



**Ade v Auto Industries (Cause 521 of 2017)  
[2023] KEELRC 1490 (KLR) (16 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1490 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 521 OF 2017  
AN MWAURE, J  
JUNE 16, 2023**

**BETWEEN**

**KINGSLEY OCHIENG ADE ..... CLAIMANT**

**AND**

**AUTO INDUSTRIES ..... RESPONDENT**

**JUDGMENT**

**Introduction.**

1. The claimant filed a memorandum of claim dated 14<sup>th</sup> March 2017.

**Claimant's Case**

2. He says he was employed by the respondent as a dispatch supervisor and he was confirmed in a permanent position on 24<sup>th</sup> July 2014 and his salary was kshs 30,000/-.
3. He says on 10<sup>th</sup> October 2016 he was given a letter to show cause why disciplinary action should not be taken against him. He was accused of shouting to his seniors
4. He says he was not given an opportunity to be heard and on 17<sup>th</sup> October 2017 he got a letter of summary dismissal. He says his dismissal was unlawful and wrongful and prays the court to declare the same. He also prays to be paid his terminal dues and certificate of service.

**Respondent's Case**

5. The respondent filed a response dated 22<sup>nd</sup> June 2017 and they averred that on 7<sup>th</sup> October 2016 claimant was abusive and disruptive and insubordinate to his managers and so was issued with a letter of notice to show cause dated 11<sup>th</sup> October 2016 and was further informed that disciplinary action was to be taken against him.



6. He says disciplinary action was conducted and claimant failed to explain why he was insubordinate to his managers. He was therefore terminated summarily vide a letter dated 17<sup>th</sup> October 2016.
7. The respondent states that the claimant failed to do a handover so that he would be paid his terminal dues and so he was not compliant.
8. The respondent states this suit by the claimant therefore is frivolous and vexatious and incompetent and should be dismissed with costs.

### **Claimant's Evidence**

9. The claimant in his evidence says he was employed by the respondent. He says further that on 7<sup>th</sup> October 2016 there was commotion at his place of work. He says he went there and meanwhile all the other people ran away. He says that his boss went where he was and he was shouting. The claimant says he asked him why he was shouting and he apologised.
10. Then on 11<sup>th</sup> October 2016 he received a letter asking him to show cause why disciplinary action should not be taken against him. He says he wrote an email and explained that he did not shout to his senior. He says that was on 13<sup>th</sup> October 2016. Then on 17<sup>th</sup> October 2016 he says he received a summary dismissal letter.
11. He also says he was locked out of the premises. He says he did his handover to his immediate supervisor one Kumuar. He says he is praying for his dues.

### **Respondent's Case**

12. The respondent's witness is Mr Jitendra who said he was the respondent's head of Finance department. He says the claimant was at a site where there was commotion. He says when he went to try to calm the commotion the claimant started to push him off and he was contained by the security.
13. He says claimant was issued with a notice to show cause dated 14/10/2016 and he did not respond. He was then invited for a disciplinary hearing and attended the same but his explanation was not satisfactory. He was then terminated.
14. The witness says there were minutes taken of the disciplinary hearing but it was not produced in court. The respondent says the claimant was fairly terminated and his case should be dismissed with costs.

### **Claimant's Submissions**

15. The claimant in his submissions testifies that the procedure employed in terminating the claimant was unfair and unprocedural. He says he was not informed of the reason for termination and was not given an opportunity to be heard.
16. The claimant also states he was not given a fair hearing and no minutes were produced to confirm if the proper procedure was followed. He is depending on the cases of *Mary Chemweno Kiptui vs Kenya Pipeline Co Ltd* where court held that the outcome of a process whereby the mandatory provisions of section 41 of the *Employment Act* are not followed is held not unfair as the affected employee has not been accorded a hearing.
17. He also cited the cause of *Antony Mkala Chitavi vs Malindi Water Sewerage Co Ltd* (2013) eKLR where court held that section 41 of *Employment Act* has now made procedural fairness part of employment contract in Kenya. He says it is his humble submission that he was wrongfully and unlawfully terminated.



18. He submits that he is entitled to his dues including one month pay in lieu of notice, pay in lieu of untaken leave, unpaid traveling , service pay and damages for unfair termination equivalent to 12 months' salary. He also prays for costs.

### **Respondent's submissions**

19. The respondent in his Submissions says that the claimant offended the employer by committing violent acts of gross misconduct. The respondent therefore avers he had a sound reason to terminate the claimant from his employment.
20. The respondent submits that according to the United Kingdom case of *British Homers Stores Ltd vs Burschell* 11980 C 303 where the test was if employer believed the employee was guilty of the allegations against him. The respondent submits that claimant resolved to insulting and shouting to his managers which is gross misconduct contrary to section 44 of the [Employment Act](#).
21. The claimant as well was accused by the respondent of being served with a notice to show cause which he did not respond to. After disciplinary hearing his response was found unsatisfactory and so he was summarily dismissed.
22. The respondent are also reliant on the case of [Timothy Gakere Gachaaa & 2 Others vs Kenya Mkarine Contractors and Another](#) (2017) eKLR where court held that the court is satisfied the claimants were dismissed for a clear act of gross misconduct. The respondent submits that he has surmounted the requirement for a valid reason for termination and urges the court to hold thus.
23. He also submits they followed the right procedure. The respondent affirms they accorded the claimants a fair hearing. He avers they complied with the provisions of section 41 of the [Employment Act](#). He further submits claimant was issued with notice to show cause notification but he did not respond to the same and then he was invited to defend himself at a disciplinary hearing. After the hearing the respondents deliberated and issued the claimant with a dismissal letter. They urge the court to find that the claim was lawfully terminated.
24. The respondent further submits that the claimant is not entitled to the remedies requested and prays the court to dismiss the claimant and award costs to the respondent.

### **Analysis and Determination**

25. The termination of an employee for gross misconduct is mandatory and employer must comply with section 43 and section 45(1) of [Employment Act](#). Section 45(1) of [Employment Act](#) provides follows:
- “No employer shall terminate the employment of an employee unfairly”
26. Section 47(5) as well provides that while onus of proof of wrongful dismissal from employment is on the employee the employer should justify the grounds of termination.
27. The issues for determination would broadly be proof that respondent established a valid reason to terminate the claimant from his employment. Secondly is the claimant entitled to the reliefs prayed.
28. The allegation against the claimant as per the notice to show cause letter dated 10<sup>th</sup> October 2016 was insubordination and lack of work ethics. The respondent did not give specific details of the insubordination and lack of work ethics. The reasons for termination are mandated to be reasonable and valid and that is duly established if the said reason(s) are verified and clear.



29. The respondent witness Jitendia Sharma in his evidence in court testified that the claimant was interfering with a labour dispute confrontation and he pushed Jitendra and shouted at him. This was on 7th October 2017. He says that security attempted to calm the claimant but it was not possible. He was then issued with the referred notice to show cause.
30. The court finds the allegation lacks specifics of the abusive words and insubordination behaviour alleged by the witness. The court finds the allegations are too generalised and do not hold water as per the requirement of section 45(1) of the *Employment Act*.
31. Then when we consider section 41 (1) of the *Employment Act* 2007 it provides in mandatory terms as follows:
- 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.
32. The law as coached in section 41 of the *Employment Act* provides clearly that the employer must invite the employee to a hearing and must hear the employee. The employer should inform the employee that he can invite a fellow worker or a shop floor union representative of his choice to be present during the hearing.
33. In the often cited case of *Mary Chemweno Kiptui vs Kenya Pipeline Co. Ltd* (2014)eKLR on the issue of procedural fairness the court had this to say. “the outcome of a process whereby the mandatory provisions of section 41 of the *Employment Act* are not followed, is bound to be unfair as the affected employee has not been accorded a hearing.”
34. The respondent in his evidence in court testified that they issued the claimant with a notice to show cause letter on 11<sup>th</sup> October 2016 and then invited him for a notice to show cause hearing on 14/10/2016 which he claimed the claimant attended. He claims they were not satisfied with his explanation and so they gave him a summary dismissal letter on 7/10/2016. In the dismissal letter he was accused of shouting at his seniors and tried to cause disruption in handling investigations which amounted to insubordination and lack of work ethics. These same issues were raised in the notice to show cause but as earlier observed these allegations are rather generalised and are not specified as is the ideal position.
35. There is no evidence adduced on how the disciplinary hearing was conducted and how finally the respondent got into the conclusion that there was enough evidence to justify dismissal.
36. As held in the famous *Walter Ogal Anuro vs Teachers Service Commission* Cause No 955 of 2011 “for termination to pass the fairness test, it ought to be shown that there was not only substantive justification for the termination but also procedural.”
37. There is no evidence also that the claimant was informed during his hearing he could invite a fellow worker of his choice or a shop floor union representative. The respondent did not produce anything in writing to prove the disciplinary meeting took place and also the outcome of that meeting.
38. The court has considered the pleadings and submissions of the parties. Court is left with no doubt that the respondent flouted the requirements of termination of an employee summarily and so the



court declares claimants termination of his employment was wrongful and unfair and unlawful and respondent must compensate.

39. The reliefs which I award to the claimant are as follows:

- a. One month salary in lieu of notice kshs 34,500/-
- b. Untaken leave is not proved and there is no evidence that claimant applied for leave during the time worked for the respondent and was rejected and so this prayer is rejected.
- c. Travelling allowance is also equally not proved and so in declined.
- d. Service pay is tied with statutory payments to NSSF. The claimant did not establish that his NSSF dues were not remitted to NSSF. The court is inclined to deny this prayer as well.
- e. Claimant was unfairly, wrongful and illegally dismissed from employment. According to section 49(1)(c) of the *Employment Act* guideline the court will award claimant 3 months as general compensation considering he worked for the respondent from 2013 to 2016: ksh  $34,500 \times 3 = 103,500/-$
- f. Total award therefore is ksh 138,000/-
- g. Costs are awarded to the claimants plus interest at court rates from the date of judgment till full payment.
- h. Claimant is to be given his certificate of service within 14 days from today's date as it is his right.

40 Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 16<sup>TH</sup> DAY OF JUNE, 2023.**

**ANNA NGIBUINI MWAURE**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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.

