



**Ogiro v Tusker Mattresses Limited (Cause 433 of 2019)
[2023] KEELRC 1610 (KLR) (30 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1610 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 433 OF 2019**

SC RUTTO, J

JUNE 30, 2023

BETWEEN

CHARLES TENNYSON OGIRO CLAIMANT

AND

TUSKER MATTRESSES LIMITED RESPONDENT

JUDGMENT

1. The claimant avers that he was employed by the respondent with effect from 1st June, 2007 as a shop attendant. He claims that at the time of his termination on 17th November, 2017, he was a Branch Manager. The claimant further avers that the respondent's decision to terminate his employment was unfair and that his rights were grossly violated. He further contends that the respondent failed to proffer factual and genuine reasons for terminating his employment. Consequently, the claimant seeks against the respondent the sum of ksh 4,080,802.96 being compensatory damages for unfair termination, unpaid house allowance, overtime pay and unpaid public holidays.
2. The respondent filed a Statement of Response in answer to the Claim, through which it has admitted that the claimant was its employee and that his services were terminated on 17th November, 2017. The respondent avers that the claimant's employment was terminated after it was established through a disciplinary process that as a Branch Manager, he willfully and/or negligently violated the company's standard operating procedures relating to cash handling and change seeking policy leading to the loss of ksh 550,000/=. It contends that the claimant was afforded an opportunity to be heard and his termination by all accounts was not only justified but was also procedurally and substantively lawful and fair. The respondent has termed the suit as ill-advised and misconceived hence has asked the Court to dismiss the same with costs.
3. When the matter came up for hearing on 21st February, 2023, the respondent was absent from Court. The claimant filed an Affidavit of Service sworn by Josiah Mwangi Nyamu in which he averred that he effected service of the Hearing Notice upon the respondent's Advocate, Kanchory & Co. Advocates.



A copy of the Hearing Notice bearing the stamp of the respondent's Advocates, was annexed to the said Affidavit of Service. As per the Hearing Notice, service was effected on 27th January, 2023.

4. Being satisfied with the return of service and pursuant to Rule 22 of the *Employment and Labour Relations Court Rules* (2016), the Court directed that the matter proceeds for hearing, the respondent's absence notwithstanding.
5. It is also worth pointing out that before the matter proceeded for hearing, the Court placed the file aside and asked the claimant's Advocate to contact the respondent's Advocate. The claimant's Advocate reported back to Court that she had spoken to the respondent's Advocate who had indicated that he was in a location without proper network. Noting that the reason advanced by the respondent's Advocate for his absence was not sensible, the Court directed that the matter proceeds for hearing as scheduled.

Claimant's Case

6. The claimant testified in support of his case and at the outset, sought to rely on his witness statement together with his bundle of documents to constitute his evidence in chief.
7. It was his evidence that he was not party to the loss of ksh 550,000.00. According to him, there were no proper grounds for his termination from employment.
8. Revisiting the events leading to his termination, the claimant told the Court that on 31st May, 2017, he reported to work at 5:00 am to open the branch as he was receiving fresh produce. As they were also to receive loose change from Family Bank, he called the chief cashier to go and collect the money which was ksh 550,000/= . He states that as a manager, his role was to ensure that only ksh 550,000/= left the branch. He signed off the money and the chief cashier took the money. Accompanying the chief cashier to the bank, was another staff by the name Stephen Njoroge. He added that it was the chief cashier who selected the staff to accompany her.
9. The chief cashier later returned to the branch alone as Mr. Stephen who had accompanied her, had ran away with the bag containing the money. He also confirmed this fact that through the security cameras.
10. The claimant further stated that the respondent did not have a policy with regards to change and it was not the first time that the branch had to seek change from the bank.
11. It was his further evidence that during the disciplinary hearing, there was no representative from his branch and further, he was not accompanied as any staff who would have accompanied him, risked being terminated from employment.
12. He contended that he did not steal or conspire to steal the respondent's money. He further denied being negligent and testified that he has never been charged or arrested in connection with the incident.

Respondent's Case

13. As the respondent did not call oral evidence, its case remained as per its Statement of Response.

Submissions

14. On the part of the claimant, it was submitted that the reason for his termination was not valid and the same had no primary or circumstantial evidence showing that he was guilty. It was further submitted that the reason for his termination was not fair as his record was spic and span as he had no warning letter and had risen from a shop attendant to a Branch Manager. In support of the claimant's



submissions, the case of *Mary Chemweno Kitui v Kenya Pipeline Company Limited* (2014) eKLR was cited.

Analysis and Determination

15. Having considered the pleadings on record, the evidentiary material before me and the claimant's submissions, the issues for determination can be distilled as follows: -
 - i. Whether the claimant's termination from employment was unfair and unlawful; and
 - ii. Is the claimant entitled to the reliefs sought?

Unfair and Unlawful Termination?

16. Pursuant to Sections 43 and 45(2) of the *Employment Act*, an employer must prove that the reasons leading to the termination of an employee were fair, valid and related to the employee's conduct, capacity or compatibility; or based on its operational requirements. In addition, the employer ought to prove that it complied with the requirements of a fair process which entail notification and hearing. In a nutshell, an employer needs to prove substantive justification and procedural fairness.
17. It is also instructive to note that the burden of proof, lies with the employer. The Court of Appeal in the case of *Kenfreight (EA) Limited v Benson K. Nguti* [2016] eKLR held as much, thus; "the burden on the employee is limited only to asserting that unfair termination has occurred, leaving the burden to show that the termination is fair to the employer."

i.Substantive justification.

18. In the instant case, the reasons leading to the claimant's termination can be discerned from his letter of termination dated 17th June, 2017, which is partly couched as follows: -

"...you assented to the fact of authorizing ksh 550,000 to leave the branch without prior sanction from the management which is against the established company policy.

In your defense you claimed it to have been a custom in the branch and blamed the finance department for lack of consistency in providing the branch with sufficient change. However, you failed to escalate the said issue to relevant office for possible remedies.

This amounts to negligence of duty on your part which exposed the company to incur substantial loss.

Consequently, your services have been terminated with effect from 17th June, 2017."

19. As stated herein, an employer is bound to prove the validity and fairness of the reasons leading to an employee's termination. This can only be established upon analysis of the evidence tendered.
20. In this case, the claimant was accused of negligence of duty. However, the respondent did not support the same by evidence in whatever form or manner. I say so because the respondent failed to call oral evidence, hence the standard operating procedures and policy documents for front end operations annexed to the Response, was not adduced and admitted in evidence. Therefore, its evidentiary value was not tested. It is worth noting that a bulk of the respondent's case was hinged on the said document.
21. The Court of Appeal in the case of *Kenneth Nyaga Mwige v Austin Kiguta & 2 others* [2015] eKLR held that a document "marked for identification", is of very little, if any, evidential value until it is formally produced.



22. In this case, the said standard operating procedures and policy documents for front end operations was neither marked for identification nor formally produced as an exhibit before court. As such, it was of no evidential value to the respondent and did not aid in proving that the claimant indeed, breached the said procedures and policy, thus was negligent in the performance of his duty.
23. In his response to the show cause letter, the claimant defended himself against the allegations of negligence in a detailed manner. This line of defence presented by the claimant was not challenged in evidence by the respondent either through documentary or oral evidence.
24. Essentially, the substance of the allegations against the claimant was not proved hence the respondent did not substantiate before court, the reasons for which it terminated his employment.
25. Accordingly, this Court finds that the respondent did not produce sufficient evidence to discharge its legal burden by proving that the reasons leading to the claimant's termination from employment were fair, valid and related to his conduct.

ii.Procedural Fairness

26. This entails the procedure an employee is subjected to prior to termination. The provisions of Section 45 (2) (c) as read together with the provisions of Section 41 of the Act are relevant in this case. Section 41 provides as follows:

“(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 [Rev. 2021] Employment No. 11 of 2007 31 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 this 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.”
27. In the instant case, the record reveals that the claimant was notified of the allegations against him through the show cause letter dated 2nd June, 2017. The particulars of the allegations were clearly spelt out in the said letter. The claimant responded to the show cause letter in detail and subsequently, he was invited for a disciplinary hearing which took place on 15th June, 2017. Notably, the claimant was notified of his rights during the disciplinary hearing.
28. From the foregoing, it is apparent that the respondent satisfied the requirements of a fair hearing as stipulated under Section 41 of the Act.
29. Be that as it may, the Court finds that in as much as the respondent adhered to the requirements of a fair process, the claimant's dismissal was unfair as the allegations against him were not proved hence remained substantiated.

Reliefs

30. On account of the claimant's unfair termination, the Court awards him compensatory damages equivalent to eight (8) months of his gross salary. This award has been informed by the length of the



employment relationship and the fact that the respondent failed to substantiate and prove the reasons for the claimant's termination.

31. With regards to the claim for house allowance, the same is declined as the claimant's letter of appointment provided that his salary was consolidated. It would thus mean that the same was inclusive of the remunerative allowances payable to him, including house allowance.
32. With regards to the claim for overtime and payment during public holidays, the same is declined for want of proof and specificity. In arriving at this determination, I am guided by the finding in the case of *Rogoli Ole Manadiegi v General Cargo Services Limited* (2016) eKLR where the Court expressed itself as follows: -

“It is true the employer is the custodian of employment records. The employee, in claiming overtime pay however, is not deemed to establish the claim for overtime pay by default of the employer bringing to court such employment records. The burden of establishing hours or days served in excess of the legal maximum, rests with the employee. The claimant did not show in the trial court when he put in excess hours, when he served on public holidays or even rest days... he did not justify the global figure claimed in overtime, showing specifically how it was arrived at...”

Orders

33. Accordingly, I enter Judgment in favour of the claimant against the respondent as follows: -
 - a. The claimant is awarded compensatory damages in the sum of ksh 720,000 being equivalent to eight (8) months of his gross salary.
 - b. Interest shall apply to the amount in (a) at Court rates from the date of Judgment until payment in full.
 - c. The claimant shall also have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JUNE, 2023.

STELLA RUTTO

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 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.

STELLA RUTTO

JUDGE

