



**Ngesa v Keroche Breweries Limited (Cause 1 of 2022)  
[2023] KEELRC 2275 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2275 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
CAUSE 1 OF 2022  
DN NDERITU, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**JARED OCHIENG NGESA ..... CLAIMANT**

**AND**

**KEROCHE BREWERIES LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. In a memorandum of claim dated 21<sup>st</sup> July, 2016 filed through Maina Makome & Co Advocates the claimant prays for: -
  - a. A declaration that the indefinite suspension of the Claimant by the Respondent amounts to an unfair termination or unlawful dismissal.
  - b. An order that the Respondent to pay the claimant's salary from 12<sup>th</sup> October 2015 to the date of filing the cause herein.
  - c. An order that the Respondent do pay the claimant damages equivalent to the claimant's gross salary equivalent to twelve months pay.
  - d. Unpaid leave days from 3.8.2015 to 09.11.2015
  - e. Three months' pay in lieu of notice
  - f. Service pay.
  - g. An order that the Respondent do issue the Claimant with a certificate of service.
2. Together with the statement of claim was filed a verifying affidavit, a statement by the claimant, and a list and bundle of the listed documents in support of the claim.



3. On 19<sup>th</sup> August, 2016 the respondent entered appearance through Ndung'u Karanja & Co Advocates and filed a statement of response to the claim on 23<sup>rd</sup> August, 2016. In the said response the respondent prays that the claimant's cause be dismissed with costs for want of merits. The respondent subsequently changed its representation and instructed Kilukumi & Co Advocates and later on instructed Waruiru Karuku & Mwangale Advocates who are currently on record.
4. In addition to the response to the claim the respondent filed a witness statement by Nicholas Kipchirchir Kechir (RW1) who testified as the only witness for the respondent. A list of two documents and copies of the listed documents were also filed by the respondent.
5. This cause came up for hearing in open court on 20<sup>th</sup> September, 2022 when the Claimant (CW1) testified and closed his case. The defence was heard on the same date with RW1 testifying and the respondent's case was closed.
6. Counsel for the both parties addressed and summed up their respective client's case by way of written submissions. Counsel for the claimant filed written submissions on 25<sup>th</sup> October, 2022, while counsel for the respondent filed on 20<sup>th</sup> December, 2022.
7. For the record, this cause was originally filed in ELRC Nairobi as Cause No. 1448 OF 2016 but the same was transferred to ELRC Nakuru for trial vide an order of Rika J issued on 10<sup>th</sup> February, 2022 as the cause of action arose at Naivasha, Nakuru County, within the jurisdiction of this court.

## **II. The Claimant's Case**

8. The claimant's case is expressed in the statement of claim, the oral and documentary evidence of the Claimant (CW1), and the written submissions by his Counsel and the same is summarized as hereunder.
9. In his memorandum of claim, the Claimant pleaded that he was engaged by the Respondent, a brewery and a limited liability company, as a dispatch officer on 3<sup>rd</sup> August, 2015 at an agreed all-inclusive gross salary of Kshs.45,000/= per month.
10. It is pleaded that on or about October 7, 2015 the dispatch manager informed the claimant that there had occurred hacking and or induced malfunctioning of the dispatch email account and that fake, manipulated, and or fraudulent orders not paid for had been received and goods in those orders loaded and delivered occasioning loss in millions of shillings to the respondent.
11. The respondent suspected that the alleged fraud had emanated from the dispatch department and launched an investigation involving officers from the Directorate of Criminal Investigations (DCI).
12. On 8<sup>th</sup> October, 2015 the claimant was summoned and questioned over the alleged fraud by the human resource manager (HR) and subsequently sent on compulsory leave to report back on 12<sup>th</sup> October, 2015. When the claimant reported to work on 12<sup>th</sup> October, 2015 he was issued with a suspension letter for seven days to 21<sup>st</sup> October, 2015. The suspension was subsequently extended to 28<sup>th</sup> October, 2015 but he received a call from HR assistant informing him to see the HR manager on 23<sup>rd</sup> October, 2015. On this last date when he reported to work he met detectives from DCI and he was questioned and interrogated in relation to the alleged fraud.
13. After several extensions of the suspension, on 9<sup>th</sup> November, 2015 the claimant was issued with a letter suspending him from duty indefinitely. The claimant alleges that he was directed by the HR manager to apply for leave in place of the days he was out on suspension prior to the indefinite suspension.



14. It is the claimant's case that he has remained on suspension since October, 2015 without any pay and that the indefinite suspension amounted to wrongful, unfair, and unlawful constructive dismissal or termination. He states that he was denied both substantive and procedural fairness as envisaged under the Employment Act (the Act) and that the same is against fair labour practice under Article 41 and against the principles of fair hearing as envisaged under Article 47 of the Constitution.
15. In his oral testimony in court the claimant relied on the foregoing contents of the memorandum of claim as reiterated and reproduced in his filed written statement dated 20<sup>th</sup> July, 2016. He produced the letter of appointment, the leave application form, suspension letters, and demand letter by his counsel, all filed with the claim as exhibits in this cause.
16. He insisted that the leave application was made under pressure from the HR manager in order for the respondent to cover itself for the unlawful suspension that had been imposed on him with a view of not paying him for the same.
17. He testified that if any fraud occurred as alleged by the respondent or at all he was not party to it. He stated that emails for ordered and paid for goods were received by the officer in-charge of dispatch one Mr. Maina who had the sole custody of the passwords to the email address. He stated that at no time did he have direct contact with any customer whether physically or virtually and that he had no capacity and did not engage in the alleged fraudulent scheme as he only acted on instructions as given by the said supervisor.
18. He stated that his role was to confirm that the goods as ordered, as communicated by his supervisor, were availed and loaded into a delivery truck with a delivery note a copy whereof was left in the custody of the supervisor who was also the acting manager dispatch.
19. He said that he was at no time given an opportunity to explain his side of the story and defend himself against the allegations of his involvement in the alleged fraud. Further, he stated that he was not served with a letter of termination and that the letter availed as an exhibit by the respondent was not addressed to his postal address as supplied in his biodata. In any event, he stated that the respondent had always contacted him through his mobile phone and no call was placed over his termination or for him to collect the alleged letter of termination.
20. He testified that he was in contact with the HR manager in March, 2016 who reassured him that he was on suspension and that his salary arrears would be paid once he resumed his duties. He was never called back to resume work. He was not even paid half-pay to which he was entitled during the suspension.
21. He stated that he had worked for about two months by the time the alleged fraud occurred and that he was not capable of engaging in such activities in a work place that was so new to him. He stated that no criminal charges were ever pressed against him. He insists that there was no basis at all for his dismissal and as he such is entitled to the reliefs sought in the memorandum of claim.
22. In cross-examination, he confirmed that other three dispatchers were suspended with him but the supervisor was not. He stated that all the three letters of suspension were hand-delivered to him and as such if the respondent indeed issued a letter of termination as alleged there is no reason as to why he was not called to pick the same. He therefore states that the alleged letter of termination relied upon by the respondent is an afterthought and manufactured to cover and sanitize the unfair and unlawful termination.
23. The submissions by his counsel shall be considered in the succeeding parts of this judgment alongside those by counsel for the respondent.



### **III. The Respondent's Case**

24. The respondent's case is expressed in the response to the claim, the oral and documentary evidence adduced through RW1, and the written submissions filed by its counsel. The respondent's case is summarized as hereunder.
25. In the filed response to the claim the respondent denies all the allegations levelled against it by the claimant and more so that it is liable for the unfair and unlawful termination or wrongful dismissal of the claimant from employment. It is pleaded that the claimant was regularly, fairly, and lawfully terminated and afforded due process both in substance and procedure. It is categorically denied that the claimant is entitled to the reliefs sought and it is urged that this claim be dismissed with costs.
26. In his testimony in court, RW1, the general manager, relied on the filed response to the claim as summarized above and on his filed statement. He also produced two exhibits as listed by the respondent being a letter of termination dated 8<sup>th</sup> April, 2016 and a copy of biodata as supplied by the claimant at recruitment as exhibits 1 and 2.
27. He stated that as one of the dispatch officers the claimant received paid for orders from the accounts section and then he was to ensure that the ordered goods were loaded and sealed for delivery. He alleged that the said orders from the accounts department were sent via email and that all the dispatch officers, including the claimant, had access to the email account.
28. He stated that in the first week of October, 2015 it was detected that an order for goods not paid for had been delivered to Nakuru and that the accounts section was not aware and had not authorized or authenticated the same as was the practice. He alleged that many other fraudulent orders were unearthed initiated through a fake and fraudulent email account. He alleged that the respondent lost about Kshs.15 Millions in the alleged fraudulent orders.
29. He stated that dispatch and accounting officers including the claimant were consequently suspended from duty to pave way for investigations by the DCI. He stated that the DCI did not avail a report on the matter and that there is no evidence that the claimant was involved in the fraud.
30. He admitted that while the claimant was interrogated by the DCI officers in the presence of a HR officer, there was no formal disciplinary hearing of his alleged misconduct. He stated that the claimant was suspected of having been involved in the fraud and that is why he was terminated.
31. In cross-examination RW1 admitted that there was no duty roster to confirm that the claimant was on duty when the alleged fraud and or theft occurred. He also admitted that there is no evidence or record of what was actually lost or stolen in the alleged fraud. He also admitted that the address on the termination letter is different from the one provided by the claimant in his biodata. He admitted that there is no evidence connecting the claimant to the alleged fraud or theft. Further, he admitted that no terminal dues were paid to the claimant.
32. The submissions by counsel for the respondent shall be considered in the succeeding parts of this judgment alongside those by counsel for the claimant.

### **IV. Issues for Determination**

33. Upon thorough and careful examination and consideration of the pleadings filed, the oral and documentary evidence tendered from the Claimant and RW1, and the submissions by counsel for both parties the court identifies the following issues for determination –



- a. Was the Claimant unfairly and unlawfully terminated or wrongfully dismissed by the Respondent?
- b. If (a) above is in the affirmative, is the Claimant entitled to the reliefs sought in the claim?
- c. Who meets the costs in this cause?

## V. Dismissal/Termination

34. The terms of engagement of the Claimant by the Respondent are not in dispute as contained in the letter of appointment dated 3<sup>rd</sup> August, 2015, which engagement took effect from that date. The Claimant was on a gross monthly consolidated salary of Kshs.45,000/=.
35. It is common ground that in early October, 2015 there was an allegation by the respondent that a fraud and or theft had been detected allegedly occasioning huge financial loss to the respondent. As a result, the claimant and other officers from dispatch and accounts departments were suspended indefinitely.
36. It is the claimant's case that he was not thereafter contacted by the respondent and as such he assumed that he had been constructively dismissed and hence he filed this cause in court seeking the reliefs reproduced in the introductory part of this judgment.
37. It is the claimant's position that the letter of termination produced in court by the respondent was not served upon him and that the address thereon is not the one that he had supplied in his biodata to the respondent. He saw the said letter in court for the first time.
38. It is the claimant's case that he was not given a hearing as required in law and as such he was denied procedural fairness. He posits that he was not involved in the alleged fraud and or theft and as such there was no lawful substantive reason for his dismissal as required by the law.
39. It is admitted by the respondent that the letter of termination bears the wrong address and that there is no evidence that the claimant was involved in the alleged fraud or theft. It is also admitted that the claimant was not subjected to due process of the law. It is also admitted that no terminal dues were paid to the claimant.
40. This court comes to the logical and reasonable conclusion and holds that the Respondent unfairly and wrongfully dismissed the Claimant without notice and without affording him both substantive and procedural fairness as envisaged by the law under Sections 41, 43, 45, and 47 of the *Employment Act* (the Act).
41. Counsel for the Claimant has correctly submitted on the above cited provisions in buttressing the argument that the termination was completely unfair and unlawful. The alleged letter of termination was addressed to the wrong postal address and no evidence at all is availed that the letter was posted or delivered to the claimant. The claimant was not subjected to disciplinary hearing as envisaged under the Act, Article 47 of the *Constitution*, and Sections 4 to 6 of the *Fair Administrative Action Act*.
42. Counsel for the respondent has cited various authorities on what constitutes wrongful dismissal or unlawful termination for lack of substantive and procedural fairness. Counsel has cited *Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR, *Jane Nyandiko V Kenya Commercial Bank* (2017) eKLR, and *Pamela Nelima Lutta V Mumias Sugar Co. Ltd* (2017) eKLR which in my view supports the claimant's case.
43. This is rather a straight forward matter which in my view the respondent should have settled without waiting to be sued in court. There is no iota of evidence that the claimant was engaged in the alleged fraud or theft and there is no dispute that he was not subjected to a disciplinary hearing. Is that not the



hallmark of an unfair and unlawful dismissal? As long as matters like this one keeps on coming to court, with the party obviously and clearly in wrong failing and or refusing to settle the matter at the earliest, it will be rather difficult for our courts to deal with and eliminate backlog of cases in their portfolio.

44. The court has said enough in demonstrating that the claimant's dismissal was wrongful, unfair, and unlawful. Wrongful dismissal as no notice was served upon the claimant. It is so held and declared.

## VI. Reliefs

45. Having held that the Claimant was wrongfully, unfairly, and unlawfully dismissed for lack of notice, substantive, and procedural fairness, this court shall now consider each of the reliefs sought as hereunder.
46. Prayer (a) is for a declaration that the indefinite suspension of the claimant from work by the respondent amounts to unfair and unlawful termination or dismissal. The evidence on record is that the respondent issued to the claimant a letter of termination on 8<sup>th</sup> April, 2016. As analyzed above, the said letter was addressed to the wrong address and there is no evidence that the same was either sent, delivered, or received by the claimant. On a balance of probability, and for lack of any other probative evidence, this court finds and holds that the suspension of the claimant from work came to an end upon the respondent's decision to terminate him on the said date and issuing the said letter, albeit without serving the same upon the claimant. The termination was a dismissal for lack of notice.
47. In the foregoing circumstances, the appropriate order to make in this regard is that the dismissal of the claimant by the respondent vide the letter dated 8<sup>th</sup> April, 2016, or in any other manner whatsoever was wrongful, unfair, and unlawful for lack of both substantive and procedural fairness. It is so held and declared.
48. Prayer (b) is for an order that the respondent do pay to the claimant salary from 12<sup>th</sup> October, 2015 to the date of filing this cause. This cause was filed in court on 23<sup>rd</sup> July, 2016. However, this court has found above that the decision to terminate the claimant was made in April, 2016 only that the attendant letter of termination was not properly addressed and or delivered to the claimant. In the circumstances, the appropriate remedy under this head is that the claimant be paid salary arrears for the period from October, 2015, when he was suspended, to April, 2016, when he was terminated at the monthly rate of Kshs.45,000/= calculated as – Kshs.45,000/ \* 7 months = Kshs.315,000/=. This amount is subject to statutory deductions.
49. Prayer (c) is for compensation for unfair and unlawful termination. The claimant is seeking the maximum award of 12 months salary under Section 49(1)(c) of the Act. The factors that this court should consider in making an award under this head are catered for under Section 49(4) of the Act. As at the time of suspension from duty the claimant had worked for only two months. He remained on suspension until April, 2016 when he was terminated, although the termination, which was in effect a dismissal, was not communicated to him.
50. It is admitted by the respondent that no evidence of misconduct was established against the claimant. The respondent has not expressed an interest in re-engaging the claimant and this court cannot order reinstatement as time for such an order has lapsed. There is no doubt that the respondent treated the claimant in a most unfair and unlawful manner. The claimant was denied due process and there was no lawful reason for the termination. He was denied an opportunity for career growth and livelihood. He informed the court that upon suspension he remained unemployed until February, 2017 when he found another job.



51. Considering the entire circumstances of this cause, bar the short period that the claimant served the respondent, this is a proper cause for an award of the maximum compensation of 12 months gross salary. However, doing the best that I can and in consideration of all the foregoing factors, the court awards compensation for wrongful, unfair, and unlawful dismissal equivalent to six months gross salary calculated as – Kshs.45,000/= \*6= Kshs.270,000/=. This award is subject to statutory deductions.
52. Prayer (d) is for unpaid leave. As noted above the claimant worked for only a month or so and was thereafter suspended. He did not earn any leave in that short working period. He alleged that he signed leave forms under duress but no such duress or coercion was proved. This prayer is hereby denied and dismissed.
53. Prayer (e) is for three months pay in lieu of notice. However, the uncontested contract of employment produced in court by the claimant clearly and categorically provides for one month’s notice or payment of salary equivalent by either party exiting the contract. There is no reason or logic given as to why the claimant is seeking for three months pay in lieu of notice instead of the one month provided for in the contract. The claimant is awarded one month’s gross salary in the sum of Kshs.45,000/= under this head.
54. Prayer (f) is for service pay. In the written submissions counsel for the claimant has quantified the same at Kshs.4,978/=. Again, no justification has been made for the same as the claimant did not serve for one year which would have qualified him for service pay equivalent to 15 days pay under the law. This prayer is thus denied and dismissed.
55. Prayer (g) is for an order that the respondent do supply the claimant with a certificate of service under Section 51 of the Act. The evidence on record is that the claimant worked for more than four consecutive weeks. It is now over seven years since he was dismissed and there is practically nothing left for him to clear with the respondent. In the circumstances, the respondent is ordered to unconditionally issue and deliver a certificate of service to the claimant within 30 days of this judgment.

## VII. Costs

56. Costs follow the event and therefore the Claimant is awarded costs of this cause.

## VIII. Disposal

57. In final disposal of this cause, this court issues the following orders: -
  - a) A declaration be and is hereby issued that the termination of the claimant by the respondent amounted to wrongful, unfair, and unlawful dismissal.
  - b) The claimant is awarded a total of Kshs.630,000/= made up as follows –
    - i. Salary arrears ..... Kshs.315,000/=
    - ii. Salary in lieu of notice ..... Kshs. 45,000/=
    - iii. Compensation for wrongful, unfair, and unlawful dismissal ..\_Kshs.270,000/=
    - Total .....Kshs.630,000
  - d) The respondent is hereby ordered to issue and deliver a certificate of service to the claimant within 30 days of this judgment.
  - e) Costs of the cause to the claimant.



DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 28<sup>TH</sup> DAY OF SEPTEMBER, 2023.

.....

DAVID NDERITU

JUDGE

