



**Hillary v Fargo Courier Ltd (Employment and Labour Relations Cause
138 of 2017) [2023] KEELRC 629 (KLR) (7 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 629 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 138 OF 2017**

JK GAKERI, J

MARCH 7, 2023

BETWEEN

YEGON HILLARY CLAIMANT

AND

FARGO COURIER LTD RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Memorandum of Claim filed on January 26, 2017 alleging unfair termination of employment by the Respondent.
2. The Claimant prayed for various reliefs including compensation for injuries sustained in the course of duty which was abandoned when the Claimant amended the Memorandum of Claim on May 23, 2018 and filed the same on even date.
3. The Claimant avers that he was employed by the Respondent as a courier escort at the Kisumu Branch at a gross salary of Kshs 21,142.00 per month on a permanent basis and worked from May 6, 2015 to May 27, 2016 and executed his duties faithfully until he was involved in a road traffic accident on December 23, 2015 and sustained heavy bruising of the upper limbs and left leg and tenderness of the lumber region and the Respondent company paid for his treatment but was not compensated for the injuries sustained.
4. It is the Claimant's case that after the accident, he continued to suffer recurring back pains and visited the hospital upon communication with his immediate supervisor but received a notice to show cause on May 17, 2016 and was required to respond by 16.00 hours on May 18, 2016.
5. The Claimant avers that his explanation that he had obtained permission from his immediate supervisor and provided sms records fell on deaf ears and was thus terminated from employment unfairly as he was not accorded a fair hearing and no administrative investigation took place.



6. That his plea that he was on sick leave was not listened to or verified.
7. That termination of employment resulted in loss of income and earnings.
8. The Claimant prays for;
 - a. A declaration that the dismissal or the termination of the Claimant's employment by the Respondent was unlawful and unfair entitling the Claimant to terminal dues and compensatory damages.
 - b. An order for the Respondent to pay the Claimant terminal dues and compensatory damages in the sum of Kshs 292,735/= comprising;
 - i. One month's salary in lieu of notice Kshs 21,142.00
 - ii. Unpaid leave 22 days Kshs 17,859.00
 - iii. Exemplary damages for oppressive arbitrary and unconstitutional acts of the Respondent.
 - iv. 12 months gross pay as damages for unfair termination Kshs 253,704.00
 - c. Costs of the claim.
 - d. Any other order or relief that this Honourable Court deems it necessary and fit to grant.

Respondent's case

9. In its Memorandum of Response filed on November 24, 2017, the Respondent admitted that the Claimant was its employee from May 6, 2015 to May 27, 2016. It denies that the Claimant was involved in a road traffic accident.
10. The Respondent further denies that the Claimant notified his immediate supervisor that he would be going for treatment.
11. The Respondent avers that it invited the Claimant to a disciplinary hearing vide letter dated May 18, 2016 and accorded the Claimant a fair opportunity to be heard for having absconded duty for 12 days and on returning, a notice to show cause was issued on May 17, 2016 and he responded, was invited to a hearing and notified of his right to be accompanied by a colleague and one Nelson Speke accompanied him.
12. It is the Respondent's case that he was given a chance to state his case but failed to produce a certificate of incapacity from a medical professional.
13. The Respondent further avers that the hearing was adjourned to enable the Claimant secure the document but failed to do so on May 26, 2016 during the adjourned hearing. He however produced a document showing that he had been attended to at the Mama Lucy Hospital on May 4, 2016 and released on the same day.
14. The Respondent further avers that the Claimant testified that he was on medication and reported to work when he felt that his health had improved.



15. That the panel was persuaded that although the Claimant proved that he was in hospital on May 4, 2016, he could not account for 11 days absence from work and the same warranted summary dismissal for absconding duty without lawful excuse and a decision was made to dismiss him from employment.
16. The Respondent admitted owing the Claimant 22 days accrued leave, uniform refund and salary for the 2 days worked in May 2016 which he had declined on termination of employment.
17. The Respondent prays for dismissal of the suit with costs.

Claimant's evidence

18. The Claimant's written statement dated January 24, 2017 rehashes the contents of the Memorandum of Claim.
19. On cross-examination, the Claimant testified that he received a notice to show cause on May 17, 2016 and invited for a disciplinary hearing on May 18, 2016 and the hearing took place on May 20, 2016 and signed the minutes on the same day and did not complain about the minutes in the statement of claim or witness statement.
20. The witness stated that he and the witness were coerced to sign the minutes.
21. The Claimant further testified that he wrote an sms to Mr Kibet on May 3, 2016 at 5.12 am who responded and instructed him to proceed to hospital and forward a doctor's letter or report.
22. The witness confirmed that he attended the adjourned meeting on May 26, 2016 and produced a letter from Mama Lucy Hospital but had no sick off as evidence from the hospital.
23. On re-examination, the Claimant testified that he sought permission to go to the hospital from one Ivet and proceeded to Mama Lucy Hospital and X-ray was performed on May 4, 2016 and the doctor advised him to take a rest.
24. That he signed the minutes under duress and did not agree with them as several things were added.

Respondent's evidence

25. In his evidence-in-chief, the Respondent's witness Mr Robert Nderitu testified that he signed the minutes on record and they were a true reflection of what had transpired at the meeting.
26. He testified that during the hearing, the panel was satisfied that Claimant had justified his absence from work on May 4, 2016 but had no explanation as to where he was from 5th – May 16, 2016 and was accorded time to avail the documentation on May 26, 2016, but failed to do so.
27. On cross-examination, the witness confirmed that the Claimant's supervisor was not interrogated and Evet was not part of the hearing.
28. It was his testimony that although the Claimant's response to the notice to show cause was considered by the panel, he failed to produce a medical report.
29. On re-examination, the witness testified that the letter dated May 24, 2016 from Mama Lucy Hospital had no indication of a sick off by the doctor and only indicated that the Claimant was attended to on May 4, 2016 on out-patient basis.



Claimant's submissions

30. In totality, the Claimant's counsel's submissions address the singular issue as to whether termination of the Claimant's employment was fair. Counsel submitted that the termination was unfair on account that the Respondent had no sufficient reason to do so as it was aware that the Claimant was unwell having been involved in a road traffic accident on December 23, 2015 where he sustained injuries.
31. Counsel submitted that on the morning of May 3, 2016, the Claimant texted the immediate supervisor that he was not feeling well and could not make it to work who told him to go to hospital and avail a doctor's letter.
32. Counsel further submitted that the issue of permission was not brought up during the hearing.
33. That the absenteeism was occasioned by the injuries sustained in the course of employment, that the Claimant availed a medical report and the Respondent was aware that he had recurring back pains.
34. Counsel argued that the Claimant could not produce a sick off sheet as the hospital could not back date sick off.
35. That the Respondent had not given the Claimant a previous warning to justify termination of employment.
36. Reliance was made on the provisions of Section 45 (4) (b) of the [Employment Act](#) to urge that the termination was not conducted in accordance with justice and equity as the Claimant had a medical report but no sick off.
37. It was urged that the Claimant sought permission from the immediate supervisor and wrote an email to the supervisor and was given a document which he produced at the hearing.
38. Counsel submitted that the only reason why the Claimant was dismissed from employment was because he did not provide a sick off letter from the hospital which according to counsel was not a valid reason.
39. The decisions in *Janet Nyandiko V Kenya Commercial Bank Ltd (2017) eKLR*, [National Bank of Kenya V Samuel Nguru Mutonya \(2017\) eKLR](#) and Pius Machafu Isindu V Lavington Security Guards Ltd were relied upon to urge that termination of the Claimant's employment was unfair.
40. It was further submitted that the Claimant was not accorded a fair hearing in terms of Section 41 of the [Employment Act](#) as no investigations were conducted to verify that the Claimant had committed a misconduct.
41. Counsel submitted that the Respondent's conduct was arbitrary, oppressive and draconian warranting the award of exemplary damages.
42. Counsel, finally submitted that the Claimant had proved his case on a balance of probabilities and was entitled to the reliefs sought of Kshs 292,735.00

Respondent's submissions

43. By January 11, 2023 when the court retired to prepare this judgement, the Respondent had not filed submissions.



Determination

44. The issues for determination are;
- i. Whether termination of the Claimant's employment was unfair.
 - ii. Whether the Claimant is entitled to the reliefs sought.
45. As to whether termination of the Claimant's employment was unfair, the starting point are the relevant provisions of the [Employment Act](#) which address specific aspects of termination of employment such as notice, reason for termination and burden of proof, justification, termination procedure and summary dismissal among other provisions.
46. Among the core provisions are those set out in Section 45 of the Act which provides that;
1. 'No employer shall terminate the employment of an employee unfairly.
 2. 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 employee's conduct, capacity or compatibility; or
 - ii. Based on the operational requirements of the employer; and
 - c. That the employment was terminated in accordance with fair procedure.'
47. Needless to emphasize, the foregoing provisions and those cited above lay it bare that for a termination of employment to pass muster, it must be substantively justifiable and procedurally fair. This was aptly captured by Ndolo J in [Walter Ogal Anuro V Teachers Service Commission \(2013\) eKLR](#) as follows;
- ' For a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also 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.'
48. The Court of Appeal expressed similar sentiments in [Naima Khamis V Oxford University Press \(EA\) Ltd \(2017\) eKLR](#).
49. In [Pius Machafu Isindu V Lavington Security Guards Ltd \(Supra\)](#), the Court of Appeal held that;
- ' 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.'

50. These sentiments leave no doubt that the *Employment Act* imposes an onerous duty on the employer in matters relating to termination of employment or dismissal.
51. The salient issue for determination is whether the Respondent had a valid and fair reason to terminate the Claimant's employment and conducted the process in accordance with fair procedure.
52. I will now proceed to apply the foregoing provisions and propositions of law to the facts of the instant case.

Reason for termination

53. It is not in dispute that the Claimant was involved in a road traffic accident on December 23, 2015 (the abstract has an incorrect date) involving motor vehicles Reg Nos xxxx and xxxx and was attended to at the Gilgil General and Psychiatric Hospital and Nakuru PGH and the Respondent paid the bills. Regrettably, there is no evidence on record on the Claimant's health between the date of the accident and the morning of May 3, 2016. More significantly, there is no medical report on the Claimant's indisposition at all.
54. It is common ground that on the morning of May 3, 2016, the Claimant sent a message to the Assistant supervisor, one Evet intimating that he was unwell and could not make it to work. M/s Evet responded and informed the Claimant to proceed to hospital and provide a doctor's letter and the Claimant confirmed that he would go to the hospital for scanning and the communication ended.
55. Instructively, the Claimant did not explain the nature of the illness or seek any assistance from the employer.
56. Puzzlingly, the Claimant tendered no evidence that he went to the hospital on 3rd May as promised but went on May 4, 2016 as the doctor's letter dated May 24, 2016 attests.
57. The Claimant was attended to and given drugs for 5 days and for 14 days.
58. Surprisingly, the Claimant tendered no evidence on May 17, 2016 to show that he was attended to at the Mama Lucy Hospital on May 4, 2016 to demonstrate the diagnosis and treatment.
59. It is also not in dispute that the Claimant did not report to work from May 5, 2016 to May 16, 2016, a duration of 11 days a fact he confirmed on cross-examination.
60. The Respondent's show cause letter dated May 17, 2016 required the Claimant to explain his absenteeism from 3rd to May 16, 2016 and he responded by letter dated the same day.
61. Unusually, the Claimant did not attach any documentation to his response but explained that he was still under medication for the duration and had felt better by May 16, 2016 to report on May 17, 2016.
62. The termination letter dated May 27, 2016 under the reference 'Unauthorised Leave of Absence' stated that the Claimant was unable to provide proof of any sick off granted by the Doctor at the Mama Lucy Hospital on May 4, 2016. That he absented himself from the work place without lawful cause or prior arrangements which amounted to gross misconduct.
63. The dismissal was justified under the provisions of Section 44 (4) (a) of the *Employment Act*, 2007 which provides that;



Without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work.

64. Although the Claimant had notified one Evet about his indisposition, the Assistant Supervisor directed him to proceed to hospital and provide a doctor's letter. Evet's text was emphatic 'Enda hosi uje no barua ya daktari' misspelled as dictari). Was this text leave for the Claimant to remain at home for 11 days as he was on medication? Did the text accord the Claimant leave to remain at home until recovery? Does permission to go to hospital to seek medical attention amount to leave to an employee? This court is not persuaded so.
65. It is trite that an employee is contractually bound to be at the work place every day unless on leave, sick off or other lawful cause. Sick offs by doctors are generally accepted by employers as evidence of an employee's absence at the work place and must be availed as soon as is reasonably practicable. Unforeseen circumstances such as accidents and emergencies typically pass as justifiable based on their nature and the evidence availed.
66. This court is of the view that in as much as the Claimant was indisposed, it behoved him to keep the employer informed about his recovery or at the very least seek advise on how to deal with the recovery phase. Regrettably, the Claimant made no effort to keep the employer in the loop. He was aware that he had no doctor's sick off for 11 days and did nothing to ameliorate the situation as he awaited recovery. How would the employer know that he was recovering and when he was likely to report back.
67. The Claimant's contract of employment provided for 2 weeks sick leave with full pay provided that he produced a doctor's letter of incapacity covering the period of leave claimed. In this case, the Claimant failed to provide the letter of incapacitation or doctor's sick off days. When asked about not taking leave, the Claimant stated that he did not know the duration it would take for him to get well. He was accorded time to furnish a doctor's report and provide the doctor's letter dated May 24, 2016 on the fact that he had been attended to at the hospital on May 4, 2016.
68. In the court's view, the Claimant's conduct in this instance fell below the threshold of a diligent employee. He had the wherewithal to act proactively but failed to do so.
69. Nothing prevented him from sending text messages or updates or calling M/s Evet or other supervisor. In the circumstances, the court is persuaded that the employer had a justifiable reason to terminate the Claimant's employment as it did for absenteeism.
70. Contrary to the Claimant counsel's submissions that the Claimant was dismissed from employment for failure to avail a sick off sheet, the Claimant was dismissed for absenteeism while not on leave and could not explain why he did not report to work for 11 days.
71. This finding is consistent with the Court of Appeal decision in [*Rodgers Titus Wasike V General Motors East Africa Ltd \(2020\) eKLR*](#) where the appellant had been summarily dismissed by the employer for absence from the work place for 8 days without explanation. The court of 1st instance dismissed the claim as did Court of Appeal. The Court of Appeal stated as follows;

' From the facts presented before the court to the effect that the appellant left his station for 8 days without explanation, cause or communication, we are of the considered opinion that there was proof and substantive reason to warrant the sanction of summary dismissal of the appellant. The burden of proving that a wrongful dismissal has occurred rests with an employee. The appellant was well aware that under the Respondent's Code of Conduct,



he was to inform the Respondent of any absence or sickness. Furthermore, lack of medical evidence to support his illness casts doubt on his tale.'

72. Similarly, in *Naima Khamis V Oxford University Press (EA) Ltd (Supra)*, the Court of Appeal held;

' It is necessary to point out that reasons for termination of a contract are matters that an employer at the time of termination of contract can genuinely support by evidence and which impact on the relationship of both the employer and employee in regard to the terms and conditions of work set out in a contract.'

73. For the foregoing reasons and authorities, it is the finding of the court that the Claimant has failed to establish on a balance of probabilities that the dismissal by the Respondent was unfair or unlawful.

Procedure

74. Section 41 of the *Employment Act* prescribes the procedural precepts to be complied with prior to dismissal or termination of employment. These precepts are mandatory for the dismissal or termination of employment to pass the fairness test.

75. In *Postal Corporation of Kenya V Andrew K Tanui (2019) eKLR*, the Court of Appeal summarised the procedural tenets in the following words;

' Four elements must thus be discernible for the procedure to pass muster:-

- i. An explanation of the grounds of termination in a language understood by the employee;
- ii. The reason for which the employer is considering termination;
- iii. Entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination are made;
- iv. Hearing and considering any representations made by the employee and the person chosen by the employee.'

76. In the instant case, after the Claimant responded to the notice to show cause on May 17, 2015, he was invited for a disciplinary hearing to be held on May 20, 2016 and advised that he had the right to be accompanied by another employee of his choice. The Claimant attended the hearing in the company of one, Mr Nelson Speke.

77. The minutes of the hearing dated May 20, 2016, which the Claimant and his witness signed without protest show that the Human Resource Manager explained the purpose of the meeting and procedure to be adopted and the charges were read out by the Human Resource Manager. The Claimant explained that on May 3, 2016, the queue was too long and returned on May 4, 2016. His evidence made no reference to having been at the hospital on May 3, 2016 and if he did, it was his duty to notify the employer that he had not been attended to owing to the unending queue. A text message was sufficient. He did not.

78. As a sign of good faith and fairness, the Disciplinary Committee gave the Claimant time to obtain the necessary documentation to explain his absence from the work place. The document availed explained his absence on May 4, 2016 leaving out 11 days unexplained or unaccounted for.

79. Mr Nelson Speke testified that it was the responsibility of the doctor to give sick off if satisfied that the Claimant was not in a position to work and as it was not given, the Claimant was expected to report



to work. One of the panellists gave an example of an employee who had been granted sick off from 17th – May 21, 2016.

80. The committee deliberated and recommended summary dismissal of the Claimant for absenteeism without lawful cause. Did the Respondent's conduct meet the threshold prescribed by Section 41 of the *Employment Act*, 2007?
81. The Claimant asserted that he and the witness were coerced to sign the minutes but furnished no scintilla of evidence to demonstrate the alleged coercion. Calling Mr Nelson Speke to testify on the alleged coercion would have buttressed the allegation if it was true. In addition, the Claimant adduced no evidence as to who specifically coerced them to sign the minutes. In the absence of specific evidence or clear circumstances of the alleged coercion, the allegation remains unproven.
82. The Claimant's counsel faulted the procedural aspects of the dismissal on the grounds that the Claimant was not accorded a fair hearing as the allegations made against him were never investigated internally and he provided a doctor's report.
83. The pith and substance of the submission was that M/s Evet was neither interrogated nor testify evidence at the hearing. As regards the internal investigation not having been conducted, it is unclear what the investigation would have added to the facts of the case as the Claimant admitted having been away from the work place from 4th May to May 16, 2016.
84. Relatedly, if the Claimant felt that M/s Evet's evidence was necessary at the hearing, nothing prevented him from making the request that she be called to testify. Neither the Claimant nor the witness raised the issue during the hearing having participated voluntarily.
85. For the foregoing reasons, the court is satisfied that the Claimant has failed to puncture the procedure adopted by the Respondent in the summary dismissal.
86. Finally, the Claimant submitted that the Respondent's conduct towards the Claimant was arbitrary, oppressive and draconian.
87. In the court's view, this was a weighty submission which ought to have been supported by cogent evidence to substantiate.
88. An examination of the conduct of the Respondent from the date of the accident to the date of summary dismissal does not reveal an employer who acted arbitrarily, oppressively or in a draconian manner. On the contrary, it would appear to suggest an employer who cared about its employees, facilitated them and undoubtedly not oppressive.
89. The court so finds.
90. In the upshot, having found that the Respondent had a valid and fair reason to terminate the Claimant's employment and adopted a procedure that accorded the Claimant an opportunity to respond to the charges in writing and an oral hearing in the presence of a witness who spoke on his behalf, the court is satisfied that this suit is for dismissal and is accordingly dismissed.
91. Parties to bear own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 7TH DAY OF MARCH 2023

DR. JACOB GAKERI



JUDGE

