



**Ayako v Quality Plast Limited (Employment and Labour Relations Cause  
2396 of 2017) [2023] KEELRC 2320 (KLR) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2320 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 2396 OF 2017  
AN MWAURE, J  
SEPTEMBER 29, 2023**

**BETWEEN**

**JOASH NYAINGIRI AYAKO ..... CLAIMANT**

**AND**

**QUALITY PLAST LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant filed a memorandum of claim dated November 29, 2017.

**Claimant's Case**

2. The claimant avers that he was employed by the respondent as a machine attendant at a monthly gross salary of Kshs 19,562.50/- from December 15, 2015.
3. The claimant avers that throughout his employment he was a trustworthy, industrious, hardworking and zealous employee and had never contravened any laws and policies laid down by the respondent.
4. The claimant further avers that during his employment his duty was to watch over machines assigned to him whose function was to produce plastic items and whose nature is set in different modes to produce a variety of items.
5. The claimant avers that on 01/04/2016, the respondent unlawfully terminated his employment by way of summary dismissal without proper basis and/or merit and contrary to labour laws.
6. The claimant avers that he was terminated without prior notice and/or monthly salary in lieu of notice as provided by the *Employment Act*, 2007.
7. The claimant states that despite demand and notice of intention to sue being given, the respondent has failed, omitted, neglected or refused to honour the claimant's demand.



### **Respondent's Case**

8. The respondent opposed this suit and filed a defence to the claim dated February 18, 2018.
9. The respondent avers that the claimant failed to perform his duties as per the terms of the employment contract.
10. The respondent avers that the claimant used to report to work late after lunch break without any valid explanation and he used to sleep while on duty which was risky for his safety and caused the respondent a lot of damages in terms of rejects.
11. The respondent avers that the claimant was dismissed from Employment as per the terms of his employment contract dated December 18, 2015.
12. The suit was canvassed by way of written submissions and supporting affidavits with the claimant filing submissions on April 11, 2023 and the respondent filed on April 26, 2023. The parties adopted their pleadings and witness statements.

### **Claimant's Submissions**

13. The claimant submitted that he was unlawfully terminated by way of summary dismissal on allegations that there were several irregularities with his performance and that being the case the respondent was required by law to give the employee notice before termination, give a hearing notice and give reasons for termination as provided section 41 of the [Employment Act](#).
14. The claimant submitted that where an employer fails to follow the mandatory provisions under section 41 of the [Employment Act](#) and he was only issued with summary dismissal letter, he was not accorded a fair hearing to defend himself on the respondent's allegations and was denied his statutory right to have another employee or shop floor union representative of his choice at the hearing and no evidence was produced to warrant his termination.
15. The claimant submitted that the respondent failed to comply with the substantive and procedural aspects of termination as required by sections 41, 43 and 45 of the [Employment Act](#) and therefore the same was unlawful and unfair under the Act.
16. The claimant submitted his termination being unfair and unlawful he is entitled to 1-month salary in lieu of notice and maximum compensation in law.

### **Respondent's Submissions**

17. The respondent submitted that the claimant was summarily dismissed as per the provisions of the employment contract dated December 18, 2015.
18. The respondent submitted on numerous occasions the claimant used to report to work after lunch break late without any proper reasons and was issued a warning letter on March 18, 2016 which he acknowledged receipt to show cause. The claimant was directed in the letter to do a written explanation; however, the claimant ignored the same which amounted to insubordination and gross negligence of duties.
19. The respondent submitted that the claimant was given a chance to fair representation and explanation and he never responded therefore the respondent was under no obligation to force the claimant to respond thus prompting the issuance of the termination.



20. The respondent submitted that it not obligated to force the claimant to assert his rights as his disinterest and wilful neglect of his duties which occasioned losses to the respondent and this led to the claimant's summary dismissal.

### **Analysis and Determination**

21. To establish whether summarily dismissal is fair and lawful, the employer must satisfactorily show this court that before determining an employee is to be dismissed its disciplinary process must be both procedurally and substantively fair.
22. The issue for determination therefore is whether claimant was unlawfully terminated or not.
23. In *Waweru v Keroche Breweries Limited* (Cause 530 of 2014) [2022] KEELRC 12799 (KLR) the court held:-

“Sections 35, 36, 40(redundancy), 41, 43, 44, 45, 46, and 47 of the *Employment Act* (the Act) provides that for an employer to fairly and lawfully terminate or dismiss any employee the employer must comply with both substantive and procedural requirements set out therein. While substantive fairness has to do with the reason(s) for termination or dismissal, which has to be reasonable and fair, procedural fairness is about due process or fair hearing. Article 47 of the *Constitution* and section 4 of the *Fair Administrative Action Act* further firms up the importance and centrality of due process and fairness in all administrative actions.

This court (ELRC) has stressed the importance and mandatory requirement for both substantive and procedural fairness in disciplinary proceedings by an employer against an employee. Where and when an employer fails to avail both to an employee, any disciplinary proceedings and resultant action, may it be termination or dismissal, is amenable to be declared unfair and unlawful by the court - 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.”

24. Substantive fairness is provided under section 43 of the *Employment Act* as follows:

- “(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
- (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”

25. The respondent submitted that the claimant was in the habit of reporting late to work after lunch break without any valid reason and when he was issued a warning letter dated March 18, 2016 and he was directed to do a written explanation, the claimant ignored the same which amounted to insubordination and gross negligence of duties. The claimant did not deny this in his supporting affidavit.
26. Against this background, this court finds the respondent had a justifiable reason to take disciplinary action against the claimant.



27. In respect to procedural fairness, section 45 (1) and (2) and section 41 of the *Employment Act* provides:
- “(1) No employer shall terminate the employment of an employee unfairly.
- (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 employees 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.”
28. The aforementioned termination in accordance with fair procedure has been set on stone under section 41 of the *Employment Act*:-
- “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.”
29. The respondent produced before this court a warning letter dated March 18, 2016 which it submitted that it constituted the claimant’s opportunity to fair representation and explanation. The claimant never responded and it is the respondent’s submission that it was under no obligation to force the claimant to respond thus prompting the issuance of the termination letter.
30. A warning letter is not a notice for disciplinary hearing. Further, the letter was not accompanied by any evidence supporting the respondent’s allegations.
31. Before summarily dismissing the claimant, the respondent did not take to account the mandatory requirements for procedural fairness set out in section 41 of the *Employment Act*.
32. This court holds that while the respondent may have had a substantively justifiable reason for summarily dismissing the claimant, it did not apply procedural fairness before dismissing the claimant, therefore, the claimant’s summary dismissal was unlawful for want of procedural fairness. As held in the case of *Waweru v. Keroche Breweries Supra* “ the court has stressed the importance and mandatory requirement for both substantive an procedural fairness in disciplinary proceedings by and employer against an employee. In *Walter Ogal Oguro v Teachers Service Commission* Cause No 955 of 2015 the



court held: “for termination to pass the fairness test, it ought to be shown that there was not only substantive justification for the termination but also procedural fairness.

33. The court finds the respondent did not satisfy the requirement threshold for terminating the claimant. The court therefore holds that the claimant was unlawfully and procedurally terminated.
34. Having found the same the claimant is awarded the following reliefs.
  1. General damages will be given at 1-month salary considering claimant worked for a short time (section 49 of *Employment Act* kshs 19,562.50/-.
  2. One month pay in lieu of notice kshs 19,562.50.
  3. Damages for unpaid leave not substantiated and so not possible to award the same.
  4. Costs are awarded to the claimant.
  5. Interest at court rates from date of judgment till full payment at the total award of kshs 39,125/-.

Order accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 29<sup>TH</sup> DAY OF SEPTEMBER, 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 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 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**

