



**Wachoro v Ellams Products Limited (Cause 1470 of 2017)
[2023] KEELRC 1180 (KLR) (18 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1180 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1470 OF 2017
K OCHARO, J
MAY 18, 2023**

**BETWEEN
GEDION MULUNGU WACHORO CLAIMANT
AND
ELLAMS PRODUCTS LIMITED RESPONDENT**

((Before Hon Justice Ocharo Kebira on 18/5/2023))

JUDGMENT

Introduction

1. Through a Memorandum of Claim dated 27th July 2017, the Claimant instituted a claim against the Respondent seeking the following reliefs;
 - a. A Declaration that the Claimant’s suspension by the Respondent is null and the continued suspension indefinitely violates the Claimant’s rights as enshrined under article 41 of the *Constitution*.
 - b. That the Respondent be ordered to pay the Claimant Kshs. 23,534 being the monthly full salary from June 2016 up to the full hearing and determination of this matter or further court orders.
 - c. The Claimant is hereby reinstated in the Respondent’s employment without break of service. In the alternative;
 - I. The Claimant be paid full salary during the suspension period.
 - II. Damages compensation for unfair termination equivalent to 12 months’ pay being KShs. 282, 408.
 - III. Payment in lieu of notice.



IV. The Respondent to pay cost of the suit.

2. The Memorandum of the claim was filed together with the Claimant's witness statement and a bundle of documents that he intended to place reliance on as documentary evidence in support of his case.
3. Upon being served with the summons to enter appearance, The Respondent filed a Statement of Response dated 2nd May 2018, wherein it denied the Claimant's claim in toto.
4. Subsequent to the close of pleadings, the matter was heard inter-partes. The Claimant's case was heard on the 16th May 2022 while the Respondent's was heard on the 27th July 2022.

The Claimant's case.

5. The Claimant urged the Court to adopt the contents of his witness statement as part of his evidence in Chief, thing the court did as there was no objection by the Respondent. The documents that he filed herein contemporaneously with the Memorandum of Claim, were by consent admitted as exhibits 1-6.
6. The Claimant testified that he came into the employment of the Respondent on the 28th October 2009. At the time of employment, he was asked to give details to wit; telephone number; postal address [48 Karaba Embu]; and those of a person who knew him very well and who could be reached any time. He gave the name of Mr. Mbuvi, who also working with the Respondent.
7. The Claimant averred that he worked diligently for the Respondent without any record of discipline issue[s] until his unlawful and unfair termination from the employment.
8. The Claimant contended that on the 27th June 2016, he reported late to work at 8:30 am, and attempted to seek audience with his supervisors to explain the reason for the late coming, however, he was sent away by the Respondent's at the instructions of the supervisor, Mr. Nduma.
9. Later another day, he managed to see the Respondent's Human Resource Manager, the Manager told him off. He told him to go and wait for a call from the Respondent. while working with the Respondent.
10. On or about the 26th October 2016, through post he received two letters simultaneously one dated 27th September 2016 and another 10th October 2016, both purported to be Show cause letters.
11. The Claimant wondered why the Respondent didn't call him, yet they had his telephone number instead of sending a letter by post which they knew could reach him when it was late. According to him, the move to send the letter was deliberate, they calculated to have the letter reach him long after, the date for showing cause had passed.
12. The respondent didn't pay him any money as alleged.
13. Cross examined by Counsel for the Respondent; the Claimant testified that one of the ways through which the Respondent would reach him was through the postal address that he had provided them. The letters were sent to the said address. He received it after the date the Respondent set therein had passed.
14. Mr Nduma verbally told him to go home and wait for a call from the Respondent. After the 25th June 2016, he never reported back to work.

The Respondent's case.

15. The Respondent presented Mr. Guyvira Ndumato testify on its behalf. The witness adopted the contents of his witness statement filed herein as part of his evidence in chief. At the hearing, he



- highlighted the statement, clarifying on areas therein that required to be. He stated that the Claimant was engaged with the Respondent as a General Labourer in its production Development, under a contract of employment with effect 1st February ,2016, for a period of six months.
16. The witness further stated that on the 25th June 2016, the Claimant left employment on his own volition upon absencing himself from duty without reasons or authority. He never returned thereafter. The Respondent's Staff Daily Clocking Report, is testament that he deserted duty.
 17. It was further stated that the Claimant was issued with a show cause letter on the 27th September ,2016, which was received by the District Labour Officer on the 29th September 2016, owing to the fact that the Respondent was unaware of the Claimant's whereabouts and address of service. The letter required him to show cause why stern action could not be taken against him for absenteeism.
 18. He alleged that the Claimant was subsequently issued with a Notice to appear before a Disciplinary Committee through a letter dated 10th October ,2016 and received by the District Labour Officer on the 11th October,2016. The disciplinary proceedings were to be held on the 18th October ,2016. The Claimant failed to appear before the Disciplinary Committee, forcing the Respondent to issue a letter of summary dismissal dated 19th October ,2016. The letter was received by the District Labour Officer on the 20th October ,2016.
 19. He asserted that the Claimant was accorded all forms of procedural fairness and his actions of absenteeism from work without any communication between the dates of 25th June, 2016 and 19th October, 2016, constituted gross misconduct on his part.
 20. The witness contended that the Claimant was duly paid his terminal dues of KShs. 53,306. This money was deposited with the Labour Officer.
 21. Cross examined by Mr. Okemwa Counsel for the Claimant; the witness testified that the Respondent didn't place before this Court any deposit receipt to indeed demonstrate that the terminal dues were deposited with the Labour Officer.
 22. Periodically, the Respondent reviewed its employees' contracts, and if an employee wanted to change his or her contact details he would then. The witness admitted that the Claimant did give his telephone number as an alternative to the postal address. The Respondent is a manufacturing, manufacturing prints and security items.
 23. He further testified that in the Respondent's records, the details of the Claimant's next of kin obtained.
 24. The Claimant was accused of deserting duty on the 25th June 2016. Contrary to what the Claimant alleged, he [the Claimant] didn't meet the witness on the 25th June 2016.
 25. The Respondent didn't call the Claimant through the telephone number, they had in their records.
 26. The witness asserted that it is a legal requirement that if one has to terminate an employee's employment, the Labour Officer has to be informed. He confirmed that they didn't at all give the Labour Officer, the Claimant's contact details.
 27. In his evidence under re-examination, the witness asserted that the Labour Officer issued them with a deposit receipt, but by oversight, the same was not filed in court.

The Claimant's Submissions

28. The Claimant identified two issues for determination in this matter, thus, whether the Claimant's termination was lawful and fair, and what remedies are available to the Claimant.



29. The Claimant's Counsel submitted that though the Respondent alleged that it sent a notice to show cause to the Claimant on the 27th September 2016, there was no certificate of postage tendered in evidence to prove the postage.
30. It was further submitted that the Claimant's evidence that he received the letter dated 10th October 2016, that purported to invite him to the disciplinary hearing, way after the date that was set therein for hearing had passed. Therefore, he was never accorded to an opportunity to be heard. This was contrary to the procedural fairness requirements encompassed in section 41 of the *Employment Act*.
31. It was further submitted that the Respondent purported to discipline the Claimant but choose not to call him for a hearing. This rendered the termination unfair. To bolster this point, reliance was placed on the case of *Arasa & another v Benard Agencies and Servises* [2022] KEELRC 116[KLR].
32. The Respondent's position that the Claimant deserted duty is one that holds no water. The Respondent didn't demonstrate as required by law, the reasonable steps they took to contact the Claimant.
33. It was argued that the Respondent's assertion that it computed the Claimant's terminal benefits and deposited the same with the Labour Officer, was not proved, however, it should be treated as an admission that it owes the Claimant. Judgment on admission for the sum of KShs. 53,306, should be entered over and above the terminal dues that this Court should award.
34. Considering the provisions of the law relating to reinstatement in the Kenyan situation, the Claim for reinstatement and payback is abandoned.
35. The Claimant urged this court to award him damages for unfair termination, KShs. 183,672, representing twelve months of his gross salary. He further prays for a certificate of service.

The Respondent's Submissions.

36. Despite the directions by this Court for the parties to file written submissions, the Respondent didn't. This Judgement is therefore without the benefit of considering the same.

Analysis and Determination.

37. From the material placed before this Court, the following issues emerge for determination by in this matter, thus;
 - [a]. How did the separation in employment between the Claimant and the Respondent?
 - [b]. If by termination by the Respondent, was the termination fair?
 - (c) Is the Claimant entitled to the reliefs sought or any of them?

Of the Separation.

38. There is no contestation that the Claimant was an employee of the Respondent at all material times, but what is, is how the two parted. The Claimant contended that his employment was terminated by the Respondent when the latter's Human Resource Manager, ordered him off work till that time he could be called back. The Respondent on the other hand took the position that it summarily dismissed the Claimant on account of desertion of duty. The positions taken by the two are diametrically opposite therefore. The Court has to decide on which version to believe.



39. In a situation that there is here, the Court is not hapless, the parties' evidence considered in totality, and the pleadings by them, become useful aides. I have carefully considered the Claimant's pleadings, his witness statement, and his testimony in court, I discern inconsistency. In his statement of claim, and witness statement, he clearly contends that his last day to report to work was on the 27th day of June 2016, when he was prevented from entering the workplace by the Respondent's guards. That on the 28th June 2016, the Human Resource Manager, Mr Nduma, ordered him never to report to work. In his testimony, he alleged that the two events occurred on the 25th and 26th respectively.
40. In my view, this is material contradiction regards how the separation occurred.
41. The Court notes that the Claimant has sought in the reliefs section of the Memorandum of Claim inter alia ;
- I. A declaration that the Claimant 's suspension by the Respondents is null and the continuous suspension indefinitely violates the Claimant's rights as enshrined under article 41 of the Constitution.
 - II. That the Respondents be ordered to pay the Claimant to pay the Claimant Kshs. 23,534 being the monthly full salary from June 2016 up to the full hearing and determination of this matter or further court orders.
42. The pleadings speak to suspension, not summary dismissal or termination of employment. However, some of the reliefs sought relate to situations where either there has been a summary dismissal of an employee from employment or the employment of an employee has been terminated.
43. The Court notes further that the Claimant in his submissions, does not at all refer to the suspension aspect of his pleadings.
44. These premises leave no other impression of the Claimant other than that of a party not very sure of how the separation in employment between him and his employer occurred, or one who has deliberately concealed a material fact from the Court.
45. The Court is cognisant of the provisions of section 47[5] of the Employment Act, 2007. That in a dispute like is herein, where discharge of an employee is the subject matter, the3 employee bears a duty to establish prima facie, that his employment was terminated, before the burden shifts to the employer to prove the reasons for termination and that they were valid and fair.
46. Legal burdens are discharged by adduction of sufficient evidence, by a party charged by law with the duty to. However, where there is an admission by the adversary on the matter to be proved by the party, a conclusion is drawn that the burden of proof has been discharged. The Claimant's claim herein was one fit for dismissal on account that he didn't discharge his legal burden under section 47[5] of the Employment Act. However, as shall come out hereinafter shortly, the Respondent made an admission that it discharged the Claimant from employment, summarily. Therefore, by the admission, the burden of the Claimant contemplated under the provision was discharged.
47. The Respondent alleged that the Claimant deserted duty as from the 25th June 2016, and never reported back to work. The material placed before this Court by it, was consistent and not sufficiently challenged by the Claimant. Desertion from service must be a voluntary act on the part of the concerned employee and in order to draw any inference in this regard, intention of the concerned employee should be considered. In the facts and surrounding the circumstances of the present case, it the court safely concludes that there was a voluntary relinquishment on the part of the Claimant, and therefore the Respondent's conclusion that he deserted duty, was justified.



48. In the upshot, I conclude that the separation in employment between the Claimant and the Respondent, occurred when the Respondent summarily dismissed the former from employment.

Of procedural and substantive fairness.

49. Having found as I have hereinabove, that the Respondent summarily dismissed the Claimant from employment, I now turn to consider whether the dismissal was fair. When interrogating fairness in dismissal of an employee by his employer from employment, Court is enjoined to consider two aspects, substantive fairness and procedural fairness. Substantive fairness speaks to the decision, whilst procedural fairness speaks to the procedure leading to the decision.

50. Section 43 of the Employment Act, 2007, places upon the employer a legal burden to prove reason[s] for the termination of an employee's employment. By reason of the premises herein above, I have no hesitation to conclude that, this burden, the Respondent discharged.

51. Section 45[2] of the Employment Act, 2007, provides that in order for a termination to be deemed substantively fair, the reason[s] for the termination must be shown to be fair and valid. The Court is persuaded by the Respondent's evidence that the Claimant absented himself from duties unauthorizedly for a prolonged period, implicating desertion from service, which is a gross misconduct as provided for under the provisions of section 44 of the Act. I consequently find that the dismissal was on a valid and fair reason.

52. The summary dismissal penalty against the Claimant was in my view, substantively justified.

53. Section 41 of the Employment Act provides for the Procedure that an employer contemplating terminating an employee's employment must adhere to. The procedure is mandatory. Any deviation from the procedure, renders the termination unfair by dint of the provisions of section 45[2] of the Act. The procedure contemplated thereunder has three components; the notification component; the hearing component; and the consideration component.

54. The Respondent asserted that it accorded the Claimant every form of procedural fairness before it summarily dismissed him. The Respondent contended that it issued the Claimant with a show cause letter dated 27th September, 2016. The letter required him to show cause why disciplinary action couldn't be taken against him for absenteeism pursuant to the provisions of section 44[4] of the Act.

55. It has not escaped the Court's sight that in his witness statement, paragraph [c], the Respondent's witness clearly stated that as they were not aware of the Claimant's whereabouts and address of service, the letter was issued through the District Labour Officer.

56. In contradiction of what he stated in the witness statement, the witness testified that the letter was sent to the Claimant's postal address.

57. Assuming the letter was issued through the Labour Officer, one would ask, why, yet the Respondent's witness admitted in his evidence under cross examination that they had both the Claimant's postal address number and phone number. Further, when was the letter then dispatched to the Claimant? This are not idle questions, they needed to be answered. However, they were not answered.

58. Further, even if one were to assume that the letter was sent through the Claimant's postal address, the question when, needed to be answered, yet it was imperative that it be owing to the position that the Claimant had taken from the word go, that he received the letter together with the one dated 10th October 2016, long after the dates set therein for his action had passed.



59. By reason of the premises, the Respondent failed to demonstrate to court that the letters were sent to the Claimant well in good time to enable them reach the him early enough for him to undertake the action[s], they contemplated. Consequently, I am persuaded by the Claimant's evidence that he received the two letters together, on the 27th October 2016, long after the dates appointed therein, for the show cause, and disciplinary hearing had passed.
60. By reason of the premises foregoing, I am impelled to conclude that the Provisions of section 41 of the Employment Act were not adhered to. The summary dismissal wasn't procedurally fair.

Of the reliefs

61. I have carefully, considered the reliefs sought by the Claimant, in view of the premises foregoing, this court can only grant compensation pursuant to the provisions of section 49[1][c] of the Employment Act, a direction that he be issued with a certificate of service, and costs.
62. The Claimant did seek for a month's salary in lieu of notice. Having found that the penalty of summary dismissal was grounded, I decline to grant the relief.
63. Having found that the dismissal was procedurally unfair, I find that the Claimant is entitled to a compensatory relief under the provisions of section 49[1][c] of the Employment Act. I have considered that the Respondent totally deviated from the mandatory statutory procedure that was required of it, that the Claimant's conduct attracted the sanction, and that the Respondent's liability is attaching only, on the failure to adhere to procedural fairness. A four months' gross salary, Kshs. 61,472, compensation commends itself to the Court as fair and appropriate.
64. Section 51 of the Employment Act makes issuance of a certificate of service by the employer who has terminated an employee's employment under whatever circumstance, to such an employee, mandatory. The certificate was not issued, the Respondent is hereby directed to issue the same to the Claimant within 30 days of this judgment.
65. By reason of the premises, judgment is hereby entered in favour of the Claimant for;
- I. A declaration that the dismissal of the Claimant from employment was procedurally unfair.
 - II. Compensation pursuant to the provisions of section 49[1][c] of the Employment Act, four months' gross salary, KShs. 61,472.
 - III. A direction that the Respondent does issue a certificate of service within 30 days of this Judgment.
 - IV. Costs of this suit.
 - V. Interest at Court rates on the awarded sum above [II], from the date of this judgment till full payment.

READ SIGNED AND DELIVERED THIS 18TH DAY OF MAY 2023.

OCHARO KEBIRA

JUDGE

In presence of

Mr. Okwemwa for the Claimant.

Mr. Kavaji for the Respondent.



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 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.

A signed copy will be availed to each party upon payment of court fees.

