



**Muthiwa v Tononoka Rolling Mills Limited (Cause 250 of 2017)
[2023] KEELRC 1472 (KLR) (8 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1472 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 250 OF 2017
BOM MANANI, J
JUNE 8, 2023**

BETWEEN

SAMUEL MUTHOKA MUTHIWA CLAIMANT

AND

TONONOKA ROLLING MILLS LIMITED RESPONDENT

JUDGMENT

Background

1. This is a claim for compensation for wrongful termination. The facts giving rise to the dispute are not complicated. The parties agree that they had an employment relation which came to a close on January 22, 2014. What they contest is whether the relation was lawfully terminated and whether the Claimant is entitled to the reliefs that he seeks in the Statement of Claim.
2. According to the Claimant, he was employed by the Respondent in December 2005 as a clerk. Although he quotes his entry monthly salary as Ksh 8,200.00, the Claimant does not plead his exit salary.
3. According to the Respondent, the Claimant's exit basic salary was Ksh 15,200.00. This fact is confirmed by the Claimant's exit pay slip produced in evidence by the Respondent.
4. The Claimant asserts that he reported on duty on January 22, 2014 as usual. As he went about his duties, he was summoned by the Respondent's management and given a letter terminating his contract.
5. According to the Claimant, the Respondent did not have valid reason to terminate the contract between the parties. Neither did the Respondent follow the legal procedure for terminating the contract.
6. On the other hand, the Respondent states that the Claimant failed to account for stock that was supposed to have been documented by him in his capacity as a records clerk. The Respondent asserts



that the issue of unexplained variances in stock in the Respondent's records and stores had been raised with the Claimant several times with instructions that he handles the matter more diligently. However, the Claimant had failed to implement these instructions. As a result, the Claimant's contract was terminated.

7. It is the Respondent's case that the various meetings that the Respondent's management held with the Claimant on the matter provided him with an opportunity to be heard. Besides, the Respondent states that before his termination, the Claimant held a discussion with a member of the Respondent's management over the matter. However, the Respondent's witness concedes that none of the meetings alluded to were documented.

Issues for Determination

8. As mentioned in the initial parts of this decision, the parties do not contest the fact that they were in an employment relation prior to closure of the relation on January 22, 2014. The only contest is on whether the said closure was lawful and whether the parties are entitled to the reliefs set out in their respective pleadings. In my decision, I have considered these two as the issues for determination.

Analysis and Determination

9. The law on termination of contracts of employment on account of incompetence and or poor performance, gross misconduct and physical incapacity is now fairly settled. Under sections 41, 43 and 45 of the *Employment Act*, the employer must surmount two requirements before he terminates a contract of service for an employee. First, he must establish a valid reason for his decision. Second, he must follow due process in closing the contract.
10. Sections 43 and 45 of the *Employment Act* place the burden of proving the validity of the decision to terminate a contract of service on the employer. The employer must establish the two ingredients aforesaid before a tribunal can return a verdict upholding the decision to terminate the contract.
11. The Respondent's reason for terminating the Claimant's contract of service was the variance in the physical stock against the stock captured in its records. The Respondent blames the Claimant for stock loss due to poor record keeping.
12. On the other hand, the Claimant disputes this fact and attributes the loss to weakness in the Respondent's control and monitoring system. As a matter of fact, the Claimant asserts that he had made recommendations for improvement of the stock control system in 2012 but the recommendations were allegedly ignored.
13. On the evidence before court, it is difficult to determine where blame lies for the lost stock. The positions expressed by both the Claimant and the Respondent were not supported by cogent evidence to enable the court determine with a measure of precision where blame lies for the loss.
14. The fore stated notwithstanding, the fact that the loss of stock is not denied by the Claimant coupled with the fact that the responsibility of maintaining stock control through record keeping lay with him provides a reasonable basis to reach the conclusion that the Respondent had reasonable ground to believe that the loss may have been due to the failure by the Claimant to maintain proper records. Indeed, section 43 (2) of the *Employment Act* entitles an employer to terminate an employee's contract of service if he has genuine reason to believe that there exists a valid reason to support his decision. In the premises, it is reasonable to hold that the Respondent had a valid reason to consider terminating the Claimant's contract.



15. Despite presence of reasonable grounds to terminate the employee's contract of service, the law obligates the employer to ensure due process in closing the contract. Under sections 41, 43 and 45 of the *Employment Act*, due process entails the employer informing the employee of the charge that he faces and allowing the employee an opportunity to respond to it. This procedure contemplates the employer subjecting the employee to a disciplinary process at which the employee can respond to the accusations against him.
16. The evidence on record shows that when the Claimant reported to work on the morning of January 22, 2014, he was given a letter terminating his employment. According to the Claimant, he was not offered an opportunity to refute the charge against him before he was handed the dismissal letter.
17. The Respondent refutes this assertion by the Claimant. According to the Respondent, the Claimant had a session with the Respondent's management on the morning of January 22, 2014 before he was given the letter terminating his employment.
18. Noteworthy however is that the Respondent's witness who asserted that there was a meeting between the parties on January 22, 2014 concedes that she was not on duty on January 22, 2014. Therefore, it was not within her personal knowledge whether the Respondent's management held a meeting with the Claimant on January 22, 2014 as alleged.
19. The Respondent's witness also states that the Claimant had been given several opportunities to discuss the issue with the Respondent's management. However, and according to the witness, all these meetings were not documented.
20. Before an employee is dismissed from employment, he is entitled to be heard on the charge against him. This requires that the employee's attention is formally drawn to the charge and the consequence of the disciplinary session is explained to him. The employee must be made to appreciate that the meeting is of a disciplinary nature and could result in job loss. Further, the employee must be given the opportunity to avail a witness if he elects.
21. It is therefore doubtful that the law will construe routine work meetings as disciplinary meetings under section 41 of the *Employment Act*. Unlike a routine work meeting where the employee is not expected to attend with a witness, a disciplinary meeting has provision for the employee being accompanied by a witness. The dynamics of the two meetings are certainly different.
22. Consequently, I reject the Respondent's assertion that the several routine work meetings that the Respondent's management had with the Claimant during which the issue of the stock mismatch was allegedly raised satisfied the requirements of section 41 of the *Employment Act* with regard to affording the Claimant an opportunity to be heard on the charges against him. In any event, the Claimant disputes that such meetings took place. Further, the Respondent's witness concedes that there was no record of the alleged meetings.
23. Having regard to the evidence on record, I am convinced that the Respondent did not subject the Claimant to a disciplinary process as contemplated under section 41 of the *Employment Act*. I am convinced that the Respondent did not afford the Claimant the chance to respond to the accusations against him before the decision to terminate his contract of service was made. Consequently, I find that the Respondent's termination of the Claimant's contract was procedurally flawed.
24. Having reached this conclusion, the next question for determination is whether the parties are entitled to the reliefs that they seek through their respective pleadings. In view of my findings that the decision to terminate the Claimant's contract was procedurally flawed, I have no doubt in my mind that the



Respondent's plea that the Claimant's case be dismissed with costs is untenable. Accordingly, this request is declined.

25. On his part, the Claimant has prayed for a number of monetary reliefs. These include compensation for unfair termination, pay for accrued leave, pay for public holidays and rest days worked, severance pay, pay in lieu of notice to terminate the contract of service, costs of the case, interest and Certificate of Service.
26. The record shows that apart from including the prayers for accrued leave pay and pay for public holidays and rest days worked in his Statement of Claim, the Claimant did not offer evidence on these claims either through his written witness statement or oral evidence during his testimony in chief. The only time that the Claimant alluded to the issue of accrued leave pay is during cross examination. He confirmed having taken his leave days except for 45 days. When asked whether compensation for those days was Ksh 7471.00 as computed by the Respondent, the Claimant responded in the affirmative. When asked about overtime pay, he conceded that he was paid.
27. Having regard for the foregoing, I do not think that the Claimant is entitled to pursue these heads of damages. Save for permitting him to recover the sum of Ksh 7471.00 on account of accrued leave dues as offered by the Respondent, I dismiss the claims for overtime pay arising on account of work done outside normal work hours and public holidays.
28. The Claimant has also claimed for severance pay. As is easily noticeable from section 40 of the Employment Act, this head of damages is only applicable to redundancy situations. I do not understand the Claimant's case as being one of redundancy. Consequently, the prayer for severance pay is declined.
29. As regards pay in lieu of notice to terminate, the court having reached the conclusion that the Claimant's contract was improperly terminated, it is clear to my mind that he is entitled to recover pay in lieu of notice in terms of section 35 as read with Section 36 of the Employment Act. Consequently, I award him salary for one (1) month in lieu of notice to terminate his contract, that is to say, Ksh 15,200.00.
30. In respect of compensation for unfair termination, I award the Claimant damages equivalent to his salary for eight (8) months, that is to say Ksh 15,200.00 x 8 = Ksh 121,600.00. In making this award, I have considered the length of service of the Claimant to the Respondent in terms of section 49 of the Employment Act.
31. I award the Claimant interest on the amounts awarded at court rates from the date of this decision.
32. I award the Claimant costs of the case.
33. The awards are subject to the applicable statutory deductions.
34. The Respondent is ordered to issue the Claimant with a Certificate of Service.

Summary of the Award

- a. The Respondent's decision to terminate the Claimant's contract of service is declared procedurally unfair.
- b. The Claimant's prayers for overtime pay and severance pay are declined.
- c. The Claimant is awarded Ksh 7471.00 being accrued leave dues.
- d. The Claimant is awarded Ksh 15,200.00 in lieu of the notice to terminate his contract of service.



- e. The Claimant is awarded Ksh 121,600.00 as compensation for unfair termination of his contract of employment.
- f. The Claimant is awarded interest on the amount awarded at court rates from the date of this decision.
- g. The Claimant is awarded costs of the case.
- h. The awards are subject to the applicable statutory deductions.
- i. The Respondent is ordered to issue the Claimant with a Certificate of Service.

DATED, SIGNED AND DELIVERED ON THE 8TH DAY OF JUNE, 2023

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant

.....for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M. MANANI

JUDGE

