



REPUBLIC OF KENYA



KENYA LAW
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**Ongori v Colour Labels Limited (Cause 1988 of 2017)
[2023] KEELRC 863 (KLR) (17 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 863 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1988 OF 2017**

**JK GAKERI, J
APRIL 17, 2023**

BETWEEN

ENOCK ONDONG'A ONGORI CLAIMANT

AND

COLOUR LABELS LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed this suit on 5th October, 2017 alleging unfair and unlawful termination of employment and non-payment of terminal benefits.
2. The Claimant avers that he was an employee of the Respondent from 2008 to 16th May, 2017, initially as a general worker and later on in the Department of Gravure.
3. It is the Claimant's case that the Respondent unfairly termination his employment on 16th May, 2017.
4. The Claimant faults his termination of employment in that he was neither accorded notice or warning letter nor opportunity to be heard.
5. The Claimant pray for;
 - (i) A declaration that the termination of the employment was wrongful and unlawful.
 - (ii) Terminal dues of Kshs.424,518/= comprising one month's salary in lieu of notice, leave for one (1) year, salary for 15 days worked in May 2017, service gratuity for each completed year of service and 12 months compensation.
 - (iii) Damages for unfair, illegal, unlawful and wrongful termination of employment.
 - (iv) Certificate of service.



- (v) Costs of this suit.
- (vi) Interest on (i), (ii) and (iii) above at court rates.
- (vii) Any other relief court may deem fit.

Respondent's case

6. In its Memorandum of Response dated 8th December, 2021, the Respondent avers that before dismissal from employment, the Claimant was found on various occasions sitting around and loitering during his night shift which resulted in a decline in production.
7. It is the Respondent's case that the Claimant was subjected to a disciplinary process and could not account for his misconduct and was summarily dismissed on 16th May, 2017 and appealed through the union on 7th July, 2017 and requested the termination be changed from summary to normal which was done and a revised letter of termination was issued on 7th July, 2017.
8. That the Respondent computed the Claimant's dues and issued cheques which the Claimant refused to collect.

Claimant's evidence

9. In his written statement, the Claimant stated that his monthly salary was Kshs.27,253/=. That on 11th May, 2017, he was on the night shift and those on the shift were allowed to carry packed food.
10. That he requested his colleagues to allow him take his super at 3 am and they agreed and was done in 20 minutes and resumed duty.
11. On cross-examination, the Claimant testified that he was an Assistant Operator and worked for 9 years and was shown a video which depicted him eating while on night shift and that was the reason for termination of employment.
12. That his colleagues on that day were Alex and Javan and had not named them in his written statement.
13. He admitted having been taken through a disciplinary process and the union had a meeting with the Respondent on his appeal.
14. He admitted that there were discussions on terminal dues but he was not paid.
15. On re-examination, the witness stated that the complimentary slip from the Respondent had neither stamp nor acknowledgement and had no warning letter previously.
16. That he was accused of idling and talking to other staff during working hours.
17. That the hearing took place at 4.40 and the termination letter was issued at 5 p.m and made no reference to the right of appeal.

Respondent's evidence

18. RWI, Mr. Bernard Kereri, on cross-examination confirmed that he had no evidence that the Claimant was found sitting around or loitering during the night shift and the machine could operate in the absence of the Claimant as his role was to assess the quality of products and they were three of them loading and offloading the machine, an automatic exercise. That two employees were subjected to a disciplinary hearing.



19. The witness confirmed that the Claimant's name was not identified on the disciplinary action form nor the responses to the questions asked. He confirmed that the Claimant worked for 8 years and 9 months.
20. The witness testified that the claimant had no prior warning or caution and no notice to show cause had been issued and he was not notified of the right to be accompanied by a colleague.
21. The witness testified that he attended the meeting with the union on 7th July, 2017.
22. That although the Respondent had an internal appeal system as a policy, the Claimant was not notified of the same. That the transgression did not warrant a warning. That the minutes were not signed and had no list of attendees.
23. On re-examination, the witness testified that the Claimant had the right of appeal and appealed. That the Claimant refused to collect cheques of Kshs.88,100/= and Kshs.29,694/=.
24. That the Claimant was allowed to call witnesses but did not call any.

Submissions

25. According to the Claimant's counsel, the issues for determination are;
 - i. Whether termination of the Claimant's employment was unfair and unlawful.
 - ii. Whether the Claimant is entitled to the reliefs sought.
26. The Respondent's counsel identified substantially similar issues but for costs of the suit.
27. On the 1st issue, the Claimant's counsel urged that the Respondent exaggerated the alleged loitering by the Claimant who was at least entitled to a break of 20-30 minutes, counsel relied on the provisions of Section 45 (2) of the [Employment Act](#) and the decision in Josephat Otieno Kongo v Riley Services Ltd [2022] eKLR to urge that the reason for termination was invalid as employees on night duty had short breaks to rest and take meals and submitted that the termination was substantively and procedurally unfair. Reliance was made on the decisions in Loice Atieno v Kenya Commercial Bank [2013] eKLR, CMC Aviation Ltd v Mohammed Noor [2015] eKLR, David Gichana Omuya v Mombasa Maize Millers Ltd [2014] eKLR as well as Moses Stanley Okoth v Hyper Market Ltd [2021] eKLR.
28. In the latter case, the Claimant was away from his workplace for 3 hours only and his employment was terminated. The court held that the duration had not attained the threshold for summary dismissal.
29. The Respondent's counsel on the other hand submitted that according to Respondent, the Claimant had been found sitting or loitering on several occasions during the night shift and relied on provisions of Section 44 (4) (a) and (c) of the [Employment Act](#) to urge that the Claimant had absented himself from work without leave or lawful cause or neglected to perform his work.
30. The Respondent's counsel further relied on the provisions of Section 47 (5) of the [Employment Act](#) to urge that the Claimant bore the burden of proof that termination of his employment was unfair. Reliance was also made on the provisions of Section 107 and 108 of the [Evidence Act](#) as were the decisions in George Okello Munyolo v Unilever Kenya Ltd [2019] eKLR and Jennifer Nyambura Kamau v Humphrey Mbaka Nandi [2013] eKLR to reinforce the submission on the burden of proof.
31. As regards the remedies sought, the Claimant's counsel submitted that the Claimant was entitled to all the reliefs sought as termination of his employment was unfair and in particular 12 months salary as his conduct did not warrant summary dismissal, had no previous record and had worked diligently for 9 years.



32. The Respondent’s counsel submitted that as the Claimant had failed to discharge the burden of proof under Section 47 (5) of the [Employment Act](#) and he was not entitled to the reliefs sought.
33. Counsel urged the court to award costs to the Respondent.

Determination

34. 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.
35. As to whether termination of the Claimant’s employment was unfair, both provisions of the [Employment Act](#), 2007 and case law are clear that for a termination of employment to pass as the fairness test, it must be substantively justifiable and procedurally fair.
36. The provisions of Sections 41, 43, 44, 45 and 47 of the [Employment Act](#) set out the architecture of fair and lawful termination of employment. These provisions address the specific substantive and procedural elements of a fair termination of employment.
37. Section 45 (2) of the [Employment Act](#) is emphatic that for a termination of employment to pass the fairness test, it must be proved that the employer;
 - (i) had a valid and fair reason to do so,
 - (ii) the reason related to the conduct, capacity or compatibility of the employee or operational requirements of the employer and
 - (iii) the employment was terminated in accordance with fair procedure.
38. In *Naima Khamis v Oxford University Press (E.A) Ltd (2017) eKLR*, the Court of Appeal considered the import of Sections 43 (1) and 45 (2) (c) of the [Employment Act](#), 2007 and held as follows;

“From the foregoing, termination of employment may be substantively and/or procedurally unfair. A termination is also deemed substantively unfair where the employer fails to give valid reasons to support the termination. On the other hand, procedural unfairness arises where the employer fails to follow the laid down procedure as per the contract, or fails to accord the employee an opportunity to be heard as by law required. ”
39. Similarly, in the words of Ndolo J. in *Walter Ogal Anuro v Teachers Service Commission [2013] eKLR*,

“. . . 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.”
40. The court is in agreement with these sentiments.
41. I will now proceed to apply the foregoing provisions and principles of law to the facts of this case.



Reason for termination

42. The letter of termination of the Claimant's employment outlined the reason for termination of employment as follows:

“This is in reference to the incident captured last week during your night shift whereby you carelessly and negligently performed your duty as an assistant operator. In this instance you were seen meandering around and telling stories instead of keenly observing the job you were running. This has caused a lot of wastage, rejections and losses which is totally unacceptable. This amounts to gross misconduct as per the *Employment Act*, 2007, Section 44 . . .”
43. While the Claimant testified that he was having dinner or supper on that day, the Respondent's witness stated that the Claimant had been found “sitting around and loitering” on various occasions during the night shift but had no evidence of the alleged occasions.
44. The termination letter dated 16th May, 2017 refers to an incident captured a week earlier and the Claimant confirmed on cross-examination that he was indeed shown a video of him eating at 3.00 am in the morning.
45. RWI confirmed on cross-examination that he had no evidence of the Claimant sitting around or loitering during the night shift.
46. RWI adduced no evidence of the alleged meandering and telling stories to other staff. None of the colleagues he was allegedly talking to called to confirm the allegation.
47. Evidence of what transpired on the alleged occasion and previous incidents or occasions as alleged would have demonstrated that the Claimant habitually left his work station unattended.
48. It is unclear why the Respondent did not find it necessary to issue a notice to show cause for the Claimant to explain why he was eating at that time, assuming it was forbidden.
49. Similarly, the Respondent adduced no evidence to demonstrate how the alleged misconduct affected production and led to rejection and losses. Such evidence would have been available if the matter had been investigated and if indeed production was affected as alleged.
50. RWI testified that the Claimant was working with two (2) other colleagues and the machine was automated and their work was to load and unload.
51. Even assuming that the Claimant was loitering and meandering and telling stories as alleged, the Respondent adduced no evidence of how long the Claimant was out of his duty station and the ensuing consequences so as to crystallize his alleged negligence as he was at the workplace.
52. Finally, the Claimant's testimony that he had notified his colleagues that he needed to eat the food he had carried and they accepted the request was not controverted. The only credible and reliable evidence on record is that the Claimant was captured eating at around 3.00 am while on night shift and the Respondent has not demonstrated that the same was forbidden or that the Claimant took too long.
53. In the absence of any other material implicating the Claimant in other transgressions, it is the finding of the court that the Respondent has on a balance of probabilities failed to show that it had a valid and fair reason to terminate the Claimant's employment on 16th May, 2017.
54. In *Moses Stanley Okoth v Hyper Market Ltd (Supra)*, cited by the Claimant's counsel where the Claimant's employment was terminated on account of absence from the work place for 3 hours, this



court held that duration did not meet the threshold for dismissal. The court was of the view that a strongly worded warning would have been sufficient.

55. From the evidence on record in this case and in light of the decision in *Moses Stanley Okoth v Hyper Market Ltd (Supra)*, the court is of the view that the alleged transgressions of the Claimant even if true did not warrant summary dismissal. The Respondent adduced no evidence to prove the Claimant habitually left his work station to tell stories or loitering around.
56. In the courts view, the sanction imposed by the Respondent appears too harsh in the circumstances.
57. For the above-stated reasons, it is the finding of the court that termination of the Claimant's employment was substantively unfair.

Procedure

58. On matters procedure, the Claimant admitted on cross-examination that he was taken through a disciplinary hearing and appealed the decision through the union.
59. That he attended the meeting alone and had not been informed of the right to be accompanied by a witness and RWI confirmed as much on cross-examination.
60. According to the Respondent's Copy Disciplinary Form on record, the disciplinary proceedings took place on 16th May, 2017 and 6 persons attended the meeting. The Claimant's presence was not acknowledged in the minutes.
61. From the record, it is unclear whether the accusation was read out to the Claimant at the beginning of the hearing.
62. Relatedly, RWI admitted that the Claimant's defence was not recorded nor were the questions he was asked by the panel. It is unclear why the Respondent did not attach the clip or footage relied upon by the committee or a transcript of it.
63. Significantly, although the committee found the Claimant at fault for not performing his work carefully, it did not find him negligent in the performance of his duties and made no specific recommendation. It is unclear as to when the decision to terminate the Claimant's employment was made as the letter of termination is dated on the same day and the Respondent adduced no evidence as to when the meeting commenced or ended and when the Claimant's representations were considered.
64. Finally, RWI confirmed that the minutes were not signed.
65. Although on the face of it, it would appear that the Claimant was taken through a disciplinary process, the salient question is whether the process employed by the Respondent met the threshold of procedural fairness as envisioned by the provisions of Section 41 of the [Employment Act](#), 2007. While the Claimant submitted that the provisions of the [Employment Act](#) were not complied with, the Respondent did not submit on this issue.
66. Section 41 of the [employment Act](#) 2007 provides;
 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 the 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.
67. The essential elements of Section 41 have been explained in several decisions including *Loice Atienov Kenya Commercial Bank* [2013] eKLR and *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR among others.
68. In the latter case, the Court of Appeal held as follows;
- “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 is made;
 - (iv) hearing and considering any representations made by the employee and the person chosen by the employee.”
69. The court is bound and guided by these sentiments.
70. From the evidence on record, it is unclear as to when the Claimant was invited for the hearing as the alleged misconduct took place on the morning of 12th May, 2017 and the Respondent adduced no evidence of a notice to show cause or invitation to the meeting nor email to the Claimant.
71. The Respondent’s evidence on record make no reference to the date or time of the alleged acts of the Claimant.
72. RWI confirmed that the Respondent did not issue a notice show cause. This would appear to suggest that the Claimant had not been confronted with the charges he faced at the disciplinary hearing, which he attended.
73. Similarly, RWI confirmed that the Claimant had not been notified of the right to be accompanied by a colleague of his choice or shop floor representative and had no witness.
74. RWI’s testimony that the issue arose at the hearing and the Claimant was notified of his right was not supported by any evidence, and more so the unsigned proceedings on record.
75. The right to appear with a colleague or shop floor union representative is a statutory right of the employee and cannot be wished away. While addressing this issue in *Postal Corporation of Kenya v Andrew K. Tanui* (supra), the Court of Appeal stated;
- “In this case, the letter inviting the Respondent to appear before the Board was only two lines containing the date and venue. It said nothing about the reasons for such invitation. It said nothing about the Respondent appearing with another employee of his choice. The retort that an employer has no obligation to ask the employee to be accompanied does not avail the appellant because the law requires that such other person be present to hear the grounds of termination, and, if so inclined, make representations thereon. A hearing not so conducted



is irregular. At the Board meeting, there is no evidence that an explanation of the grounds of termination was made to the Respondent and if so, in what language.”

76. These sentiments apply to the facts of the instance case on all fours.
77. Puzzlingly, the Claimant’s representations at the hearing were not captured in the minutes, a fact confirmed by RWI on cross-examination.
78. In the circumstances, it is unclear as to whether the disciplinary committee considered the Claimant’s representations.
79. Finally, the termination letter did not indicate to the Claimant that he had the right to appeal though he did so through the union.
80. For the above-stated reasons, the court is satisfied and finds that the procedure adopted by the Respondent in the termination of the Claimant’s employment fell short of the threshold envisaged by Section 41 of the *Employment Act*, 2007.
81. In sum, it is the finding of the court that termination of the Claimant’s employment was unfair for want of substantive justification and procedural propriety.

DIVISION - Reliefs

(a) Having found that termination of the Claimant’s employment was unfair, a declaration to that effect is merited.

(b) One month’s salary in lieu of notice

82. From the evidence on record, it is evident that the Respondent did not comply with the provisions of Section 35 or 36 of the *Employment Act* as regards notice.

The Claimant is awarded the equivalent of one month’s salary in lieu of notice.

(c) Leave days for one (1) year

83. Neither the Claimant’s written statement dated 3rd October, 2017 nor the oral testimony adduced in court make reference to pending leave days.

The claim is disallowed.

(d) Salary for 15 days worked in May

84. From the evidence on record, it is clear that the Claimant was not paid for the days worked in May 2017.

The claim for pay for the 15 days worked in May 2017 is allowed.

(e) Service gratuity at 15% for each completed year.

85. It is unclear as to whether the Claimant is praying for service pay as his counsel suggested in the submissions or gratuity which is a contractual term.

86. However, the Claimant has not proved entitlement to any for two reasons. First, the payslips on record shows that the Respondent deducted NSSF contributions and the Claimant was thus excluded from service pay by the provisions of Section 35 (6) of the *Employment Act*. Secondly, the Claimant adduced no evidence of entitlement to gratuity either under the contract of employment or Collective Bargaining Agreement.



(f) 12 months compensation

87. Having found that termination of the Claimant's employment was unfair, the Claimant is entitled to compensation pursuant to the provisions of Section 49 (1) (c) of the Employment Act, 2007.
88. In determining the quantum of compensation, courts are enjoined to juxtapose the relevant factors in Section 49 (4) of the Act to the facts of the case.
89. In this case, the court has taken into consideration the fact that;
- (i) The Claimant was an employee of the Respondent for a duration of 8 years and 9 months.
 - (ii) The Claimant had no previous warning letter or misconduct.
 - (iii) The Claimant wished to continue in the employment of the Respondent as evidenced by the appeal against termination of employment.
 - (iv) The Claimant contributed to the termination of employment by his conduct on 11th May, 2016.
 - (v) The Claimant's dues were computed but the Claimant declined to collect the cheques and offered no explanation.
90. In the circumstances, the Court is satisfied that the equivalent of 5 months salary is fair.

(g) Damages for unfair, illegal, unlawful and wrongful termination of employment

91. The Claimant adduced no evidence to demonstrate entitlement to damages for unfair or unlawful termination of employment. Moreover, the compensation awarded under Section 49 (1) (c) of the Employment Act, 2007 is sufficient.

(h) Certificate of service

92. The Claimant is entitled to a certificate of service by dint of section 51 of the Employment Act, 2007.
93. In conclusion, 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) Salary for 15 days worked in May 2017.
 - (d) Equivalent of 5 month's salary.
 - (e) Certificate of service.
 - (f) Costs of this suit.
 - (g) Interest at court rates from date of judgement till payment in full.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 17TH DAY OF APRIL 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

