



Tire World Limited v Jarra (Employment and Labour Relations Appeal E124 of 2021) [2023] KEELRC 2031 (KLR) (18 August 2023) (Judgment)

Neutral citation: [2023] KEELRC 2031 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E124 OF 2021**

**AN MWAURE, J
AUGUST 18, 2023**

BETWEEN

TIRE WORLD LIMITED APPELLANT

AND

BERYL AGATHA JARRA RESPONDENT

JUDGMENT

1. The Appellant filed this appeal vide a Memorandum of Appeal dated 21st October 2021 against the whole judgement by Hon. E. Wanjala on grounds that: -
 - a. That the learned magistrate erred in law and fact by failing to hold that the Respondent's termination was for cause and followed due process in compliance with Section 41 and 45, *Employment Act*.
 - b. That the learned magistrate erred in law and fact by materially disregarding the nature of the Appellant's business; and consequently, the manner, nature and form in which the customer complaints would be made is oral/verbal as opposed to formal/documentary.
 - c. That the learned magistrate erred in law and fact misdirected herself by disregarding the Appellant's evidence from its Human Resource Manager whose office had indeed received customer complaints against the Respondent.
 - d. That the learned magistrate erred in law and fact by failing to hold that the Claimant's employment was terminated on grounds of unexplained absenteeism and absconding duty, and not her illness or complaints against her.
 - e. That the learned magistrate erred in law and fact and misdirected herself, when she held that the Respondent was forced to proceed on compulsory leave and subsequently terminated



on account of her absence during the compulsory leave, which finding was contrary to the evidence on record.

- f. That the learned magistrate erred in law and fact by failing to find that not only had the Respondent been served with a Notice to Show Cause; but that she brazenly failed to respond to the same.
 - g. That the learned magistrate erred in law and fact by failing to find that the Respondent's own failure to respond to the Notice to show cause, divested her of the opportunity to be heard.
 - h. That the learned magistrate erred in law and fact by awarding the Respondent payment in lieu of leave notwithstanding that a conflicting holding in the same judgment, that no leave days were unpaid or unutilized.
 - i. That the learned magistrate erred in law and fact by disregarding the principles governing computation and award of compensation (where merited) under Section 49 and 50 of the Employment Act rendering the award of 12 months compensation excessive in the circumstances.
2. The Appellant prays for the following orders:-
- i. The Appeal be allowed and, the Judgment of the Chief Magistrates Court of Kenya at Nairobi by Hon. E. Wanjala delivered on 24th September, 2021 in C.M.E.L Cause No. 318 of 2020 be set aside and substituted by an order dismissing the Respondent's Memorandum of Claim dated 2nd July 2020;
 - ii. In the alternative to prayer (i) above, the Hon Court be and is pleased to vary and set aside the Judgment of the Chief Magistrates Court of Kenya at Nairobi by Hon. E. Wanjala delivered on 24th September, 2021 in C.M.E.L Cause No. 318 of 2020 on the award of payment in lieu of leave as well as the award of compensation for 12 months; and
 - iii. The Appellant's costs of this appeal be provided for.

Appellant's Submissions

3. The Appellant submitted that the trial court erred in law and fact by failing to find that the Respondent had been served with a Notice to show cause but she failed to respond. Further, the trial court erred in law and fact by failing to find that the Respondent's own failure to respond to the Notice to show cause divested her opportunity to be heard.
4. That the learned Magistrate erred in law and fact by failing to hold that the Claimant's employment was terminated on grounds of unexplained absenteeism and absconding duty and not her illness or complaints against her.
5. It was submitted for the Appellant that the Respondent was in the habit of absenting herself from the work place on various occasions including the 23rd, 24th and 26th October 2019 without lawful cause and/or permission from the Appellant. Upon this background, the Appellant issued a Notice to show cause to the Respondent via WhatsApp.
6. It is the Appellant's submission that the Respondent was duly served with the Notice to show cause on 28th October 2019 but the Respondent failed and/or refused to respond to the notice to show cause hence failed by her own conduct to avail herself to the Appellant's internal grievance handling procedure therefore the Respondent cannot complain that she was not heard as she placed herself up for summary dismissal and with that regard the Appellant proceeded to summarily dismiss the



Respondent in accordance with Section 44 (4)(a) of the [Employment Act](#) via a Notice of termination dated 31st October 2019.

Respondent's Submissions

7. The Respondent supported the trial court's decision and submitted that the learned Magistrate correctly made a finding that the Claimant's dismissal is unlawful and unfair based on correct parameters and evidence presented by the parties and there is no reason for interference with the finding.
8. It was submitted for the Respondent that it is not disputed that the Respondent was taken ill on 29th September 2019 for a period of one week which she took leave to recuperate and that the same was taken as part of her annual leave. The Respondent resumed duty on 14th October 2019 and worked until 23rd October 2019 when she was informed that some employees and customers had allegedly complained that she was acting hyperactive. During trial, the Respondent testified that she requested for specific details on the alleged incident and complaints but the same was never furnished.
9. That on 26th October 2019 the Respondent was directed by the Appellant to proceed on leave that she had never requested or applied for. On the same day, she was removed from the Appellant's WhatsApp platforms without any explanation and on 28th October 2019 she was informed by her colleagues that the Appellant had circulated an email indicating she was no longer its employee. The Respondent went to enquire the veracity of the information on 31st October 2019 when she was informed that she had been dismissed and issued with a dismissal letter stating she was dismissed on grounds of absenteeism on 23rd, 24th and 26th October 2019.
10. It was submitted by the Respondent that she did not absent herself from duty as alleged and that the Appellant did not produce any material to demonstrate the Respondent was absent as indicated in the dismissal letter. Further, the Appellant had a biometric clocking system that every employee clocked in or out when entering and leaving work and these reports were not presented in court thereby the Appellant failed to establish the Respondent's absenteeism in breach of Section 43 and 45 of the [Employment Act](#).
11. It was further submitted for the Respondent that there is no evidence that the Respondent received the Notice to show cause and/or the same was sent to Respondent as the Appellant did not state which medium the document was sent to the Respondent and the said medium is being introduced in this Appeal. Further, the Notice to show cause appears to be in form of a text message but there is no telephone number to demonstrate the recipient of the said message.
12. It was the Respondent's submission that even if the Notice to show cause was sent and received by the Respondent as alleged, the Notice did not provide the period which the Respondent was to respond to the allegations. Further, a disciplinary hearing is the epitome of internal grievances process, if an employee does not respond to a show cause or an employer is dissatisfied with the employee's response to a show cause, the next step is to invite the employee for a disciplinary hearing but not dismiss her.
13. The Respondent submitted that she was dismissed and unfairly and without any valid reason for dismissal and neither was she accorded an opportunity to be heard as provided by law.

Analysis and determination

14. Arising from the grounds of appeal, the following are the issues for determination:
 - a. Whether the learned Magistrate erred in law and fact to by failing to hold that the Respondent was dismissed fairly and lawfully



- b. Whether the trial court disregarded the principles governing computation and award of compensation under Section 49 and 50 of the [Employment Act](#)

Whether the learned Magistrate erred in law and fact by failing to hold that the Respondent was dismissed fairly and lawfully

15. The Appellant argues the Respondent was duly served with the Notice to show cause on 28th October 2019 vide WhatsApp and that the Respondent failed and/or refused to respond to the notice to show cause hence failed by her own conduct to avail herself to the internal grievance handling procedure provided by the Appellant and that Respondent cannot complain that she was not heard as she placed herself up for summary dismissal.
16. Firstly, the Appellant avers that the Notice to show cause was sent to the Respondent vide WhatsApp and submitted before this court a screenshot of the said message, however, as argued by the Respondent the message does not state the telephone number of the recipient. It will be very difficult for this court to determine the authenticity of the message as any person can save a phone number using a name they desire and a profile picture of their choice, the Appellant should have submitted the same clearly indicating the recipient's number for ease of this court to determine whether or not the Respondent received the show cause.
17. Secondly, the Appellant argues that by Respondent's failure to respond to the Notice to show cause was a ground of gross misconduct and failure to submit to its internal disciplinary procedure hence its decision to summarily dismiss the Respondent was in accordance with the law. This raises the question can an employer summarily dismiss an employee on grounds that he/she failed to respond to a notice to show cause? In *Omenda v Gurudumu Sacco Society Limited (Cause 2588 of 2016) [2023] KEELRC 727 (KLR) (16 March 2023) (Judgment)* the court held as follows:-

“Section 41 of the Act provides the architecture of procedural fairness in the Kenyan situation. The procedure provided under the provision that must be adhered to by an employer considering termination of an employee's employment, or summarily dismissing the employee is mandatory. The procedure has four components, and absence of all of them or one of them renders a termination or summary dismissal unfair. The components are:

- i. The notification component, the employer must inform the employee the grounds/reasons upon which he considers terminating the employment.
- ii. The hearing component, the employee must be given an opportunity to adequately prepare for, and make a representation on the grounds. The right to a hearing is conjoined with the right to accompaniment at the hearing. The employee has to be allowed to be accompanied by a colleague [if he is not a member of a union] or a representative of the union, [if the employee is a member of a union].
- iii. Consideration, the employer must consider the representation[s] made by the employee and the accompanying person before making a decision on the grounds.

It was the Claimant's case and I am persuaded, that the dismissal was absent of any procedural fairness.

I have no doubt in my mind that where an employer has called upon the employee to answer to a show cause letter, no disciplinary hearing shall be undertaken and or action taken against her or him, before the due date of the response. The evidence that the Claimant was dismissed on the 22nd September 2022 before the due date for the response, in my view stands on firm ground, and only indicates that the dismissal was without any hearing as contemplated in Section 41 of the [Employment Act](#).”



18. In *Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR the court stated: -

“But even where there exists substantive ground(s) to justify a termination, the law obligates the employer to observe certain procedural strictures to ensure the upholding of the broad principles of natural justice in processing the separation between him/her and the affected employee. The employer has to: provide the employee with details of the accusations against the employee; allow the employee an opportunity to respond to the charges; allow the employee to be accompanied by a shop steward or co-employee of his choice during the process; and finally provide the employee with a decision either terminating or saving the contract of service.

Where the employer fails to do the foregoing, the resultant termination is deemed unlawful. And in law, the burden of justifying the lawfulness of the termination both in terms of whether there was a substantive ground to terminate and whether procedure for release of the employee was adhered to lies with the employer.”

19. A notice to show cause only lays down the allegations of misconduct raised against an employee and the employee has an option to respond or not. Against this background, an employer is required to invite the employee for a disciplinary hearing to defend him/herself within a reasonable time and before the said disciplinary hearing the employee is required to be furnished with any evidence or information necessary for the preparation of his/her defence. Additionally, an employer must inform the employee of his right to be accompanied with a colleague [if he is not a member of a union] or a representative of the union, [if the employee is a member of a union]. Lastly, the disciplinary committee must consider the representations of the employee before determining its decision. That is the trite mandatory process in the Kenyan employment laws.

20. In view of the foregoing, this court agrees with the learned Magistrate that the Appellant failed to grant the Respondent a fair and lawful disciplinary process in accordance with Section 41 of the *Employment Act* and it finds no reason to interfere with the findings and determination by the trial court.

Whether the trial court disregarded the principles governing computation and award of compensation under Section 49 and 50 of the *Employment Act*

21. In *Cooperative Bank of Kenya Limited v Yator* (Civil Appeal 87 of 2018) [2021] KECA 95 (KLR) (22 October 2021) (Judgment) the court held as follows:-

“The remedies for wrongful dismissal and unfair termination are provided for in section 49 as read with section 50 of the Act. Among them is an award of the equivalent of a number of month’s wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.”

22 This is what the trial court based its award on. But Section 49 (4) sets out 14 considerations which should be taken into account in deciding the appropriate remedy under 49 (1); which provide as follows:

“considerations which the court must take into account before determining what remedy is appropriate in each case. Those considerations include the wishes of the employee, the circumstances of the termination and the extent to which the employee caused or contributed to it, the practicability of reinstatement or re-engagement, the common law principle that an order for specific performance of a contract for service should not be made save in exceptional cases, the employee’s length of service with the employer, the



employee's reasonable expectation of the length of time the employment was to last but for the termination, the employee's opportunities for securing comparable or suitable employment, any conduct of the employee that may have caused or contributed to the termination, any action on the part of the employee to mitigate his losses, etc. What all the above means, is that before exercising the discretion to determine which remedy to award, the court must be guided by the above comprehensive list of considerations."

23 Section 50 of the [Employment Act](#), as well as section 12(3) (vi) and (vii) gives the Employment and Labor Relations Court power to make an award in line with section 49 aforementioned. As already stated power to grant the remedies provided for under section 49 of the Act is discretionary. Such discretion must however be exercised judiciously, and in the words of this court in.

Kenya Revenue Authority & 2 Others vs Darasa Investments Limited [2018] eKLR Civil Appeal No 24 of 2018:

"The court ought not to interfere with the exercise of such discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the Judge was clearly wrong in the exercise of discretion and occasioned injustice."

24. It was submitted for the Appellant that the trial court's decision to award the Respondent the full 12 months compensation was not merited as it did not consider the mandatory principles and parameter outlined under Section 49 (4) of the Employment. It is the Appellant's argument as discussed above that the Respondent by her own conduct contributed to her dismissal and that she was not dismissed on grounds of her illness.
24. The court has already addressed the issue of whether the termination of the claimant was lawful or not and the court has entered a verdict that the claimant was unlawfully terminated from her employment. The judgment of the trial magistrate was therefore upheld.
24. Remedies
 - a. The court however guided by the principles that guide computation of damages as provided on section 49 of the [Employment Act](#) and especially reference to the period the claimant worked for the respondent which was only about one year the court finds the award of 12 months equivalent of salary is excessive. This court will replace the award of 12 months to 4 months which amounts to kshs 308,000/-.
 - b. She is awarded her leave days as is clear there were 7 days leave pending at the time of termination and the one month salary in lieu of notice. Total award is Kshs 423,499.99.
 - c. She is awarded costs of the lower court and costs of this appeal based on this award.
 - d. She is also awarded interest from date of this judgment till full payment.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 18TH DAY OF AUGUST, 2023.

ANNA NGIBUINI MWAURE

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 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 has 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 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

