he then was) found the provision unwarranted in the *Employment Act* in the context of the preambular provision.
55. Relying on the sentiments of the court in *Hamdarda Wakhama V Union of India* AIR (1960) at 554, the learned judge was of the view that;
- “I wholly agree and as I have shown above, Section 43(3) is unreasonable and has the opposite of what the object of the *Employment Act* was intended to be.”
56. The court declared that Section 45(3) of the *Employment Act*, 2007 was inconsistent with the provisions of the *Constitution* of Kenya, 2010 particularly Article 28, 41(1), 47, 48 and 50(1) as it purported to deny the Petitioner the right and freedoms enshrined in the *Constitution*.
57. Although this court may with reasons depart from the foregoing decision, it is persuaded that the learned judge made the correct decision in the circumstances and it is still good law which the Employment and Labour Relations Court has applied consistently.
58. Having been declared unconstitutional on 18th May, 2012, Section 45(3) of the *Employment Act* is inapplicable by this court as it does not exist.
59. The Claimant had the right to the claim herein and the court has jurisdiction to hear and determine the suit.
60. Although the Claimant alleged that he was constructively dismissed, he neither adduced evidence to prove the alleged termination nor submit substantively on it. The Respondent's counsel relied on the sentiments of the Lord Denning in *Western Excavating ECC Ltd V Sharp* (Supra) to urge that the Claimant adduced no evidence to demonstrate that the Respondent's conduct had made the place of work intolerable for the Claimant.



61. In the court's view, the contractual test enunciated by Lord Denning in *Western Excavating ECC Ltd V Sharp (supra)* is clear that the conduct complained of must be such that it runs to the root of the contract of employment or shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. Repudiatory breach constructive dismissal arises where the employer by his conduct makes the continued stay of the employee untenable and quits and thus blames the employer for the separation.
62. In *Coca Cola East & Central Africa V Maria Kagai Ligaga* (2015) eKLR, the Court of Appeal adopted the contractual test and set out the principles for determination of constructive dismissal. The Claimant adduced no evidence of a repudiatory breach by the Respondent or that he left employment on account of the Respondent's conduct. In the court's view, the principle of constructive dismissal was inapplicable in instant suit.
63. As to whether termination of the Claimant's employment was unfair, parties have adopted opposing positions with the Respondent urging that the termination was fair as the Respondent had a valid reason do so and accorded the Claimant a fair hearing. The Claimant's counsel submitted that it was unfair for want of a valid and fair reason and compliance with Section 41 of the *Employment Act*, 2007.
64. Both the provisions of the *Employment Act*, 2007 and judicial authority are consistent that for a termination of employment to pass muster, it must be not only substantively justified but also procedurally fair as held by the Court of Appeal in *Naima Khamis v Oxford University Press (E.A) Ltd* (2017) eKLR as well as Ndolo J. in *Walter Ogal Anuro v Teachers Service Commission* cited by the Claimant's counsel.
65. While compliance with the provisions of Section 43(1), 45(2) and 47(5) ensures substantive justification of termination of employment, compliance with the provisions of Section 41 of the *Act* ensures procedural propriety.

Reason for termination

66. RWI testified that the Claimant's employment was terminated because he was guilty of gross-misconduct as envisaged by Section 44(4) of the *Employment Act* in that the Respondent discovered that the sum of Kshs.297,095/= collected on 16th March, 2020 was missing and the Claimant was on duty.
67. In his statement, the Claimant stated that he had left the sum of Kshs.295,595/= in the safe on the morning of 16th March, 2020 when his shift ended and the issue was raised on 17th March, 2020.
68. It is unclear who and when the cash was discovered missing as the witness was not the one who did so and the Claimant had handed over the safe keys to one Mrs Seema, who regrettably did not testify or indeed anyone connected with the alleged cash.
69. Relatedly, it is unclear as to how the shift system worked at the Respondent's ABC Branch.
70. It would be fair to assume that the outgoing manager handed over cash and the premises to the incoming and both would sign particularly for the cash.
71. Although the Claimant testified that there was an exercise book, he did not testify about any handover nor did the Respondent's witness.
72. It is unclear as to how Managers and Assistant Managers accounted for monies collected during their shift.



73. Surprisingly, the Respondent's witness uses the sum of Kshs.297,095/= as the missing funds while the Claimant testified that he collected the sum of Kshs.295,595.00 on the night of 15th/16th March, 2020.
74. The Claimant stated that when he received the cash, he signed and stamped the same and kept it in a separate drawer and had the key to the safe until he handed it over to Mrs Seema and the Claimant was notified of the loss on 17th March, 2020 having reported for the night shift on 16th/17th March, 2020. This evidence was not controverted.
75. From the evident on record, there does not appear to have been any serious investigation to ascertain how and when the alleged cash was lost.
76. The CCTV camera for the cellar had been switched off and the Claimant was unaware of that fact.
77. Puzzlingly, the Respondent did not find it necessary to issue a show cause letter setting the particulars of the alleged loss and how the Claimant was implicated in the loss.
78. The Claimant's statement to the Respondent dated 17th April, 2020 was not a response to notice to show cause but his version of the alleged disappearance of funds.
79. The Respondent did not accuse the Claimant for having taken the cash as it does not appear to have had evidence to sustain the allegation.
80. The Claimant testified that from the moment he left at 7.30 am on the morning of 16th March, 2020, other Managers had access to the safe as they had the key during their shift.
81. Intriguingly, the Respondent did not report the alleged loss to the police for investigation and possible prosecution of the culprit.
82. In sum, the question as to who found the cash missing and when remains unanswered.
83. For unexplained reasons, the Respondent opted not to give the Claimant a termination letter setting out the reason(s) for termination. Could it be because it was not satisfied that it had sustainable reasons?
84. Section 43(1) of the *Employment Act* read together with Section 45(2) are clear that the employer must prove the reason or reasons for the termination and that the reason(s) was valid and fair.
85. In the instant, no cogent evidence was adduced that the Claimant was culpable in the loss or disappearance of the Kshs.295,595/= and the Respondent did not furnish evidence implicating the Claimant in the loss of the money. There was no investigation report nor termination letter to demonstrate the reason for termination of the Claimant's employment.
86. For the foregoing reasons, it is the finding of the court that the Respondent has failed on a balance of probabilities to prove that it had a valid and fair reason to terminate the Claimant's employment contract.

Procedure

87. Section 41 of the *Employment Act*, 2007 prescribes the procedural precepts to be complied with prior to termination of Employment and as held in *Pius Machafu Isindu v Lavington Security Guards* (2017) eKLR, Section 41 is couched in mandatory terms and the procedure therein prescribed must be complied with.
88. The specific precepts have been itemised in legions of decisions including by the Court of Appeal in *Postal Corporation of Kenya v Andrew K. Tanui* (2019) eKLR.



89. Although RWI testified that the Claimant was invited for a disciplinary hearing, that indeed she called him, it was also her testimony that there was no disciplinary committee and had neither evidence of the invitation nor minutes of the purported hearing. The Claimant's evidence in chief is clear on this issue. RWI's testimony makes no reference as to how and when the Claimant's employment was terminated.
90. A panoramic view of the evidence before the court reveals that the Claimant was neither invited nor participated in a disciplinary hearing. He was not notified of the charges he was facing and had no opportunity to present his case as efforts to speak to Mr. Depak were unsuccessful.
91. After the Claimant wrote a statement at the instigation of RWI, the witness subsequently informed him that the matter had been referred to the Board of Directors which would communicate its decision, which she did on 2nd May, 2020 by word of mouth, that the board had lost trust in him.
92. In the absence of evidence of compliance with the provisions of Section 41 of the *Employment Act, 2007*, the court is satisfied and finds that termination of the Claimant's employment was procedurally flawed.
93. In sum, it is the finding of the court that termination of the Claimant's employment by the Respondent was unfair.

Reliefs

- i. Having found that termination of the Claimant's employment was unfair, a declaration to that effect is hereby issued.
 - ii. Having found that the Claimant failed to demonstrate that he was constructively dismissed, a declaration to that effect is unmerited.
 - iii. One month's salary in lieu of notice
94. The Respondent adduced no evidence that it gave the Claimant the required one month's notice in compliance with Section 35 of the *Employment Act, 2007*.
The Claimant is awarded one month's salary in lieu of notice.
- iv. 15 days worked in April 2020
95. Since the Claimant rejected the cheque drawn in his favour by the Respondent and the Respondent led no evidence of payment for days worked in April 2020, the Claimant is awarded payment for the total number of days worked in April 2020.
- v. Leave allowance
96. The Respondent did not contest leave days due to the Claimant for the duration worked. The Claimant is awarded leave pay for the accrued number of days for the duration he served as an employee of the Respondent.
- vi. Certificate of service
97. The Claimant is entitled to a certificate of service by virtue of Section 51 of the *Employment Act, 2007*.
- vii. Exemplary and general damages
98. The court is in agreement with the Respondent counsel's submission that based on the decisions in *Rooges V Bernard (supra)* and *Bank of Baroda (K) Ltd v Timwood Products Ltd (supra)*, the Claimant



has not demonstrated the circumstances necessary for an award of exemplary or general damages to be made.

The prayer is declined.

viii. 12 months compensation Kshs.1,362,792/=

99. Having found that termination of the Claimant's employment by the Respondent was unfair, the Claimant is entitled to the relief provided by Section 49(1)(c) of the *Employment Act*, 2007 and in compliance with the provisions of Section 49(4) of the *Act*, the court has considered the following;
- i. The Claimant was an employee of the Respondent for about 9 months, a fairly short duration.
 - ii. The Claimant did not express his wish to continue in the Respondent's employment or apply for reinstatement.
 - iii. The Claimant had a previous notice to show cause and apologised for the conduct in question.
 - iv. The Claimant did not appeal the decision communicated to her by the Respondent's witness, who was the Head of Human Resource or write to the Board of Directors.
100. In the circumstances, the court is satisfied that the equivalent of 2 months' salary is fair.
101. In the upshot, judgement is entered for the Claimant against the Respondent in the following terms;
- a. Declaration that termination of the Claimant's employment was unfair.
 - b. One month's salary in lieu of notice.
 - c. 15 days worked in April 2020.
 - d. Accrued leave days.
 - e. Certificate of service.
 - f. Equivalent of 2 month's salary.
 - g. Costs of this suit.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 21ST 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 *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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