



REPUBLIC OF KENYA



KENYA LAW

THE NATIONAL COUNCIL FOR LAW REPORTING

Where Legal Information is Public Knowledge

**Mwenda v Batian Flowers Limited (Employment and Labour Relations Petition
E003 of 2021) [2023] KEELRC 631 (KLR) (6 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 631 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU
EMPLOYMENT AND LABOUR RELATIONS PETITION E003 OF 2021
ON MAKAU, J
MARCH 6, 2023**

BETWEEN

JACKSON MWENDA PETITIONER

AND

BATIAN FLOWERS LIMITED RESPONDENT

JUDGMENT

1. By a petition dated February 22, 2021, the petitioner alleges that his employer violated his constitutional right to fair labour practices under Article 41 (2) (b) of the Constitution by exposing him to occupational hazard which impaired his hearing and as a result of which it dismissed him from employment. The petition seeks the following reliefs:-
 - a. A declaration that the petitioner's rights to fair labour practices and right to reasonable working condition under Article 41 and 41(2)(b) of the Constitution of Kenya, 2010 were breached by the respondent.
 - b. Damages for unfair labour practices.
 - c. Damages for breach of right to reasonable working condition.
 - d. Damages for breach of his right to human dignity under article 28.
 - e. Award for damages for false imprisonment.
 - f. Damages for unfair termination
 - g. Damages for unlawful termination
 - h. An award of terminal benefits as itemized under paragraph 15 of the petition.



- i. An order of compensation for injuries sustained (hearing loss) under General damages for pain, suffering and loss of amenities.
 - j. Damages for loss of earning and future earning capacity
 - k. Special damages
 - l. Costs and interests at 14% on a-j above.
 - m. Any other relief or award that this court may deem fit and proper to grant in the interests of justice.
2. The respondent is in denial of petitioner's allegations and avers that the petitioner had a hearing impairment even before joining the company. Further it avers that the termination of the petitioner's employment was justified by a valid reason and a fair procedure was followed before the termination. Finally it was averred that the petitioner was paid all his terminal dues and nothing is owing. Consequently, the court was urged to dismiss the petition with costs.
 3. The suit was disposed of by written submissions on the basis of the evidence filed.

Submissions

4. The petitioner submitted that in the year 2016 he suffered an ear injury while in the cause of employment of operating the respondent's machine without safety equipment. He contended that the respondent exposed him to loud noise and failed to provide him with personal protective equipment to protect him from the vagaries of work. Further, the respondent breached his duty to provide and maintain systems and procedures of work that are safe and without risk of health.
5. The respondent allegedly did not take heed of the petitioner's injury over the years until he lost hearing completely and then he was dismissed. Consequently, the petitioner submits that he is entitled to the reliefs set out in the petition plus costs.
6. The respondent, on the other hand, submits that it has filed documentary evidence to prove that the petitioner had hearing impairment before joining the company. Further the petitioner was guilty of gross misconduct by absenting himself from work and had been served with three warning letters. It submitted that the petitioner was afforded a disciplinary hearing before the termination as required under section 41 of the *Employment Act* and Section 4 of the *Fair Administrative Actions (FAA) Act*.
7. It was further submitted that the petitioner's terminal dues were computed and he signed a Clearance Form dated May 13, 2020 and a terminal dues sheet dated May 12, 2020 in which he accepted the money to be used to settle a Sacco loan. Therefore the respondent maintained that the petition has no merits and it should be dismissed with costs.

Determination

8. There is no dispute that the petitioner was employed by the respondent vide the contract dated November 4, 2012 until May 11, 2020 when the contract was terminated for gross misconduct. The issues for determination are:-
 - a. Whether the termination was grounded on a valid reason.
 - b. Whether a fair procedure was followed
 - c. Whether respondent violated the petitioner's right to fair labour practices.



- d. Whether the petitioner is entitled to the reliefs sought.

Reason for the termination

9. The burden of proving that termination was grounded on valid reason is placed upon the employer by Section 43 and 45 of the *Employment Act*. The reason must be one that relates to the employees' conduct, capacity and compability or based on operational requirement of the employer.
10. In this case the termination letter cited the reason for the termination as petitioner's absence from work on May 7, 2020 without permission, while fully aware that he had been served with a third and final warning. The termination was pursuant to Section 44(4) (a) of the *Employment Act* but the petitioner was still paid salary in lieu of notice among other terminal benefits.
11. The petitioner did not deny that he absented himself from work on May 7, 2020 nor did he rebut the evidence by the employer that he had received formal warning for previous similar offence. Instead, he alleged that the respondent dismissed him because of the injuries and loss of hearing ability.
12. I have considered the material presented to the court. There is on record first, second and third warning letters served on the petitioner. The first and the third warning letters were in respect of his absence from work without permission. The third and last warning was given in May 9, 2019 and he repeated the offence on May 7, 2020.
13. Section 44 (4) (a) of the *Employment Act* entitled an employer to summarily dismiss his employee, who absents himself from work without permission or a just cause. The evidence presented by the employer herein support a finding that the petitioner was a habitual absentee from work without leave. He absented himself on May 7, 2020 without permission and failed to produce any medical certificate to prove that he was incapacitated. Such misconduct was a valid and fair reason for termination of the employment contract by the employer.

Procedure

14. Section 41 of the *Employment Act* provides that:-
- “(1) 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.
- (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”
15. In this case the petitioner was served with a letter dated May 8, 2020 asking him to furnish the employer with documentary evidence to prove that he attended hospital on May 7, 2020, but he did not. He was then summoned for disciplinary hearing on May 11, 2020 and he attended in the company of the shop steward where he admitted that he never attended hospital for treatment and that he did not report to his supervisor.



16. Having considered the evidence above and the provision of Section 41 of the Act, I am satisfied that the respondent has provided that the termination of the petitioner's employment was done in accordance with a fair procedure.

Violation of Right to fair labour practices

17. The complaint raised under this heading is constitutional in nature but matter there is statutory mechanism set out under the *Work Injury Benefits Act* (WIBA) which can sufficiently remedy the alleged violation. I will therefore not say more on the same.

Reliefs

18. In view of the finding herein above that the employer has proved on a balance of probability that the reason for the termination was valid and fair and that fair procedure was followed, I must hold that the termination was fair and lawful. Further in view of the observation that there is an alternative mechanism for remedying the claim for work related injury, I decline to make declaration with respect to the work injury claim.
19. As regard the claim for damages, I decline to make any award because the petitioner is estopped from bringing the said claim by the settlement agreement he signed upon termination of his employment. The respondent produced as exhibit an Employee Disclaimer signed between him and the employer by which the petitioner acknowledge payment of Kshs 62,039.00:-

“In full and final settlement and discharge of all sums due to me and also acknowledge that I have no further claims against the company including claims for reinstatement into my job or to further compensation arising out of my termination. I further confirm that I have left the services of Batian Flowers Limited without any injuries sustained and I have no claims regarding the same.”

20. The petitioner has not denied that he signed the said agreement. He has also not said that he signed the same without full knowledge of its details or the nature of the document. He has not denied that he signed the document voluntarily. Consequently, the court finds that the said agreement constitutes a valid contract between the petitioner and his employer and this court will not interfered with the same.
21. I gather support from the case of *Coastal Bottlers Ltd v Kimathi Mithika* (2018) eKLR where the Court of Appeal held that:-

“A court faced with a case of discharge agreement should address its mind upon the import of the agreement and secondly whether the same was voluntarily executed by the concerned parties.”

22. The court went on to observe that:-

“In our minds, it is clear that the parties agreed that the payment of the amount stated in the settlement agreement would absolve the appellant from any further claims under the contract of employment and even in relation to the respondent's termination. It is instructive to note that the respondent never denied signing the said agreement or questioned the veracity of the agreement. Further from the record, we do not discern any misrepresentation on the import of the said agreement or incapacity on the respondent's



part at the time he executed the same. It did not matter that the amount thereunder would be deemed as inadequate. As it stood, the agreement was binding contract between the parties.”

23. In conclusion, the petition herein is dismissed for lack of merits. Considering the health condition cited by the petitioner, I will not condemn him to pay costs.

DATED, SIGNED AND DELIVERED AT NYERI THIS 6TH DAY OF MARCH, 2023.

ONESMUS N MAKAU

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 April 2020, this judgment 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.

