



Wambu v British Army Training Unit Kenya (BATUK) (Cause E060 of 2021) [2023] KEELRC 1945 (KLR) (28 July 2023) (Judgment)

Neutral citation: [2023] KEELRC 1945 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CAUSE E060 OF 2021
ON MAKAU, J
JULY 28, 2023**

BETWEEN

STANLEY MWANGI WAMBU CLAIMANT

AND

BRITISH ARMY TRAINING UNIT KENYA (BATUK RESPONDENT

JUDGMENT

1. By an amended statement of claim dated December 10, 2021 the claimant alleged that his employment contract was unfairly and unlawfully terminated by the respondent on June 25, 2019. Therefore the suit seeks the following reliefs:-
 - a. A declaration that the termination of the claimant's employment was unfair and unlawful.
 - b. One month salary in lieu of notice.....Kshs 81,455.00
 - c. Maximum compensation for unfair termination of employmentKshs 977,460.00
 - d. Gratuity for six years and one month served....Kshs 455,517.92
 - e. Accrued house allowance for six years and one month served.....Kshs 981,932.25
 - f. Costs of this claim.
 - g. Interest on (b) (c) (d) and (e) above at court rates from the date of filing suit till payment in full.
 - h. Any other relieve that this honourable court deems fit to grant.



2. The respondent filed a response on April 28, 2022 admitting the employment relationship with the claimant but denied that it unfairly and unlawfully dismissed the claimant from service. On the contrary it averred that the termination was justified because the claimant committed gross misconduct. Further, that the termination was done in accordance with fair procedure. Therefore, it prayed for the suit to be dismissed with costs.

Evidence

3. The claimant testified as CW1 and adopted his written statement dated December 10, 2021 as his evidence. He further produced as exhibits, ten (10) documents in the list of documents dated even date. In brief, he testified that he was employed by the respondent as Plant Operator/Maintainer from June 1, 2013. His basic salary was Kshs 54,514.00 but it was later increased to Kshs 81,455.00. His contract was also governed by the respondent's Regulations for Locally Engaged Civilians Staff (RLECs), 2018 Standing Order 103. He served the respondent until June 25, 2019 when he was summarily dismissed for alleged gross misconduct.
4. The claimant denied the validity of the alleged misconduct contending that he had permission to use the truck in issue from Mr Pawson, the plant section commander, to transport sand for his own use. His colleagues Dennis Kariuki Githui also did the same on the same day. He contended that when he was allocated the truck on May 7, 2019, he did inspection and made a faulty report indicating that the tyres were worn out. He testified that the tyres were never replaced until the material day when he ferried sand and therefore he denied that he caused the damages on the tyres due to overloading of the truck with sand.
5. He further stated that he was subjected to an unfair disciplinary process under non-existent RLECs, of 2019 and which were unknown to him before the disciplinary process. He further testified that employer discriminated him by isolating him from his two other colleague who were with him on the material day and did the same act of ferrying sand for their personal use. He contended that the investigation report that led to his dismissal, recommended for disciplinary action against the claimant and the other two colleague but only him was dismissed. He prayed for the reliefs sought based on the Regulations for Locally Engaged Civilian Staff of 2018.
6. On cross-examination, he admitted that he was served with a show cause letter dated June 6, 2019 which referred to RLECs of 2019. He further admitted that he received a notification of a hearing date also referring to the RLECs, 2019 but he never sought for a copy of the regulations. He also admitted that paragraph 6 of the minutes of the disciplinary hearing indicates that he confirmed to have received all the documents referred therein. He confirmed that after the dismissal he appealed but the appeal was dismissed on July 2, 2022.
7. On further cross examination, he admitted that during the disciplinary hearing, he confirmed that he used the respondent's vehicle to deliver sand to his home for personal use with permission from MrPawson. He further admitted that the vehicle got two punctures while he was taking the sand to his home. He further admitted that he never paid for the fuel and he never got any written authority to use the vehicle for personal use.
8. As regards the reliefs sought he admitted that since 2013 when he joined the respondent until the time he was dismissed he never claimed for house allowance. He further admitted that regulation 422 of RLECs, 2019 provided that payment is consolidated.
9. In re-examination, he maintained that he was never notified of that the regulations were changed from the 2018 ones and as no letter to that effect was served on him. He maintained that he was never given



a copy of the 2019 regulations. He reiterated that he was authorized by his boss Mr Jamie Pawson to use the respondent's vehicle to deliver sand.

10. The respondent called Mr Graham Robert Weavers as its witness and he testified as RW1. He adopted his written statement dated August 25, 2022 as his evidence and produced 8 documents in the list dated April 26, 2022 and further 2 document in the list dated November 16, 2022 as exhibits. In brief, he admitted that the claimant was employed by the respondent as Plant Operator/Maintainer from June 24, 2013.
11. He further stated that on May 21, 2019 the claimant, without authorization or approval from the respondent, overloaded the respondent's truck number 51KM 71 with sand from the respondent's area at Archer's Post in Nanyuki and transported the sand to his home for personal use. As a result of the said overloading, the truck's two tyres were damaged. He contended that the claimant did not have any written authority for him to transport the sand for personal use and maintained that he was given verbal warning.
12. RW1 further stated that the claimant was notified of his offence under the RLECs of 2019 and he was then taken through disciplinary process under the same regulations. He stated that the claimant was served with show cause letter, notice of hearing date citing the charges and thereafter he attended the hearing where he admitted that he used the respondent's vehicle to transport sand for personal use.
13. He testified that the explanation by the claimant was considered before the dismissal. He appealed but the appeal was unsuccessful. Thereafter he wrote an undated apology letter admitting that he used the vehicle to ferry sand without permission. The letter was received by the respondent on July 2, 2019. Therefore RW1 maintained that the claimant's dismissal was fair and lawful.
14. He further testified that paragraph 422 of the RLECs 2019 provides that all locally engaged civilians are paid a consolidated basic salary including house allowance. He further stated that the claimant is not entitled to gratuity since paragraph 911 of the RLECs provides that gratuity would be forfeited on the instance of summary dismissal. Finally, he stated that the claimant was paid his terminal dues on July 31, 2019.
15. On cross-examination, RW1 stated that he has access to all the employees' records. However, he did not have the RLCEs for 2013 when the claimant was employed by the respondent. He admitted that clause 7 of the Terms and Conditions of Service (TACOS) provided that any change thereof required a prior notice of 30 days. The same position was provided in clause 18 of the claimant's contract. He admitted that the claimant's payslip did not indicate that the salary was consolidated but reiterated that the regulations of 2019 provided that salary was consolidated.
16. He further stated that he never attended the disciplinary hearing and he never witnessed the incidence that led us to the claimant's dismissal. He admitted that during the disciplinary hearing, Mr Pawson was asked whether he gave authority to the claimant to ferry sand with the respondent's vehicle and he responded that "I don't care." RW1 further admitted that the TACOS do not require that authority must always be in writing.

Submissions

17. The claimant testified that he was unfairly and unlawful dismissed because there was no valid and/or fair reason and fair procedure was not followed. He maintained that he got authority from his boss Mr Jamie Pawson to transport sand for personal use using the employer's vehicle. He further submitted that the vehicle had worn out tyres before the alleged damages as per the inspection report he prepared



- when he was assigned the vehicle on May 7, 2019. He contended that the above evidence has not been rebutted by the RW1 in his evidence.
18. As regards the undated apology letter, it was submitted that there is no proof that the letter was authored by the claimant. Further the letter was not the basis for the dismissal because it was allegedly received after the dismissal. He maintained that the punctures were not caused by him but due to worn out tyres.
 19. As regards the alleged discrimination the claimant reiterated that he was singled out for dismissal and three others recommended for disciplinary action which were left out. For emphasis, he relied on *Jane I Khalechi v Oxford University Press EA* (2013) eKLR where the court held that in a case for discrimination by an employee, the employer has the burden of proof that no discrimination occurred.
 20. As regards procedural fairness, the claimant submitted that the procedure provided under section 41 of the *Employment Act* was not followed before his dismissal as he was not accorded any opportunity to respond to the show cause letter and the notification for hearing. He relied on *Mary Chemweno Kiptui v Kenya Pipeline Company Ltd* (2014) eKLR. In addition, he submitted that he was placed at a disadvantage by being taken through a disciplinary process under RLECs, of 2019 which he was unaware of. He submitted that failure to base the process under RLECs of 2018 rendered the procedure followed unfair.
 21. Finally he submitted that he is entitled to the reliefs sought in his claim including gratuity under paragraph 1400 and 1404 RLECs of 2018 and contended that the application of the RLECs of 2019 to his case is only meant to deny him payment of his gratuity. He maintained that the change of TACOS from RLECs of 2019 was a nullity because he was not given a prior notice of 30 days. For the same reasons he submitted that the RLECs of 2019 is being used to deny him the claim for house allowance since the RLECs of 2018 never provided that his salary was consolidated with House allowance. He relied on *Vipingo Ridge Ltd v Swalebe Ngonge Mpitta* (2022) eKLR, *G4S Security Services (K) Ltd v Joseph Kamau & 468 others* (2018) eKLR and *Gram Pro Kenya Inc Ltd v Andrew Waitbaka Kiragu* (2019) eKLR to urge that his claim for arrears of house allowance is justified and not time barred.
 22. The respondent on the other hand submitted that the claim for arrears of house allowance is time barred by dint of section 90 of the *Employment Act* for being made after the lapse of 3 years. It further submitted that under paragraph 422 of the RLECs of February 2019, the claimant's salary was consolidated and his claim for the same after his dismissal is an afterthought. The respondent further submitted that the dismissal of the claimant was fair and lawful because there was a valid reason and a fair procedure was followed. It submitted that the claimant admitted that he used its truck to ferry sand for his own use without authorization. It submitted that the claimant overloaded the vehicle with sand which caused it to suffer multiple punctures that led to extensive damage on the vehicle when the tyres blew up.
 23. As regards procedural fairness, the respondent submitted that the claimant was served with a show cause letter, followed by a notification of hearing date and thereafter accorded a hearing by a disciplinary committee before the dismissal. His appeal was also considered but it was dismissed. Consequently, it was submitted that section 41 of the *Employment Act* was complied with, and the claimant is not entitled to reliefs sought. Therefore it prayed for the suit to be dismissed with costs.

Issues for determination

24. I have carefully considered the pleadings, evidence and submissions by both sides. There is no dispute that the claimant was employed by the respondent from June 2013 to June 2019 when he was summarily dismissed for alleged misconduct. The issues for determination are:-



- a. Whether the summary dismissal was grounded on a valid and fair reasons.
- b. Whether fair procedure was followed.
- c. Whether the claimant is entitled to the reliefs sought.

Reasons for termination

25. Section 45 (2) of the *Employment Act* states that;

“45(2) A termination of employment by an employer is unfair if the employer fails to prove –

- a. That the reason for the termination is valid;
- b. That the reason for the termination is a fair reason -
 - i. Related to the employee’s conduct, capacity or compatibility, or
 - ii. Based on the operational requirements of the employer; and
- c. That the employment was terminated in accordance with fair procedure.”

26. The reasons for termination herein were set out in the dismissal letter dated June 25, 2019 as follows;

- a. Improper use of departmental stores and labour, which are official vehicles and fuels and your RESp colleagues-Ref D Section 8 para 820, by using two BATUK vehicles to transport sand from Archer’s Post Training Area, loaded by you and your colleague Stephen Mwangi Wambugu 0940, and driven by Dennis Kariuki Gichui 0692. You have admitted in your statement that you know BATUK standing orders prohibit you from using military vehicles for personal use.
- b. Carelessly and improperly performing your work causing damage to the tyres on a military vehicle –Ref D Section 8 para 821 and Ref B Section 9 para 910, by enlisting the assistance of your two colleagues, Justus Kinyali 0291 and Dennis Kariuki Githui 0692, to put a defective tyre on an overloaded vehicle, VRN 51 KM 71, which you were driving, resulting in the damage of two tyres at a cost of \$1,300 (approximately Kshs 166,400).”

27. The claimant denied the offences before the disciplinary committee and before this court. He maintained that he was given authority by his supervisor Mr Jamie Pawson, to transport sand to his home for personal use. The claimant told the court that Mr Pawson has never denied that he authorized him to transport sand to his house. The respondent questioned Mr Pawson during the disciplinary hearing and he never denied that he authorized the claimant and his colleagues to ferry sand to their homes using respondent’s vehicles. His statement recorded before the investigator has not been shown to this court to prove that he denied that he authorized the claimant to ferry the sand.

28. Having considered the evidence and the submission by the two parties, I am satisfied that the claimant had authorization from Mr Pawson to use respondent’s vehicle to transport sand to his home for



personal use. In my view, the only reason why the matter is before the court is because the vehicle suffered damage on two tyres.

29. As regards the second reason for the dismissal, the claimant testified that the vehicle in issue was assigned to him on May 7, 2019 and as usual he prepared a faulty report. He produced the report as exhibit without any objection. The report indicated four faults including worn out tyres. The claimant testified that the worn out tyres were not replaced as at May 21, 2019 when the alleged damage on the worn out tyres occurred.
30. The respondent contends that the damage on the tyres was due to overloading but no evidence has been adduced to support that. There is no evidence of how heavy the load was in comparison to the loading weight required by the manufacturer.
31. As regards the careless driving, it is clear from the investigations report that the claimant drove his vehicle at the same speed as his colleagues who kept helping him to replace the punctured tyres. Further, it is clear from the same report at paragraph 12 that after the replacement of the tyres, the claimant drove the vehicle slowly forcing CPL Limbu and his colleague to overtake him and leave him behind.
32. From the foregoing analysis, I find that the damage on the tyres of the motor vehicle No 51KM 71 was not caused by claimant's careless and improper performance of work. The claimant had authorization to use the vehicle to transport sand, he never overloaded the vehicle and he drove it slowly.
33. The claimant complained that he was unaware of RLECs of 2019 under which he was charged and dismissed. He contended that the applicable regulations are the 2018 RLECs. The court finds that argument not merited because what section 45 of the *Employment Act* requires is that there must be a valid reason before termination. The reasons cited in the dismissal letter and paragraph 34 (a) and (g) of the RLECs of 2018 are in line with offences warranting summary dismissal provided under section 44 (4) (c) and (g) of the *Employment Act*. The same offences are duplicated under paragraph 910 bullet 5 and 16 of the RLECs of 2019. Consequently as far as the reasons for the dismissal are concerned the claimant never suffered any prejudice by being charged with the said offences under RLECs of 2019.

Procedure followed

34. Section 41 of the *Employment Act* provides that:-
 - “(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.
 - (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”
35. The claimant acknowledges that he was served with a show cause letter dated June 6, 2019 citing the offences upon which a dismissal was being considered. He was later served with a hearing notice citing the same offences and after four days he attended the disciplinary hearing in the company of a fellow employee of choice, one Ramadhan Waswa Omondi. He was heard and thereafter his representation



were considered before his dismissal. He thereafter appealed and his appeal was considered and the decision was communicated to him in writing. Consequently, I am satisfied that a fair procedure was followed before the dismissal as required by section 41 of the Employment Act.

36. The claimant contended that the conduct of the disciplinary process under the RLECs of 2019 as opposed to the 2018 version was unfair as it subjected him to unfamiliar rules. However, I have perused the two sets of regulations and found that the procedure for disciplinary hearing are the same. They both provide for investigation, show cause letter and then disciplinary hearing before an independent person. Accordingly, I see no prejudice that was occasioned on the claimant by being taken through disciplinary process under the RLECs of 2019 because the minimum requirements under section 41 of the Act were met. Therefore I find and hold that a fair procedure was followed before dismissing the claimant on June 25, 2019.

Reliefs

37. Having found that there was no valid and fair reason for dismissing the claimant from employment, I make declaration that the dismissal was unjustified, unfair and unlawful within the meaning of section 45 of the Employment Act.
38. In view of the foregoing declaration, I hold that the claimant is entitled to damages under section 49 as read with section 50 of the Employment Act, namely, salary in lieu of notice and compensation for unfair termination. Clause 10 of his contract provided for 30 days' notice before termination and therefore I award him the same. As regards compensation, section 49 of the Employment Act provides for a maximum award of 12 months gross salary but I award him six months gross salary considering that he served for six years without any warning letter. Besides, the dismissal was not caused by misconduct but factors attributable to the employer.
39. I further award him the prayer for gratuity. Paragraph 1400 of the RLECs of 2018 provided for payment of gratuity to an employee who served for a minimum period of five years. The rate was one month salary per completed year of service. Paragraph 1404 provided that gratuity would be assessed based on the final gross pay unless the employees' job grade changed during the last 3 years of service. In this case the claimant's job grade never changed during his last three years of service.
40. The same right to gratuity is also provided under paragraph 48 of the standing order 103 of February 2018. The respondent produced a portion of the RLECs for 2019 and therefore no other formula for assessing gratuity was availed to the court. I therefore assess the gratuity payable to claimant based on the RLECs of 2018 and the standing order 103 being one month gross pay for each completed year of service. The claimant served from June 2013 to June 25, 2019 equaling to six (6) years. The gratuity is Kshs 488,730.00 but he has pleaded Kshs 455,517.92 which I award.
41. The claimant further prayed for House allowance for six years he served the respondent. There is no doubt that he never demanded for the same until the time he exited the respondent. The RLECs of 2018 provided for several allowances but house allowance is not included in the list. The same position obtains in the standing orders 103 of 2018 paragraph 52 to 74. Consequently, I hold that the claimant was earning a consolidated salary inclusive of house allowance. All what paragraph 422 of the RLECs of 2019 did was to clarify that the salary was inclusive of house allowance. Therefore the claim for house allowance for the six years is dismissed.

Conclusion

42. I have found that the reason for the summary dismissal of the claimant was invalid and therefore the dismissal was unfair and unlawful. I have further found that the claimant is entitled to an award of



salary in lieu of notice, compensation for unfair termination and gratuity for the years served as if the termination was not through summary dismissal. Consequently, I enter judgment for the claimant against the respondent for payment of the following:-

- a. Notice.....Kshs 81,455.00
 - b. Compensation.....Kshs 488,730.00
 - c. Gratuity.....Kshs 455,517.92
- Total Kshs 1,025,702.92

The award is subject to statutory deductions but in addition to costs plus interest at court rate from the date hereof.

DATED, SIGNED AND DELIVERED AT NYERI THIS 28TH DAY OF JULY, 2023.

ONESMUS N MAKAU

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 15th April 2020, this judgment 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.

ONESMUS N. MAKAU

JUDGE

