



**Ngatia v Chemoquip Limited (Cause 1903 of 2016)
[2023] KEELRC 874 (KLR) (14 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 874 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1903 OF 2016**

**SC RUTTO, J
APRIL 14, 2023**

BETWEEN

REUBEN KAMURI NGATIA CLAIMANT

AND

CHEMOQUIP LIMITED RESPONDENT

JUDGMENT

1. Through a Memorandum of Claim dated August 31, 2016, the claimant avers that prior to his termination, he was employed by the respondent as a sales representative since 2009. It is the claimant's case that he worked for the respondent diligently, professionally, meticulously and with dedication. The claimant has termed his termination as unlawful and clothed with malice as he received accolades over the years he was employed by the respondent. It is against this background that the claimant seeks against the respondent a declaration that his dismissal was wrongful, unfair and in breach of the rules of natural justice, an order of payment of salary for the month of May, 2016, service pay, housing allowance, leave days, compensatory damages for wrongful and unfair dismissal, unconditional letter of reference, interest and costs of the suit.
2. The respondent opposed the Claim through its Memorandum of Reply dated December 15, 2016, in which it averred that the claimant was in gross breach and contravention of the contract of employment by his actions leading to disciplinary action and eventual termination of his employment. The respondent further denied being in breach of any term or condition set out in the contract of employment and the employment laws. It termed the claimant's demands as totally misconceived. Consequently, the respondent has asked the Court to dismiss the suit with costs.
3. The matter proceeded for hearing on March 14, 2022 with each side calling oral evidence. Upon close of the hearing, the respondent filed an Application to call additional witnesses and adduce more evidence. The said Application was declined hence parties proceeded to file their written submissions.



Claimant's Case

4. At the trial, the claimant testified in support of his case and at the outset, sought to rely on his witness statement to constitute his evidence in chief. He further produced the documents filed together with his claim as exhibits before Court.
5. It was his evidence that he was employed on a permanent basis. That he worked diligently with dedication and to confirm the same, he was receiving a salary of Kshs 19,200 at the beginning of employment and by the time he was dismissed, he was earning a salary of Kshs 55,000/=. That further, he was entitled to commissions and at the time of his dismissal, he had received accolades for huge sales and his technical input including but not limited to supply of PH meter to KEMSA which earned the respondent a contract sum of Kshs 26,000,000/= but which commission he never received. That in addition, he never received any disciplinary notice, complaint and or negative review for the seven years he worked up for the respondent.
6. Recounting the events that led to his exit from the respondent's employment, the claimant told Court that upon resuming work from his examination leave, he was called in by one of the respondent's directors who asked him to handover his laptop and the car keys. That he was then given a notice of termination of employment on alleged grounds of gross misconduct. That he was not given any reason for his termination and was never informed of any allegations. He denied being involved in any competing work with the respondent and destroying the respondent's laptop.
7. It was his further evidence that in blatant disregard of the rules of natural justice, the respondent refused and or failed to give him an opportunity to be heard and or listen to his grievances. He further testified that he was yet to receive his terminal dues as the respondent wanted to coerce him to sign a payment voucher in exchange for the same.
8. That the unlawful dismissal caused him humiliation and has adversely affected his future employment opportunities.
9. Closing his testimony in chief, the claimant asked the court to allow his claim and grant him compensation.

Respondent's Case

10. The respondent called oral evidence through Ms Joan Flora Anyona who testified as RW1. She identified herself as the Human Resource Manager of the respondent and proceeded to adopt her witness statement as her evidence in chief. She further produced the documents filed on behalf of the respondent as exhibits before Court.
11. It was her evidence that the claimant was involved in gross misconduct by breaching the terms of his employment contract and the company policies, more specifically, the sale of laboratory equipments to the respondent's clients through unauthorized proxies. That the claimant was summoned for a meeting to show cause and explain his actions.
12. That the evidence was in a work computer the claimant used to make the unauthorized transactions. That upon realizing that he had been caught and the only evidence linking him to the unauthorized dealings was in the computer, he walked into the office without permission, took the computer and smashed it on the ground with the intention of damaging it. That this act clarified to the respondent that indeed, the claimant was guilty of an offence which he did not want the respondent to know about and hence he was effectively relieved of his duties. She termed the claimant's actions as amounting to



gross misconduct. That after the commotion, the claimant was asked to handover the car keys and the laptop.

13. RW1 further told Court that the claimant was called severally to collect his terminal dues but he refused to do so.

Submissions

14. It was submitted on behalf of the claimant that there was no due procedure followed and the allegations were unsubstantiated. That there was no evidence provided and the respondent's witness was not in a position to confirm or produce any evidence. That further, the reasons fronted for termination were allegations not backed by any evidence hence raising no valid reason for termination. In support of the claimant's submissions, the cases of *Walter Ogal Anuro vs Teachers Service Commission* (2013) eKLR, *Nicholas Muasya Kyula v Farm Chem Limited* and *Alphonse Machanga Mwanichanga v Operations 680 Limited* (2013) eKLR were cited.
15. On its part, the respondent submitted that the claimant never refuted the evidence produced by its witness. That the claimant did not refute the averments contained in the letter of termination and did not produce any document, letter or email sent to the respondent stating his side of the story or rebutting the statements contained in the termination letter. The respondent further submitted that it was alive to the fact that under Section 45 of the *Employment Act*, the employer must not only prove that the reason for termination is valid and fair but also that the employment was terminated in accordance with fair procedure under Section 41 of the *Employment Act*.
16. It was further submitted that the respondent sought to accord the claimant the right to defend himself, was invited to a show cause meeting and it was during the said meeting that a scuffle ensued and the claimant destroyed the evidence against him being a computer laptop. Placing reliance on the case of *Cooperative Bank of Kenya Limited v Yator* (Civil Appeal 87 of 2018) (2021) KECA 95 (KLR), the respondent submitted that this was an exceptional circumstance where the employer was unable to hear the claimant.

Analysis And Determination

17. I have considered the issues raised in the pleadings as well as the evidence on record and the following issues stand out for determination: -
 - a. Whether the claimant's termination from employment was unfair and unlawful.
 - b. Is the claimant entitled to the reliefs sought?

Unfair and unlawful termination?

18. The *Employment Act, 2007* prohibits unfair and unlawful termination from employment. On this account, an employer is required to prove that an employee's termination was not only fair substantively but also procedurally. The legal parameters for determining whether the employer acted fairly and lawfully in terminating the employment of the employee are to be found under Sections 41, 43 and 45 of the *Employment Act*.
19. Substantive justification has to do with proof of the reasons which resulted in an employee's termination, whereas procedural fairness relates to the process applied in effecting an employee's termination from employment. I will start by considering substantive justification.



20. In accordance with Section 43(1) of the *Employment Act*, an employer is required to prove the reason or reasons for the employee's termination, and where it fails to do so, such termination shall be deemed to have been unfair within the meaning of Section 45.
21. In addition, Section 45 (2) (a) and (b) of the *Employment Act*, qualifies a termination of employment as unfair if the employer fails to prove that the reason for the termination is valid, fair and related to the employee's conduct, capacity or compatibility; or based on its operational requirements.
22. Consequently, beyond providing the reasons for an employee's termination, an employer is required to prove that the same were fair and valid and related to the employee's conduct, capacity or based on its operational requirements.
23. From the record, the claimant's employment was terminated through a letter dated 27th May, 2016, which reads in part: -

“Re: Termination Of Employment Contract

While you were away on exam leave (between the 11th and 25th of May, 2016) we received information that implied that you were involved in the sale of laboratory items to our clients through another company. We investigated the matter and got proof of email communication between you and the said client whom we later interviewed and he confirmed the same.

We held on to this information until you came back with the hope of getting your side of the story. You started by denying any knowledge of the “proxy” company that you were using to facilitate sales that were a direct competition of the work that you were supposed to do. After we showed you proof of the very many email communication on your lap top with the said company you later owned up but said that you acted as consultants to these companies and claimed to have offered this consultancy services on your free times(sic).

The above admission and actions constitutes (sic) a gross misconduct that is completely contrary to your employment contract that expects you to devote your whole time and affection to the business of the company and not to engage in direct or indirect competition with your employer. The employment contract also expects you to promote and safeguard at all times the interests of the company and its business and not to do anything that is detrimental to those interests.”

24. Evidently, the claimant was cited for gross misconduct in that he was involved in the sale of laboratory items to the respondent's clients through another company. Consequently, he was accused of breaching his employment contract which required him to devote his whole time and affection to the business of the company and not to engage in direct or indirect competition with his employer.
25. In terms of the provisions of Sections 43(1) and 45(2) (a) and (b) of the *Employment Act*, the respondent being the employer, had the heaviest responsibility in terms of proof. Essentially, the respondent had the onus of proving that the reasons leading to the claimant's termination were fair, valid and related to his conduct.
26. In this regard, the respondent did not adduce evidence to back up its assertions against the claimant. The respondent stated that the only evidence it had was in the computer that was allegedly destroyed by the claimant.
27. Be that as it may, in the letter of termination, the respondent alluded to investigations it had conducted. It further stated that it obtained proof of email communication between the claimant and the client in



- question. That the said client was interviewed and he confirmed that he had dealings with the claimant through another company. What this means is that the respondent had evidence before confronting the claimant. At least, there would have been a statement by the client in question implicating the claimant.
28. Besides, email communication is stored electronically and can be accessed from any device. Therefore, if at all the claimant destroyed the computer in question, the respondent could still access the email communication through any other device. It did not require the claimant's computer to access the same. Afterall, it was able to access the same prior to confronting the claimant hence it means that it had access to the same either way.
 29. In light of the foregoing, it is not plausible for the respondent to state that it does not have evidence for purposes of the instant whereas it had the same while confronting the claimant prior to the termination.
 30. In sum, the respondent did not discharge its evidential burden under Sections 43(1) and 45 (2) (a) and (b) of the *Employment Act* as it has not proved that the claimant's termination was not substantively fair.
 31. With regards to procedural fairness, an employer is required under section 45(2) (c) of the *Employment Act* to prove that an employee's termination was undertaken in accordance with fair procedure. Section 41(1) of the *Employment Act* sets out the specific requirements of what constitutes a fair process. This procedure entails notifying the employee of the allegations he or she is required to respond to and thereafter granting him or her the opportunity to make representations in response to the said allegations in the presence of a fellow employee or a union representative of his or her own choice.
 32. In the instant case, there was no evidence that the claimant was taken through the process envisaged under Section 41 of the *Employment Act*. The meeting alluded to by the respondent in the letter of termination appears to have been undertaken without notice. It is apparent that the same was not the one contemplated under Section 41. What the respondent was required to do upon receiving the evidence implicating the claimant was to put him on notice that it was considering terminating his employment on that basis. The claimant would then have been granted an opportunity to respond to the allegations and give his side of the story. There was no evidence this took place. Indeed, testifying under cross examination, RW1 stated that she was not aware if due process was undertaken in terminating the claimant's employment.
 33. What seems to have happened in this case is that events unfolded very fast and the claimant was terminated on the very day, he resumed work from his examination leave. Indeed, one wonders, what prejudice would the respondent have suffered by giving the claimant time to formally explain his alleged transgressions. For this reason, the respondent is at fault for failing to comply with the provisions of Section 41 of the *Employment Act*.
 34. It is also instructive to note that the provisions of Section 41 are mandatory and it is not open for an employer to elect whether or not to comply with the same. Such was the determination by the Court of Appeal in the case of Postal Corporation of Kenya vs Andrew K. Tanui [2019] eKLR.
 35. To this end, I cannot help but find that the claimant's termination from employment was procedurally unfair hence unlawful within the meaning of Section 45 (2) (c) of the *Employment Act*.
 36. The total sum of my consideration is that the claimant's termination was both unfair and unlawful in terms of Sections 41, 43 and 45 of the *Employment Act*.



Appropriate Reliefs

37. Having found that the claimant's termination was unfair and unlawful, the Court awards him compensatory damages equivalent to six (6) months of his gross salary. This award takes into consideration the length of the employment relationship between the parties as well as the fact that the respondent neither proved the reasons for the claimant's termination nor the fact that it applied a fair process in so doing.
38. The claimant is also awarded salary for the month of May, 2016 as there is no evidence that the same was paid out to him. Besides, from the evidence by both sides, the claimant had not collected his terminal dues which was inclusive of his salary for the month of May. In as much the respondent exhibited the breakdown of the claimant's pay, there is no evidence that the same was transmitted to his bank account.
39. The claimant is further awarded service pay for the years he served as the respondent did not justify that he fell within the exclusions under Section 35(6) of the *Employment Act*.
40. With regards to the claim for leave, the claimant did not specify the leave period for which he is seeking compensation as well as the amount he is claiming from the respondent. On that account, the claim collapses.
41. The claim for house allowance is also declined as the claimant's contract of employment states that his salary was "consolidated". It is therefore presumed that the house allowance was subsumed in his consolidated salary.

Orders

42. In the final analysis, I enter Judgment in favour of the claimant against the respondent in the following manner: -
 - a. A declaration that the claimant's dismissal from employment was wrongful, unfair and in breach of the rules of natural justice.
 - b. The claimant is awarded salary for the month of May, 2016 being Kshs 55,000.00
 - c. The claimant is awarded service pay for 6 years being Kshs 165,000.00.
 - d. The claimant is awarded compensatory damages in the sum of Kshs 330,000.00, being equivalent to six (6) months of his gross salary.
 - e. The total award is Kshs 550,000.00.
 - f. Interest on the amount in (e) at court rates from the date of Judgement until payment in full.
43. The claimant shall also have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF APRIL, 2023

STELLA RUTTO

JUDGE

Appearance:

For the Claimant Ms. Monyangi

For the Respondent Mr. Bariki



Court Assistant Abdimalik Hussein

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 March 15, 2020 and subsequent directions of April 21, 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 had 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.

