



**Wachira v Tusker Mattresses Limited (Cause 406 of 2017)
[2023] KEELRC 1976 (KLR) (31 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1976 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 406 OF 2017
DN NDERITU, J
JULY 31, 2023**

BETWEEN

ELIUD MBURU WACHIRA CLAIMANT

AND

TUSKER MATTRESSES LIMITED RESPONDENT

JUDGMENT

1. In a memorandum of claim dated September 20, 2017 that was filed in court on September 21, 2017 through Wachira Wanjiru & Co Advocates the Claimant prays for: -
 1. The Claimant prays for a declaration that his employment was unlawfully and unfairly terminated.
 2. The Claimant prays for payment of his terminal benefits as per the Collective Bargaining Agreement and seeks to be paid:
 - a. Salary for days worked - Kshs 3,088.20
 - b. 2 months' pay *in Lieu* of Notice - Kshs 35,823.12
 - c. House Allowance - Kshs 5,373.47
 - d. Service Pay - Kshs 161,204.04
 - e. Gratuity - Kshs 230,291.49Totals - Kshs 435,780.32
 3. The Claimant prays for 12 months compensation for unfair termination of services.
 4. The Claimant prays for Costs of this suit against the Respondent with interest thereon.



2. Together with the statement of claim was filed a verifying affidavit, a statement by the Claimant, and a list and bundle of the listed documents in support of the claim.
3. On September 23, 2017 the Respondent appointed Kanchory & Co Advocates to act for it and filed a statement of response to the claim on March 13, 2018 which was filed in court on the day that followed. In the said response the Respondent prays that the Claimant's cause be dismissed with costs for want of merits.
4. Alongside the response to the claim the Respondent filed witness statements by Simon Manjeru and Joshua Wambua Keli. A list of documents and copies of the listed documents were also filed by the Respondent.
5. This cause came up for hearing in open court on September 20, 2022 when the Claimant (CW1) testified and closed his case. The Respondent and its counsel, although properly served, did not attend the hearing.
6. Counsel for the Claimant addressed and summed up her client's case by way of written submissions. Counsel for the Claimant, Miss Wachira, filed her written submissions on October 12, 2022.

II. The Claimant's Case

7. The Claimant's case is expressed in the statement of claim, the oral and documentary evidence of the Claimant (CW1), and the written submissions by his Counsel and the same is summarized as hereunder.
8. In his memorandum of claim, the Claimant pleaded that he was at first engaged by the Respondent as a store-keeper in March, 1998, but he was not issued with a written contract until at a later date which he has not disclosed in that pleading.
9. The Claimant states that on February 3, 2017 he was taken ill and sought the permission from the assistant manager to be absent from duty to seek medical attention. He reported back to work on February 10, 2017 but he was summarily dismissed on account of absenteeism, notwithstanding that he had allegedly sought and obtained leave of absence from the assistant manager.
10. It is the Claimant's case that the dismissal was unfair and unlawful both in substance and procedure. He alleges that he was denied a fair hearing as no notice was issued and no hearing was held and, in any event, he was absent from duty with leave from the assistant manager.
11. Further, the Claimant pleads that the Respondent flagrantly and without any due consideration broke and violated the law and the terms and the conditions of the contract and the collective bargaining agreement (CBA) between it and the Claimant's union, the Kenya Union of Commercial, Food and Allied Workers Union.
12. In his testimony in court the Claimant relied on the foregoing pleading and his filed statement whereby he reiterated the above position.
13. It is on the basis of the foregoing that the Claimant is seeking for the prayers set out in the first paragraph of this judgment. The submissions by his counsel shall be considered in the succeeding parts of this judgment.

III. The Respondent's Case

14. As indicated in the foregoing part of this judgment, while the Respondent did file a response to the claim and a list of documents and copies thereof, no witness attended court during the hearing to testify



in support of its case and to tender the documents as evidence in court. As such the matter proceeded ex parte and it is on that basis and understanding that this court shall render its judgment.

15. While the Respondent denied the entire claim in its response, no evidence was called in support of that position and the documents filed in court have not been tendered in evidence. The witness statements add no value to the case as the intended makers of those statements did not attend court to give weight and meaning to the same.

IV. Issues For Determination

16. Counsel for both parties filed a list of agreed issues for determination dated April 30, 2018 but after a thorough and careful examination and consideration of the pleadings filed, the oral and documentary evidence tendered from the Claimant, and the submissions by his counsel the court identifies the following issues for determination –
 - a. Was the Claimant unfairly and unlawfully terminated or wrongfully dismissed by the Respondent?
 - b. If (a) above is in the affirmative, is the Claimant entitled to the reliefs sought in the claim?
 - c. Who meets the costs in this cause?

V. Dismissal/termination

17. The terms of engagement of the Claimant by the Respondent are not in dispute. The Claimant alleges that he was engaged by the Respondent in March, 1998, starting off as a store-keeper. He pleaded that he was issued with a written contract but he did not avail that written contract to the court. On the other hand, the Respondent pleaded that the Claimant was engaged as a shop-assistant *vide* a letter of appointment dated April 8, 2001. This letter of appointment is not disputed by the Claimant.
18. In a demand letter by his counsel dated June 14, 2017 the Claimant indicated that his gross monthly salary as at the time of termination on February 10, 2017 was Kshs 17,159.56. This was not denied in the reply to this letter by counsel for the Respondent dated July 20, 2017.
19. From the foregoing, this court shall proceed on the basis that the Claimant was engaged by the Respondent as a shop-assistant *vide* a letter of appointment dated April 8, 2001 with effect from May 1, 2000 and that his gross salary as at his time of termination on February 10, 2017 was Kshs 17,159.56. There is no evidence whatsoever that the Claimant worked for the Respondent prior to May 1, 2000.
19. On issue (a) the Respondent was under legal obligation to afford to the Claimant a fair hearing before termination. To a large extent, the law is now settled on what constitutes fair hearing. An employer has to have a good legal reason for initiating disciplinary action and an employee has to be offered and afforded a fair hearing based on sound procedural fairness grounded on rules of natural justice. The above twin tests constitute what is referred to as substantive and procedural fairness respectively – See *Mary Chemweno V Kenya Pipeline Company Limited* (2017) eKLR, *Loice Otieno V Kenya Commercial Bank Limited* (2013) eKLR, and *Walter Ogal Anuro V Teachers Service Commission* (2012) eKLR.
19. The Respondent's case, based on the response to the claim, is that the Claimant absented himself from work for the period from 31st January to February 10, 2017 without any notice or reason and without obtaining permission from the management. On the other hand, the Claimant pleaded and testified that he obtained leave of absence from unnamed assistant manager to seek medical attention. He exhibited a medication form from Twins Medical Clinic dated February 6, 2017 in support of his



- case that he never deserted duty but rather only absented himself to seek medical attention. He alleges that he obtained leave of absence from assistant manager. However, the said assistant manager is not named and no formal leave of absence or sick-off or sick-sheet leave was exhibited by the Claimant.
22. The court has closely examined the medication form from Twins Medical Clinic and noted that the same is dated February 6, 2017 yet the Claimant was out of duty and failed to report to work from January 31, 2017. The said medication form does not state or indicate that the Claimant needed to stay away from work or needed a sick-off or leave from work.
 23. It is due to the above-mentioned absence from duty that the Respondent wrote to the Claimant on February 10, 2017 informing him that he had been dismissed for absenteeism. The Claimant admits that he was served with this letter of dismissal on even date.
 24. This court takes the considered view and holds that the Claimant absented himself from duty without obtaining leave of absence. On the other hand, the Respondent has not demonstrated that any efforts were made to trace the Claimant and establish why he was not reporting to work during the material period. Further, upon the Claimant reporting back to work on February 10, 2017 the Respondent did not afford the Claimant an opportunity to explain his absence from work but instead handed to him the letter of dismissal alluded to above. This action by the Respondent was drastic, unfair, and unlawful – See *Boniface Francis Mwangi V BOM Iyego Secondary School* (2019) eKLR and *Simon Mbitshi Mbane V Inter Security Services Ltd* (2018) eKLR.
 25. The absence from work by the Claimant was not prolonged as to amount to desertion of duty as to deserve dismissal. However, this court notes that the unauthorized absence called for disciplinary action by the Respondent. However, the Respondent blew it up for failing to give a hearing to the Claimant – See *Judith Atieno Owuor V Sameer Agriculture and Livestock Limited* (2020) eKLR.
 26. This court comes to the logical and reasonable conclusion and holds that the Respondent unfairly and wrongfully dismissed the Claimant without notice and without affording him both substantive and procedural fairness as envisaged by the law under Sections 41, 43, 45, and 47 of the *Employment Act* (the Act).
 27. Counsel for the Claimant has submitted that a note or letter from a medical practitioner should be good evidence in support of sickness of the Claimant. Counsel has cited *Renson Iddi Nyambu V Mini Bakeries (Mombasa) Limited* (2018) eKLR. However, as noted above, the note from the hospital does not indicate that the Claimant needed to stay out of work or was in such bad health as not to be able to perform his duties. In any event no explanation has been offered for the Claimant’s absence from work for the period from 31st January to February 6, 2017 when he allegedly visited the hospital.
 28. For all the foregoing reasons, this court finds and holds that while the Respondent failed to follow due process by not allowing the Claimant to explain his reason for staying away from work, the Claimant absented himself from work without reason and without leave or permission from the management.

VI. Reliefs

29. Having held that the Claimant was wrongfully, unfairly, and unlawfully dismissed by the Respondent, mainly and majorly for lack of procedural fairness, this court shall now consider each of the reliefs sought as hereunder.
30. The first prayer is for a declaration from this court that the dismissal of the Claimant by the Respondent was wrongful, unfair, and unlawful. The court has already found as such in the foregoing paragraphs of this judgment. The reasoning is that while the Claimant clearly absented himself from work without permission, the Respondent un-procedurally took the drastic action of dismissing him



without affording him a hearing. The dismissal was an excessive, drastic, and unreasonable action in the circumstances and more so considering that the Respondent took no steps in establishing why the Claimant had failed to report to work and denying him an opportunity to explain his absence when he reported back on February 10, 2017. The declaration is hereby issued that the dismissal was unfair, wrongful, and unlawful.

31. Prayer (a) is for salary for days worked and not paid for in the sum of Kshs 3,088.20. It is neither pleaded nor submitted on which days, how many, in which month this claim relates to. As far as the court can deduce the Claimant did not work from 31st January to February 10, 2017 when he was dismissed. This means that the Claimant was still in employment for the 10 or so days while he was away from work. On that basis the claim for the sum of Kshs 3,088.20 is allowed.
32. Prayer (b) is for two months salary in lieu of notice amounting to Kshs 35,823.12 based on a CBA entered into between the union of the Claimant and the Respondent. The said CBA was neither disputed nor dislodged by the Respondent. The *Employment Act* (the Act) provides for the minimum terms and conditions of employment and as such where a CBA or a contract of employment provides for better or more favourable terms to the employee, the court shall apply the more favourable terms when making compensation or interpreting the terms and conditions applicable in the relationship. The CBA alluded to provides for two months pay in lieu of notice when an employee has offered over 10 years of service. The Claimant worked for the Respondent from May 1, 2000 to January 31, 2017. That qualifies him for the award of two months salary *in lieu* of notice in the sum of Kshs 35,823.12.
33. Prayer (c) is for house allowance for the period of two months payable *in lieu* of notice. This claim is contradictory in view of prayer (b) above. The understanding of this court is that the above award is based on gross salary which should of essence contain house allowance. The Claimant has not availed a pay-slip to aid the court in establishing if house allowance was included in the said gross pay. In the circumstances this claim is denied.
34. Prayer (d) is for service pay in the sum of Kshs 161,204.04. This court has gone through the letter of appointment, the CBA, the pleadings, and submissions by his counsel and I am not able to establish the basis of this claim. Service pay is paid where the employer has not provided for and or paid for pension for an employee. As stated elsewhere in this judgment the Claimant did not avail a pay-slip or any other evidence in support of his alleged salary, gross or net, and no explanation has been given for this. It is not alleged or pleaded that the Respondent failed and or refused to issue pay-slips. However, clause 32 of the CBA indicates that pension is one of the issues that were not agreed between the Respondent and the union. This implies that no pension scheme or fund was available to the Claimant. In a memo dated March 13, 2017 the Respondent offered the Claimant a sum of Kshs 285,120/= in service pay which was in itself an admission that service pay was payable to the Claimant. In the circumstances the Claimant is awarded Kshs 161,204.04 in service pay as prayed.
35. Prayer (e) is for gratuity in the sum of Kshs 230,291.49. Counsel for the Claimant has submitted that this claim is based on clause 24 of the CBA which provides that gratuity is payable at the rate of 20 days salary for each year of service completed. There are no conditions attached thereto and it is not denied that the Claimant was a member of the union and therefore a beneficiary of the CBA. The Claimant worked for the Respondent for the period from May 1, 2000 to February 10, 2017. That makes a total of 16 years completed. This prayer is awarded as prayed at Kshs 230,291.49.
36. The other prayer is for compensation for unfair and unlawful dismissal in the sum equivalent to 12 months salary. There are no reasons given either in the pleadings, oral evidence, or written submissions as to why the Claimant is asking for this maximum award. As the court has noted in another part of this judgment, the Claimant was to a large extent to blame for his dismissal for absenting himself from



duty without permission or lawful reason. While the Claimant had worked for the Respondent for a lengthy period of almost 17 years, the Respondent had a right to take disciplinary action against him but it failed to afford him procedural fairness.

37. Considering all the factors provided for under Section 49 of the Act and applying the same to the facts and circumstances of this cause this court is of the considered view that an award of three months gross salary would be fair compensation. The same is calculated as Kshs 17,911.56 *3= Kshs 53,734.68.

VII. Costs

38. The Claimant is awarded costs of this cause.

VIII. Disposal

39. In final disposal of this cause, this court issues the following orders: -

- a) A declaration be and is hereby issued that the dismissal of the Claimant by the Respondent was wrongful, unfair, and unlawful.
- b) The Claimant is awarded a total of Kshs 484,141.53 made up as follows –
 - i. Salary arrearsKshs 3,088.20
 - ii. Salary in lieu of noticeKshs 35,823.12
 - iii. Service payKshs 161,204.04
 - iv. GratuityKshs 230,291.49
 - v. Compensation for wrongful,
unfair, and
unlawful dismissalKshs 53,734.68
TotalKshs 484.141.53
- c) All the other claims are denied.
- d) Costs of the cause to the Claimant.

**DATED, DELIVERED VIRTUALLY, AND SIGNED AT NAKURU
THIS 31ST DAY OF JULY, 2023.**

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DAVID NDERITU
JUDGE

