



**Kenya Union of Commercial, Food and Allied Workers v Naivas Limited
(Cause E029 of 2021) [2023] KEELRC 1671 (KLR) (29 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1671 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E029 OF 2021**

M MBARÚ, J

JUNE 29, 2023

BETWEEN

**KENYA UNION OF COMMERCIAL, FOOD AND ALLIED
WORKERS CLAIMANT**

AND

NAIVAS LIMITED RESPONDENT

JUDGMENT

1. The claimant is a registered trade union representing the grievant in these proceedings, Samwel Chege. The respondent is a limited liability company operating a supermarket with several branches outlets.
2. On 19 March 2010 the respondent employed the grievant as a shop attendant at a wage of Ksh 12,000 per month and worked for over 9 years until February 11, 2019 when his employment was terminated then earning Ksh 32,725 per month.
3. The claim is that on 12, 14, 21 and 24 January 2019 the grievant took his off days upon approval by his supervisor and agreed these would be deducted from his leave days due in July 2019.
4. On February 11, 2019 the grievant was served with notice and warning to explain why he had been absent from work without permissions and on March 22, 2019 he was directed to report to the head office where he was issued with letter of summary dismissal. Despite lodging an appeal explaining his circumstances, the respondent rejected such pleas.
5. The claim is that there was unfair termination of employment and is claiming the following;
 - a. Notice pay Ksh 32,725;
 - b. Unpaid leave days Ksh 15,583.33;
 - c. Severance pay for 9 years Ksh 169,918.26;



- d. Refund for insurance deducted Ksh 2,746;
 - e. 12 months compensation Ksh 392,700;
 - f. Certificate of service;
 - g. Costs.
6. The grievant testified that he worked at various branches of the respondent and had a good record and on March 21, 2019 while on sick off he was called back to the office and issued with letter of summary dismissal. There was no notice issued and the reasons given were not justified since his supervisor had allowed him to take the off days. He was called to the office where he found the cashier, manager and customer care officers who told him that he had not been attending work which was not the case.
 7. The grievant also testified that he was not taken through the due process and this resulted in unfair termination of employment. For every day he was not at work, he had a reason. On January 14, 2019 he was away sick. On January 24, 2019 he was on his off day.
 8. In response, the respondent's case is that the grievant had various warnings issued to him during the course of his employment. On January 25, 2019 he was invited to the disciplinary hearing due to habitual absenteeism and a verbal warning was issued on 8 March 2019 after absconding duty.
 9. The grievant was initially employed as a shop attendant and later confirmed as a cashier in the year 2018. The grievant remained absent on various days but failed to communicate with the assistant branch manager. The grievant wrote his statement on January 15, 2019 explaining that he was ill and that he had visited the nearest health centre and was given 3 days but he failed to produce any sick off sheet to prove his assertions.
 10. There was no written arrangement allowing the grievant to take off several days to offset from his leave days as alleged. The absence on 12, 14, 21 and 24 January 2019 was without permissions and justified summary dismissal and the claims made should be dismissed with costs.
 11. In evidence, the respondent called Harry Kipkirui Yatich the branch manager and who testified that the claimant was working in his branch and held an important role of cashier and due to habitual absenteeism and absconding duty this affected other departments and operations. The claimant was called to account for his absence without permission on various day and he failed to give satisfactory response. He admitted to being absent on 12 to January 14, 2019 and from 21 to January 24, 2019. He had no permission to be away and the allegations that he had been sick was without any evidence. he did not submit any sick off sheets.
 12. The claimant had previously written a letter of commitment that he would be of good conduct on 8 March 2019 but soon thereafter he absconded duty leading to summary dismissal on March 23, 2019. The claims made should be dismissed with costs.
 13. An employee who absents himself from work commits a serious breach to the employment contract justifying summary dismissal as allowed under Section 44(3) and (4)(a) of the *Employment Act, 2007* (the Act). However, even where the employee has committed serious offences which justify summary dismissal, the employer must accord the employee a hearing at the shop floor in terms of Section 41 of the Act.
 14. The grievant is herein represented by his trade union, the claimant because he was unionised under the claimant.



15. Section 41 of the Act is mandatory that for whatever reasons the respondent contemplated termination of employment, the claimant should have been issued with notice to attend and represent the grievant at the hearing. Section 41(1) of the Act requires that;

41 (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 this explanation.

16. In the case of Kenya Union Of Commercial Food And Allied Workers v Meru North Farmers Sacco Limited [2014] eKLR the court in addressing the mandatory nature of Section 41 of the Act held that;

"Section 41 of the Employment Act is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative. The situation is dire where such an employee is terminated after such a flawed process of hearing as such termination is ultimately unfair. The union must be involved at the hearing before an employee is terminated as the union is there to regulate employer and employee relations and to ensure that their member employees get a fair chance to advance their defence with representation by the union.

And in Oyombe v Eco Bank Limited (Civil Appeal 185 of 2017) [2022] KECA 540 (KLR) (13 May 2022) (Judgment) Oyombe v Eco Bank Limited (Civil Appeal 185 of 2017) [2022] KECA 540 (KLR) (13 May 2022) (Judgment) it was held that

"whatever reasons for an employer to terminate an employee, that employee must be taken through the mandatory process as outlined under Section 41 of Act."

17. Whatever reasons that made the claimant remain absent from work as alleged, the meeting and alleged disciplinary hearing held on 21 March 2019 in the presence of cashier, manager and customer care officers and other persons listed in the minutes, the presence of an employee appointed by the grievant or the claimant as the union representing his interest is not stated. The lapse of a material provision under the law compromised the hearing and summary dismissal of the grievant.

18. The grievant had served diligently from the year 2010 until the year 2019 until January 2019 when he seems to have had challenges and alleged illness. In his letter dated January 15, 2019, the grievant noted that he woke up ready to report to work but started feeling ill. Had the claimant been allowed the presence of his representative at the disciplinary hearing, his truth would have been addressed.

19. Employment terminated unfairly. The failure to abide the mandatory provisions of the law is not justified.

20. Notice pay is due based on the last wage the claimant was earning at Ksh 32,725.

21. For the unfair termination of employment, taking into account the grievant had worked for over 9 years, 3 months gross wage is hereby found appropriate in compensation all at Ksh 98,175.

22. The claim for severance pay should not arise as this was not a claim under the provisions of Section 40 of the Act.

23. On the claim for leave days not taken, no record was submitted to confirm this claim was addressed by the claimant being paid or taking the actual leave days earned at the time employment was terminated.



24. The claim for a refund for insurance remittance is not addressed as how this arose and the purpose or context.
25. A Certificate of Service should issue in accordance with Section 51 of the Act since the grievant has since cleared.
26. The claim successful costs are hereby assessed at Ksh 20,000 all inclusive.
27. Accordingly, judgment is hereby entered for the claimant against the respondent in the following terms;
 - a. Compensation Ksh 98,175;
 - b. Notice pay Ksh 32,725;
 - c. Unpaid leave days Ksh 15,583.33;
 - d. Certificate of service;
 - e. The claimant is awarded costs at Ksh 20,000.

DELIVERED IN OPEN COURT AT MOMBASA THIS 29 DAY OF JUNE, 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

