



**Muteti v Premier Trading Co Limited (Cause 485 of 2018)  
[2023] KEELRC 1775 (KLR) (14 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1775 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 485 OF 2018**

**SC RUTTO, J**

**JULY 14, 2023**

**BETWEEN**

**BERNARD NDUVA MUTETI ..... CLAIMANT**

**AND**

**PREMIER TRADING CO LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant instituted the instant suit vide a Memorandum of Claim dated April 5, 2018, through which he avers that he was an employee of the respondent with effect from 2007 until October 10, 2017. He avers that the respondent summarily dismissed him from employment without any reasonable and just ground and/or without following the right procedure. Consequently, the claimant seeks against the respondent compensation for unfair and wrongful dismissal. He further seeks service pay for ten years calculated at 15 days salary for each year worked.
2. The respondent opposed the claim through its Statement of Defence filed on August 14, 2018 in which it avers that the claimant was legally dismissed after several warnings for causing it loss through conspiracy to steal its goods in transit. The respondent further states that the claimant's dues were settled and it does not owe him any dues.
3. The matter proceeded for hearing on July 18, 2022 and February 1, 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 together with the documents filed with his Claim, to constitute his evidence in chief.



5. In his testimony before court, the claimant stated that he was employed by the respondent as a driver. He testified that he was hijacked by robbers in 2015 and that he reported the incident to the police. He denied knowing the identity of the robbers.
6. In June, 2017, the motor vehicle he was driving was once again hijacked by unknown persons at Juja. He later recorded a statement with the police concerning the incident. The motor vehicle was later recovered.
7. It was the claimant's further evidence that on October 9, 2017, the respondent's Managing Director called him to his office and informed him that his services had been terminated. He was only given Kshs 25,000.00 and his service for ten years was not paid.
8. The claimant further stated that he was neither given a formal notice of termination nor reasons for his termination. That he was also not given a hearing at all.
9. He further told the court that he had worked for ten years without any record of mistake.

### **Respondent's case**

10. On its part, the respondent called oral evidence through Mr. Brian Ayieko Ayua who testified as RW1. He identified himself as one of the respondent's salesmen and a supervisor. Similarly, he adopted his witness statement together with the bundle of documents filed on behalf of the respondent, to constitute his evidence in chief.
11. RW1 stated in evidence that the claimant was dismissed for causing the respondent loss through conspiracy to steal its goods on transit. That on August 21, 2015 along Juja Gtaundu road, the claimant colluded with thieves who stole the respondent's goods worth Kshs 4,582,799.00. The same was reported to Kamukunji police station and an abstract was issued.
12. RW1 further stated that on June 29, 2017, at the same spot, the claimant colluded with thieves who stole goods worth Kshs 4,296,740.00. That the respondent suspected that there was something going on between the claimant and the robbers as the incident was repeated. It was his testimony that the respondent has many drivers but has never experienced such an incident again. RW1 further stated that the respondent was forced to declare vacant the claimant's position.
13. According to RW1, the claimant's claim for compensation is unfounded as he was not wrongfully terminated.

### **Submissions**

14. It was submitted on behalf of the claimant that he has proved that he was wrongly and unfairly terminated and the said evidence has not been controverted or challenged by the respondent. That the respondent's witnesses concentrated on the allegation of collusion with the hijackers yet the same was not substantiated. It was further submitted that by the respondent's witness confirming that the respondent was forced to declare vacant the claimant's position, was an admission that he was indeed declared reductant. It was further submitted that the claimant has proved his case on a balance of probability and that the respondent did not follow the procedure laid down under section 41 of the [\*Employment Act\*](#).
15. On its part, the respondent submitted that the claimant was not wrongfully terminated and is therefore not entitled to any compensation. Citing the provisions of section 44(4)(g) of the [\*Employment Act\*](#), the respondent further submitted that it is not unfounded that it draws great suspicion that the claimant remains the constant in both carjacking attempts during which goods he was ferrying were stolen. That



the amount in value was somewhat similar and considerable and the crime took place at the exact same spot on both occasions. The respondent thus submitted that it was not unfounded that it would act upon this and work towards potentially terminating any possibility of recurrence of the same in future.

16. Placing reliance on the case of *Kenya power & lighting Company vs Aggrey Lukorito Wasike* (2017) eKLR, the respondent urged the court to find that it was justified in summarily dismissing the claimant.

### **Analysis and determination**

17. I have carefully considered the pleadings, the evidentiary material placed before me and the submissions on record and find the issues falling for the Court's determination as being: -
- a. Whether the claimant's termination was unfair and unlawful; and
  - b. Is the claimant entitled to the reliefs sought?

### **Unfair and unlawful termination?**

18. Pursuant to sections 41,43 and 45 of the *Employment Act* (Act), an employer is required to prove that there was substantive justification to warrant the termination of an employee's contract of service and that the said termination was undertaken procedurally. Essentially these are the two tests to be applied in determining whether an employee's termination from employment was fair and lawful.
19. With regards to substantive justification, section 43(1) of the Act requires an employer to prove the reasons for termination, and in absence thereof, such termination is deemed to be unfair. Further along the Act, section 45 (2)(1) and (b) provides that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and related to the employee's conduct, capacity or compatibility; or based on its operational requirements.
20. Back to the instant case, the respondent stated that it dismissed the claimant from its employment for "causing loss through conspiracy to steal its goods on transit". The claimant was categorical that he was not informed of the reasons for his dismissal from employment. In this regard, he testified that following the robbery incident in June, 2017, he continued working until October, 2017 when he was dismissed from employment. He thus denied being dismissed on account of the robbery incidents.
21. In absence of a letter of termination, the court is unable to ascertain the real reason behind the claimant's termination from employment. It can very well be said that the reasons are unknown, bearing in mind the time lapse between the 2<sup>nd</sup> robbery incident and the claimant's termination. I must say that this is a dilemma the respondent would have resolved by adducing the letter of termination seeing that it is the party that severed the employment relationship.
22. Revisiting the provisions of section 43(1) of the Act, the onus is on the employer to prove the reasons for an employee's termination. Therefore, the reason for the claimant's termination was an issue that the respondent was required to prove before court. Indeed, the burden was on the respondent was to show that the dismissal was justifiable.
23. Given that the parties have taken diametrically opposite positions on the reason behind the claimant's termination, I am led to draw an adverse inference against the respondent being the party with the heaviest burden of proof.
24. As such, I cannot help but find that the respondent has failed to sufficiently discharge its evidential burden by proving the reasons for the claimant's termination from employment and specifically that the same were fair, valid or related to his conduct, capacity or compatibility.



25. Turning to the question of procedural fairness, section 45(2) (c) of the Act provides that for termination to be fair, it ought to be in line with fair procedure. In this respect, section 41(1) of the Act requires an employer to notify an employee of the allegations for which it is considering terminating the employment contract. The employer is then enjoined to afford the employee an opportunity to make representations in response to the said allegations. In so doing, the employee is entitled to be accompanied by a fellow employee or a union representative of own choice.
26. In this case, the respondent did not prove that it complied with the process envisaged under Section 41 of the Act. For starters, there was no proof that the claimant was invited to show cause and explain why his employment should not be terminated on account of whatever allegations. Further, in the event a disciplinary hearing was conducted as the respondent has stated, no evidence was adduced to prove as much.
27. It is instructive to note that the process contemplated under section 41 of the Act is mandatory. Such was the determination by the Court of Appeal in *Postal Corporation of Kenya vs Andrew K. Tanui* [2019] eKLR where it was held that: -
- “It is our further view that section 41 provides the minimum standards of a fair procedure that an employer ought to comply with... Four elements must thus be discernible for the procedure to pass muster: -
- (i) an explanation of the grounds of termination in a language understood by the employee;
  - (ii) the reason for which the employer is considering termination;
  - (iii) entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;
  - (iv) hearing and considering any representations made by the employee and the person chosen by the employee.”
28. Applying the above determination to the instant case, it is my finding that as the respondent has not proved that it undertook the mandatory process contemplated under section 41 of the Act, the claimant’s termination from employment was procedurally unfair hence unlawful.

### Reliefs

29. As the court has found that the respondent has not discharged its evidential burden by proving the reason for the claimant’s termination and further, that it subjected him to a fair process prior to his termination, the court awards him compensatory damages equivalent to six (6) months of his gross salary. This award also takes into consideration the length of the employment relationship.
30. The claim with regards to service pay is declined as it is evident that the claimant was a registered member of the National Social Security Fund hence this fact places him within the exclusions under section 35(6) of the *Employment Act*.

### Orders

31. In conclusion, the claim succeeds and the claimant is awarded the sum of Kshs 144,990.00 which is equivalent to six (6) months of his gross month salary. Interest shall apply on the said amount at court rates from the date of Judgment until payment in full.



32. The claimant shall also have the costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14<sup>TH</sup> DAY OF JULY, 2023.**

.....

**STELLA RUTTO**

**JUDGE**

Appearance:

For the Claimant Ms. Muendo

For the Respondent Mr. Kimamo

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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**

