



**Onganda v Shekhawat Engineering Works Limited (Cause
1872 of 2017) [2023] KEELRC 1883 (KLR) (31 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1883 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1872 OF 2017**

SC RUTTO, J

JULY 31, 2023

BETWEEN

ELVIS ODUOR ONGANDA CLAIMANT

AND

SHEKHAWAT ENGINEERING WORKS LIMITED RESPONDENT

JUDGMENT

1. The Claimant avers through the Memorandum of Claim filed on 19th September, 2017, that he was employed by the Respondent as a Roll Shutter Fitter with effect from 2nd May, 2013. He avers that on 1st December, 2016, he called the Respondent's General Manager informing him of his inability to report to work as his neighbour's house had burnt down hence his house had been partially affected. He reported to work the following day, on 2nd December, 2016 only to be informed that he stood dismissed. According to the Claimant, the Respondent's decision to dismiss him was not only unfair and unlawful but extremely inhumane. Consequently, the Claimant seeks against the Respondent several reliefs including notice pay, compensatory damages unpaid leave and overtime pay.
2. The Respondent opposed the claim through its Memorandum of Defence filed on 16th April, 2018, in which it has denied the Claimant's averments and put him to strict proof. The Respondent avers that the Claimant was insubordinate and failed to report to work despite several warnings issued to him to religiously attend work. It is the Respondent's case that it therefore exercised its rights to dismiss the Claimant summarily having been patient with his behaviour on various occasions. On this account, the Respondent has asked the Court to dismiss the Claimant's suit with costs.
3. The matter proceeded for hearing on 21st February, 2023, during which both sides called oral evidence.



Claimant's case

4. The Claimant testified in support of his case and for starters, he adopted his witness statement to constitute his evidence in chief. He proceeded to produce the bundle of documents filed together with the Memorandum of Claim as his exhibits before Court.
5. It was the Claimant's evidence that he served the Respondent continuously, diligently and to its satisfaction until 2nd December, 2016 when he was barred from entering his work premises. On inquiring, why he was being denied entry, he was informed that his services stood dismissed without any reasons. Attempts to establish the reasons leading to the drastic decision to dismiss him were only met with a response that he should leave never to report again.
6. He stated in further evidence that he was never served with a notice of the intention to terminate his employment and he was not given an opportunity to defend himself prior to being terminated. He was simply ordered out of the Respondent's premises.
7. The Claimant further averred that following his termination, he was not paid his terminal dues.
8. It was his further testimony that during the entire period of service to the Respondent, he did not proceed on leave and neither was he paid in lieu of the same. That he also used to report to work at 8.00 a.m. and leave at 6.00 p.m. without any overtime pay being paid to him for the extra hour worked.
9. Closing his testimony in chief, the Claimant asked the Court to allow his Claim as prayed.

Respondent's case

10. The Respondent called oral evidence through Mr. Charles Munene who testified as RW1. He started by adopting his witness statement and the Respondent's bundle of documents to constitute his evidence in chief. He identified himself as the workshop supervisor in the Respondent company.
11. It was RW1's evidence that on 30th November, 2016 the Claimant asked for permission to visit his sister who had been hospitalized. The Claimant was at the time working on one of the Respondent's projects which was already behind time and needed to catch up to meet the client's deadline. He therefore asked the Claimant to continue working for two days so as to catch up with time after which he could give him permission to visit his sister in hospital.
12. That the Respondent had already been informed that the Claimant had been seen working for a former employee who had taken a contract from the Respondent's customer.
13. It was RW1's further evidence that the Claimant chose not to follow his instructions and failed to report to work on 1st December, 2016. He reported to work on 2nd December, 2016 at around 10 a.m. and failed to give a satisfactory explanation as to why he failed to report to work on 1st December, 2016.
14. RW1 stated in further evidence that as he had previously warned the Claimant on two occasions on similar misconduct, he forwarded the case to the Director, Mr. Raju Shekhawat.
15. RW1 further averred that on the two occasions the Claimant had absconded duty and worked for the competitor, he had accepted his mistakes and given a written apology with the promise that he will not work on contracts with other third parties while employed with the Respondent in the future.
16. It was his further testimony that the Claimant adamantly refused to accept his mistake and recognize the loss that the company incurred due to his misconduct. Since the Claimant refused to cooperate, he was summarily dismissed for insubordination and working for a competitor while being employed by the Respondent.



Submissions

17. On the Claimant's part, it was submitted that he was only issued with a letter of summary dismissal on 2nd December 2016, when he reported back to work. That this was a clear indication that the decision to terminate him had already been made and the same was concluded without giving him an opportunity to explain or defend himself.
18. He maintained that even if there were reasons to terminate him, the same were never substantiated and thus, there was no justified reason to terminate him, therefore making the same unfair and unlawful. On this issue, he referred to the case of *Joseph Sitati Nato vs Kenya Ports Authority* (2010) eKLR.
19. It was the Claimant's further submission that his dismissal was done unilaterally and without notice and that the Respondent did not abide by the procedural requirements set out under Section 41(2) of the *Employment Act*, by ensuring that he was given notice and allowed a fair and reasonable chance to present a defence.
20. On the other hand, the Respondent invited the Court to find that the version of events given by its witness to be a true reflection of the facts. It submitted that the Claimant had formed a habit of absenting himself from work and he had admitted as much during cross examination. The Respondent thus urged the Court to find that the Claimant had failed on a balance of probabilities, to prove his claim.

Analysis and Determination

21. Flowing from the pleadings before Court, the evidence on record as well as the opposing submissions, the issues falling for the Court's determination can be distilled as follows: -
 - i. Whether the Respondent has proved that it had a fair and valid reason to terminate the Claimant's employment;
 - ii. Whether the Claimant was subjected to due process prior to termination from employment;
 - iii. Is the Claimant entitled to the reliefs sought?

Whether the Respondent has proved that it had a fair and valid reason to terminate the Claimant's employment

22. From the record, the Claimant's employment was terminated on 2nd December, 2016 on grounds of insubordination in that he refused to report to work when he was expressly informed of a site job that was to be done urgently. He was further alleged to have worked on a personal contract with a competitor of the Respondent company.
23. It is not in contest that the Claimant was away from work on 1st December, 2016. According to him, he called a Mr. Raju of the Respondent company on 1st December, 2016 and asked for permission to be away as fire had razed down his neighbour's house hence his house was partly affected.
24. On his part RW1 testified that the Claimant had asked him for permission to be away on 30th November, 2016 but the permission was denied due to tight deadlines at work. This assertion was denied by the Claimant who stated that it was his colleague Zachary Okoth who had asked to be away on the said date.
25. What is notable from the record is that the Claimant did not state whether or not he was granted permission on 1st December, 2016 to be away. That aside, assuming the Claimant was granted



- permission to be away by his supervisor, it would be rather odd that the same supervisor would cite him for absconding duty and proceed to dismiss him accordingly. Therefore, on a balance of probability, I am led to conclude that the Claimant was not granted permission to be away on 1st December, 2016.
26. Indeed, during cross examination, the Claimant testified that they were only two employees doing the same job and that he was informed that the Respondent company sustained losses on account of his absence from work. What manifests from the foregoing, is that the Claimant's presence at work was too crucial to the Respondent business, as to be let go without a justifiable reason.
 27. In terms of Section 45(2) (a) and (b) of the *Employment Act*, termination of employment qualifies as unfair where the employer fails to prove that an employee's termination was based on a reason that was valid, fair and related to the employee's conduct, capacity or compatibility.
 28. As stated above, the Claimant was away from work on 1st December, 2016 and he has not indicated whether he had been granted permission to be away. As a matter of fact, there is no evidence that he was authorized to be away from work.
 29. Pursuant to Section 44(4) (a) of the *Employment Act*, absence from work without leave or lawful cause is one of the grounds for summary dismissal. Therefore, the mere fact that the Claimant was absent from work with no leave or lawful authority, availed the Respondent a fair and valid reason to take disciplinary action against him.
 30. Coupled with the foregoing, it is apparent that the Claimant had been absent previously on 16th February, 2016. In that instance, he was alleged to have proceeded to work for another company on contract during the said period. The record bears that the Claimant admitted his mistake and apologized in writing.
 31. Therefore, a second instance of absence on similar grounds certainly availed the Respondent a valid and fair reason to commence termination of his employment.

Whether the Claimant was subjected to due process prior to termination from employment

32. Having found that the Claimant absented himself from work without lawful authority, it follows that the Respondent had all right as an employer to take disciplinary action against him under the *Employment Act*. This notwithstanding, there is no evidence on record that the Respondent took any step contemplated under Section 41 of the *Employment Act* upon noting the Claimant's absence.
33. Ideally, upon the Respondent realizing that the Claimant was absent from work, it ought to have reached out to him and asked him to explain his absence from work. There is no evidence of communication at all to the Claimant from the Respondent's end, citing him for absence from work and putting him on notice that it was considering termination of his employment contract on account of his absence from work.
34. Cross examined, RW1 testified that the Claimant was given a chance to defend himself. However, there was no evidence in whatever form or manner, to back up this assertion. For instance, there was no record of a meeting or such other forum in which the Claimant was given an opportunity to ventilate his defense.
35. As I have found herein, the Respondent had a valid and fair reason to commence disciplinary action against the Claimant on account of his absence from work. Nonetheless, the same was not a through pass to terminate the Claimant's employment without following due process. In this regard, the Respondent was duty bound to comply with all the legal requirements stipulated under Section 41 of the *Employment Act*. This entailed notifying the Claimant of the reasons it was considering terminating



his employment, in a language he understands and in the presence of an employee of his choice or a union representative.

36. Evidently, the Respondent did not comply with the stipulated statutory provisions, thus the Claimant's dismissal was procedurally unfair hence unlawful.

Reliefs

37. As the Court has found that the Claimant was not terminated procedurally, he is awarded one (1) month's salary in lieu of notice.
38. With regards to compensatory damages, the Claimant is awarded an equivalent of two (2) months' gross salary in compensation, as the Court has found that the Respondent had valid and fair grounds to terminate his employment but failed to follow the stipulated procedure.
39. With regards to leave pay, the Respondent exhibited leave records in respect of 2015 and 2016. It is apparent that the Claimant proceeded on leave for only two days in 2016 whereas he left employment on 2nd December, 2016. When prorated, it means the Claimant had 17.25 outstanding leave days. As there is no evidence he was compensated accordingly following his exit from the Respondent's employment, he is entitled to the same.
40. The claim for overtime is declined as the Respondent was able to prove that the Claimant was compensated accordingly for any duration he worked beyond the legal maximum.

Orders

41. In the final analysis, I enter judgment in favour of the Claimant against the Respondent and he is awarded: -
- a. One month's salary in lieu of notice being Kshs 18,353.00.
 - b. Compensatory damages in the sum of Kshs 36,706.00 being equivalent to two months of his gross salary.
 - c. Unpaid leave days being Kshs 10,552.96.
 - d. The total award is Kshs 65,611.96.
 - e. Interest on the amount in (d) at court rates from the date of Judgment until payment in full.
 - f. The Claimant shall also have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JULY, 2023.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Ms. Omamo

For the Respondent Mr. Burugu

Court Assistant Abdimalik Hussein

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 15th March 2020 and subsequent directions of 21st 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 had 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 Civil 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.

STELLA RUTTO

JUDGE

