



**Oganga v Almasi Bottlers Limited (Cause E004 of 2022)
[2023] KEELRC 1126 (KLR) (10 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1126 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E004 OF 2022**

**S RADIDO, J
MAY 10, 2023**

BETWEEN

JOSHUA OGANGA CLAIMANT

AND

ALMASI BOTTLERS LIMITED RESPONDENT

JUDGMENT

1. The Cause was heard on 2 February 2023 and 13 March 2023. Joshua Oganga (the Claimant) and a Chief Human Resource Officer with Almasi Bottlers Ltd (the Respondent) testified.
2. The Claimant filed his submissions on 6 April 2023 while the Respondent filed its submissions on 25 April 2023.
3. The Court has considered the pleadings, evidence and submissions and identified the Issues for determination as examined hereunder.

Unfair Termination of Employment

Procedural fairness

4. The Claimant challenged the procedural fairness of his dismissal on the grounds that the process was a sham as the notices issued to him were unreasonably short and did not allow him adequate time to prepare.
5. The Claimant's contract was terminated through a letter dated 10 September 2021. Prior to the termination, the Respondent had issued him a show cause dated 16 April 2021.
6. The show cause requested the Claimant to respond by close of 20 April 2021, and also informed him that an oral disciplinary hearing would be held on 23 April 2021.



7. The Claimant responded to the show cause on 18 April 2021, and in the response, he did indicate that he would not be able to attend the hearing because he was on sick-leave.
8. As a result, the Respondent notified the Claimant that the hearing had been rescheduled to 10 May 2021.
9. The Claimant attended the hearing and when asked if the notice for the hearing was received in good time, he responded in the affirmative.
10. The minutes of the hearing do not capture the Claimant as objecting that the time to prepare was not sufficient.
11. While the rules of Procedural Fairness contemplate allowing an employee sufficient time to prepare for a disciplinary hearing (or process), the question of whether the employee has been afforded sufficient time must depend on the circumstances of each case.
12. In the instant case, the Claimant did not raise any objections to the timelines given by the Respondent until he filed the Cause in Court.
13. The Court, therefore, finds that the Respondent allowed the Claimant sufficient time to prepare and that the Respondent was in compliance with the requirements of procedural fairness.

Substantive fairness

14. Sections 43 and 45 of the *Employment Act, 2007* demand that the employer proves the validity and fairness of a termination of employment whenever there is a challenge.
15. The reasons which the Respondent gave for the termination of the Claimant's employment were in brief reckless driving leading to an accident and the carrying of an unauthorised passenger.
16. The Respondent presented one witness to discharge the burden placed on it.
17. The witness produced a copy of a vehicle activity report. The report showed that on the day of the accident and just before the accident, the Claimant exceeded the speed limits prescribed by the law for the type of vehicles he was driving.
18. The Claimant was driving a pick-up and the speed limit for such vehicles is 80km/h. The Claimant admitted during the disciplinary hearing that he was driving at speeds of 80km/h to 90km/h before the accident (the speed logs produced by the Respondent show the Claimant reached up to 113km/h).
19. The Claimant explained the speeding to the fact that he was under pressure to catch up and offload a truck.
20. While the Court cannot attribute the accident to the speeding, it is not in dispute that the Claimant exceeded the speed limits prescribed for the type of vehicle he was driving.
21. On that account, the Court does not find fault with the Respondent's decision to terminate the contract on the basis of reckless driving.
22. The second reason which was advanced by the Respondent to terminate the Claimant's employment was that he had an unauthorised passenger.
23. The Claimant did not deny having an unauthorised passenger. He stated that the passenger was authorised and was meant to assist with the offloading of the truck.



24. The Respondent's witness testified that the passenger was not its employee, and that loading and offloading was the responsibility of the local distributors. The witness also testified that the Claimant had no authority to engage any employee, casual or otherwise.
25. The Court finds no reason to disbelieve the evidence and it finds that the Claimant carried an unauthorised passenger contrary to the Respondent's policies in place and this was a valid reason to terminate the contract.
26. With the conclusions, the Claimant is not entitled to compensation or pay in lieu of notice.

Breach of Contract/Acting Allowance

27. The Claimant prayed for Kshs 627,290/- on the basis that he was appointed to act as the Regional Sales Manager from 8 June 2018, and that he acted for 5 months.
28. If the Claimant acted for 5 months, it means that the acting appointment ended around November 2018.
29. The Claimant moved the Court on 19 January 2022 and clearly this is outside the 3 years prescribed by section 90 of the [Employment Act, 2007](#).
30. The head of claim is caught up by the law of limitation and thus cannot be granted.

Compensation under [Work Injury Benefits Act](#)

31. As a result of the accident on 20 February 2021, the Director of Occupational Safety and Health assessed the compensation payable to the Claimant as Kshs 281,444/25.
32. The Claimant sought to enforce payment of the awarded compensation.
33. The Respondent did not pay the compensation and it merely denied in its Response that the compensation was due. The filed witness statement did not also address the head of the claim.
34. During oral testimony, the Respondent's witness stated that the Claimant had not been paid because he was on full pay during the 62 days' sick-leave and therefore the payment under the [Work Injury Benefits Act](#) was treated as reimbursement.
35. In the submissions, the Respondent contended that since the Claimant had not suffered any permanent or temporary disablement, he did not qualify for compensation under section 10 of the Act.
36. The Court has looked at a copy of the Claimant's employment agreement. Clause 8.7 suggests that an employee on sick-leave would be entitled to basic salary or other entitlements in accordance with the policies in place.
37. The Respondent did not produce any policy in Court to show that an employee on sick-leave who is paid his normal salary would forfeit any compensation under the [Work Injury Benefits Act](#).
38. Further, the Respondent did not appeal against the compensation awarded by the Director as contemplated by Part VIII of the [Act](#).
39. The Court finds that the Respondent was in breach of contract as well as the [Work Injury Benefits Act](#) in withholding the compensation assessed by the Director.
40. The head of the claim is allowed.



Conclusion and Orders

41. In consideration of the above, the Court finds and declares that:
 - i. The claim for unfair termination of employment is without merit.
 - ii. The claim for acting allowance is statute-barred.
 - iii. The claim for enforcement of compensation under the *Work Injury Benefits Act* has merit.
42. The Claimant is awarded Kshs 281,444/25.
43. The other heads of the claim are dismissed.
44. The Claimant to have interest on the compensation from 24 June 2021 at court rates as well as costs on half-scale.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 10TH DAY OF MAY 2023.

RADIDO STEPHEN, MCI Arb

JUDGE

Appearances

For Claimant Omondi, Abande & Co. Advocates

For Respondent Nyamurongi & Co. Advocates

Court Assistant Chrispo Aura

