



**Nthusi v Adex Plastics Limited (Cause E029 of 2021)
[2023] KEELRC 1644 (KLR) (15 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1644 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E029 OF 2021
MN NDUMA, J
JUNE 15, 2023**

BETWEEN

COSMAS WAMBUA NTHUSI CLAIMANT

AND

ADEX PLASTICS LIMITED RESPONDENT

JUDGMENT

1. The suit was filed by the claimant on January 12, 2021 seeking the following reliefs:-
 - (a) A declaration that the conduct of the respondent in terminating the claimant's employment amounted to a violation of the claimant's constitutional rights and particularly article 41(1) of the Constitution of Kenya, 2010.
 - (b) A declaration that the termination of the claimant's employment was wrongful, unfair and/or unlawful and contrary to section 45 of the Employment Act No. 11 of 2007.
 - (c) A declaration that the Claimant is entitled to be compensated for.
 - (i) Violation of his constitutional rights as envisaged under article 23(3) and 41 (1) of the Constitution.
 - (ii) Violation of his employment, legal and contractual rights: and
 - (iii) Injury to the claimant on account of the respondent's breaches.
 - (d) Costs of this suit.
 - (e) Any other relief that the honourable court may deem just to grant.
2. C.W.1, the claimant testified that he was employed by the claimant on April 1, 2020 as a general worker on a three months' contract. That the employment continued until June 30, 2020. That the



- claimant worked diligently until June 30, 2020 when the respondent terminated the employment of the claimant in a humiliating manner without any lawful cause or justification,
3. That the claimant was invited to a disciplinary hearing on May 19, 2020 where he was treated harshly and not given a chance to defend himself. That he was not allowed to take a fellow employee or union official to the hearing. That in the letter of termination, the Human Resource Manager accused the claimant for displaying disobedience and arrogance towards his seniors and neglected to take care of goods entrusted to him which claims were false.
 4. That the dismissal violated the claimant's right to fair labour practice and the claimant suffered loss and damage as a result thereof.
 5. The claimant was subjected to very close cross-examination by M/s Kibaba for the respondent. The claimant admitted that he did not attend work and apologized by a letter dated April 18, 2017. The claimant also admitted that he wrote a letter dated August 5, 2019 and was given a warning letter dated August 6, 2019.
 6. The claimant admitted that he received three warning letters for absenteeism. The claimant also admitted having apologized for using a mobile phone during work time contrary to instructions and company policy. The claimant also admitted having been issued with a notice to show cause. The claimant responded to the notice to show cause on June 29, 2020 and that he was thereafter given a 3rd and final warning letter.
 7. The claimant admitted that he attended a disciplinary hearing before he got the 3rd and final warning but he had no representative at the hearing. The claimant stated that he was not dismissed after the hearing but got the 3rd and final warning instead. The claimant said the dismissal was unlawful and unfair.
 8. R.W.1 Anna Maragia, testified for the respondent that the claimant was employed by the respondent on 1st February, 2016 on a three month renewable contract. That the claimant's last contract was from April 1, 2020 to June 30, 2020. That at the time of dismissal, the claimant worked as a general worker and earned a basic salary of Kshs.13,060 and a house allowance of Kshs.2,040 per month.
 9. That on May 18, 2020, the claimant together with five other employees absconded work and switched off their mobile phones to avoid management to contact them.
 10. That on May 19, 2020, the claimant and others were summoned to a disciplinary Committee together with five (5) others to explain why they had absconded work.
 11. The claimant was excused for his action and was issued a third and final warning letter having previously received a couple of warning letters for misconduct.
 12. On June 23, 2020, the claimant declined instructions of his seniors when he was told to arrange goods in the finished goods store.
 13. On June 29, 2020, the claimant was issued with the notice to show cause for misconduct. The claimant attended the disciplinary committee meeting and was given opportunity to explain himself.
 14. That considering the facts of the case, the respondent dismissed the claimant from employment on June 30, 2020.
 15. That the claim has no merit and it be dismissed with costs.



Determination

16. The parties filed written submissions and the issues for consideration are as follows:-
- (a) Whether the termination of employment of the claimant was for a valid reason.
 - (b) Whether the claimant is entitled to the reliefs sought.
17. The court has carefully considered the evidence by C.W.1 and that by R.W.1. It is common cause that the claimant had during the tenure of his employment absented himself from work on several occasions and was issued with warning letters for misconduct. That the claimant was serving a 3rd and final warning when on June 25, 2020, the claimant misconducted himself by disobeying lawful instructions of his seniors. The claimant was subjected to a disciplinary hearing and the respondent decided to terminate his employment with effect from June 30, 2020.
18. The Court is satisfied that the respondent has proved that it had a valid reason to terminate the employment of the claimant in terms of sections 43 and 45 of the *Employment Act*, 2007. The court is also satisfied that the claimant had not been a diligent worker as he claimed or at all and had committed various infractions at the work place in the short period he served the respondent. The court is satisfied that the claimant had been given adequate opportunity to reform but had failed in that respect.
19. The court is also satisfied that the respondent followed a fair procedure in terminating the employment of the claimant after a 3rd and final warning had been granted to him.
20. The court has considered the case of *Kenya Revenue Authority v Menginya Salim Murgani* [2010] eKLR (Court of Appeal) and the case *M'Bita Ntiro v Mbae Mwirichia & another* [2018] eKLR, in arriving at its decision that the claim had no merit.
21. Accordingly, the suit has no merit and is dismissed. Each party to meet their costs of the suit taking into consideration principles of equity and that the claimant had served the respondent for a period of four (4) years.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 15TH DAY OF JUNE, 2023.

MATHEWS N. NDUMA

JUDGE

Appearances

M/s Lussialo for claimant

Mrs Ochieng for respondent

Ekale: Court clerk

