



Roy Hauliers Limited v Njora (Employment and Labour Relations Appeal E040 of 2022) [2023] KEELRC 2172 (KLR) (22 September 2023) (Judgment)

Neutral citation: [2023] KEELRC 2172 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E040 OF 2022**

**SC RUTTO, J
SEPTEMBER 22, 2023**

BETWEEN

ROY HAULIERS LIMITED APPELLANT

AND

JOSEPH KAGUONGO NJORA RESPONDENT

(Being an appeal against the Judgment and decree of Hon. E. Wanjala dated 4th March, 2022 in the Chief Magistrate's Court at Nairobi in CM ELRC No. 927 of 2019)

JUDGMENT

1. The Respondent commenced a suit against the Appellant at the Chief Magistrate's Court at Milimani being ELRC No. 927 of 2019. It was the Respondent's case that he was employed by the Appellant as a Heavy Commercial driver at a monthly salary of Kshs 33,892/=. According to the Respondent, he served the Appellant with loyalty and diligence until on or about February, 2018 when the Respondent wrongfully and unlawfully terminated his employment. He contended that the Appellant did not follow due process and further failed to pay him terminal dues. Consequently, he sought against the Appellant the sum of Kshs 1,702,088.00 being salary for February, 2018, notice pay, unpaid leave days, house allowance, compensatory damages and fuel consumption loan.
2. The Claim was opposed by the Appellant through its Amended Statement of Defence in which it averred that the Respondent was subject of various disciplinary issues at various dates for which he was given warnings. The Appellant further stated that upon the Respondent's termination, he did not have any outstanding final dues as his total dues exceeded his final dues by Kshs 5,500/=. Alongside its Defence, the Appellant lodged a Counterclaim against the Respondent in the sum of Kshs 150,000/=. In this regard, the Appellant alleged that the Respondent caused it loss of Liquefied Petroleum Gas (LPG) by siphoning and selling diesel from truck number KBU 196S which he drove. To this end, the Appellant asked the Court to dismiss the suit with costs and enter Judgment in its favour against the Respondent for the sum of Kshs 150,000/=.



3. At the trial Court, both parties were orally heard and their evidence was tested in cross examination. Further, they filed written submissions after close of the hearing. The trial Court evaluated and analyzed the evidence on record, and in the end, allowed the Claim and dismissed the Appellant's Counterclaim. The trial Court while observing that the Appellant may have had a justified reason to terminate the Respondent's services, was of the view that it did not follow due process in so doing. The trial Court was persuaded that the Respondent's services were unprocedurally, unfairly and unlawfully terminated by the Appellant. Consequently, the trial Court awarded the Respondent one month's salary in lieu of notice, salary for February, 2018 and compensation for unfair termination. The Court further awarded the Respondent costs of the suit and ordered that his Certificate of Service be issued forthwith.

The Appeal

4. The Appellant being aggrieved by the findings and orders of the trial Court has sought to challenge them on the following seven grounds listed in its Memorandum of Appeal:
 1. The learned Principal Magistrate erred and was wrong in holding that the respondent's contract of employment was unfairly terminated in light of evidence on record that the respondent was given opportunity to explain the loss of 110 kilograms of Petroleum gas worth Kshs.150,000/= in evidence with the provisions of Section 45 of the [Employment Act](#).
 2. The learned Principal Magistrate erred and was wrong in holding that the respondent's termination of employment was unfair when on being given opportunity to explain the loss of the said 110 kilograms of petroleum gas the claimant had failed to do so and in circumstances the appellant had a valid reason to terminate the respondent's employment.
 3. The learned Magistrate having found that the loss of the said 110 kilograms of Petroleum gas happened whilst it was in possession and control of the respondent shifted the burden of proof to the appellant by requiring the appellant to prove how the loss occurred with the complicity of the respondent.
 4. The learned Magistrate erred and was wrong in finding that the respondent was liable to shoulder the loss occasioned by the applicant despite the respondent adducing evidence.
 5. The learned Magistrate further erred and was wrong in her evaluation of the evidence as to when the respondent's services were terminated and when the disciplinary proceedings before termination were conducted and, in the circumstances, arrived at a wrong decision that due process was not followed before the respondent's contract of employment was terminated.
 6. The learned Magistrate erred and was wrong in dismissing the appellant's counterclaim for 110 kilograms of petroleum gas worth Kshs.150,000/= because the respondent having admitted that he had it in his possession and control of the said gas and having not explained its loss the logical inference was that such loss occurred on account of the explained (sic) its loss the logical inference was that such loss occurred on account of the negligence and/or complicity of the respondent and for which loss the respondent was required to make good.
 7. The learned Magistrate was partial and biased as against the appellant.

The Submissions

5. The Appeal was canvassed by way of written submissions. Both parties complied and I have considered their respective submissions. On its part, the Appellant submitted that in terminating the



Respondent's employment, fair procedure was followed in accordance with Section 45(2) (c) of the *Employment Act*. To this end, the Appellant argued that the Respondent was given a show cause letter, a meeting was held where he was given an opportunity to be heard and he even did a letter explaining the loss of the gas.

6. The Appellant further submitted that the onus was on the Respondent to explain the loss of the gas in his possession and the evidential burden was on him to explain that the loss occurred without his complicity and any negligence on his part. On this issue, it was contended that the Learned Magistrate had in contravention of Section 112 of the *Evidence Act* shifted the burden of proof to the Appellant. The Appellant further maintained that the Respondent's employment was validly and fairly terminated in terms of Section 43 and 47 of the *Employment Act*.
7. With regards to its Counterclaim, the Appellant submitted that the loss was admitted by the Respondent hence the Learned Magistrate should have allowed the same in the sum of Kshs 150,000/=.
8. On the other hand, the Respondent submitted that the Appellant failed the substantive test and by law, that account alone, was enough for the trial Court to make a declaration that his termination was fair. To this end, the Respondent urged that the trial Court made the correct finding. In support of the Respondent's arguments, reliance was placed on the cases of *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR and *Pamela Nelima Lutta v Mumias Sugar Co. Ltd* (2017) eKLR.
9. The Respondent further submitted that the Appellant having failed to prove and justify that indeed, he was responsible for the loss of 110 kgs gas, the Counterclaim for the said loss cannot stand. It was the Respondent's further submission that the Appellant did not provide evidence on how it arrived at the figure of 110 kgs and Kshs 150,000/= hence the trial Court did not err in dismissing the Counterclaim.

Analysis and determination

10. Being a first appeal, this Court has a duty to reconsider the evidence, evaluate it and draw its own conclusion but making allowance for the fact that it has not seen or heard the witnesses. Such was the determination by the Court of Appeal in *J. S. M. v E. N. B.* [2015] eKLR, thus: -

“We shall however bear in mind that this Court will not lightly differ with the trial court on findings of fact because that court had the distinct advantage of hearing and seeing the witnesses as they testified and was therefore in a better position to assess the extent to which their evidence was credible and believable. Should we however, be satisfied that the conclusions of the trial judge are based on no evidence or on a misapprehension of the evidence on record or that the learned judge demonstrably acted on wrong principles, we are enjoined to interfere with those conclusions.”
11. In view of the above duty, I am enjoined to revisit the evidence presented before the trial Court afresh and analyze it in order to arrive at my own independent conclusion but bearing in mind that I did not see or hear the witnesses as they testified.
12. Having reviewing the record before me, the opposing submissions, as well as the law applicable, to my mind, the following issues stand out for determination by the Court: -
 - a. Whether the Appellant proved that it had a valid and fair reason to terminate the Respondent's employment;
 - b. Whether the termination of the Respondent's employment was in line with fair procedure;
 - c. Is the counterclaim justified?



- d. Whether the remedies awarded to the Respondent lie in law.

Valid and fair reason?

13. The starting point in determining this issue is Section 43(1) of the *Employment Act* (Act) which places the burden of proving the reasons for termination on the employer and in default, such termination is rendered unfair. In addition, Section 45 (2) (a) and (b) of the *Act*, renders a termination of employment unfair where the employer fails to prove that the reason for the termination is valid, fair and relates to the employee's conduct, capacity or compatibility; or based on its operational requirements.
14. In the instant case, the Respondent averred that he was terminated verbally. As it is, there is no letter of termination on record. Be that as it may, it was not in dispute that the Respondent's termination from the Appellant's employment was due to loss of Liquefied Petroleum Gas (LPG) which he had been instructed to collect from Mombasa and deliver to the Appellant's client in Eldoret.
15. A review of the record reveals that the Respondent admitted in his testimony in chief before the trial Court, that he went on a trip to Eldoret and on coming back he had a shortage of 100 kgs LPG. Cross examined, the Respondent made the same admission to the effect that, after offloading the gas at Eldoret, he had a shortage of 100kgs. On further cross examination, he testified that he wrote a letter admitting the loss of 100 kg LPG.
16. The Respondent's version of events in this respect corresponded with the evidence of the Appellant's witness on all fours. From the record, the Respondent could not account for the loss of the 100kgs LPG. Having been tasked by the Appellant with the delivery of the LPG from Mombasa to Eldoret, it follows that the same was in the Respondent's possession and only he, could explain the loss. From the record, he did not render any plausible explanation hence his termination.
17. Having failed to account for the loss of the LPG in his possession, it is highly probable that the Respondent's credibility significantly diminished in the eyes of the Appellant. In this regard, the Respondent by his own actions and omissions, gave the Appellant reasonable and sufficient grounds to suspect his complicity in the loss of the 100kgs LPG. In terms of Section 43(2) of the Act, the reason or reasons for termination are 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. This is the applicable standard of proof in cases of termination of employment. The employer is not obliged to prove beyond reasonable doubt the misconduct on the part of an employee.
18. My position is fortified by the determination in the case of *Kenya Revenue Authority v Reuwel Waitbaka Gitabi & 2 others* [2019] eKLR, where the Court of Appeal found that the standard of proof applicable in employment disputes is on a balance of probability and not beyond reasonable doubt, and all the employer is required to prove, are the reasons that it "genuinely believed to exist," causing it to terminate the employee's services. The Learned Judges further opined that it is not for the court to substitute its own 'reasonable grounds' with those of the employer. I wholly subscribe to this position.
19. Similarly, and being guided by the finding in the aforesaid case, I hold that the Appellant only needed to prove that the reasons for the Respondent's termination, are those reasons it genuinely believed to exist at the time. In this case, the reasons touched on the level of honesty in handling the Appellant's goods.
20. Noting the nature of the Respondent's duty, he was required to be honest and trustworthy as the Appellant had put its trust in him and placed in his possession valuable goods. How could he be trusted moving forward, if he could not account for the loss of 100kgs LPG in his possession?



21. In my considered view, the circumstances of this case do not portray the Respondent as an honest and trustworthy employee. Faced with this scenario, the Appellant had a fair and valid reason to take appropriate disciplinary measures against the Respondent.
22. To this end, it is my finding that the Appellant had a reasonable and sufficient reason to take disciplinary action against the Respondent and ultimately, terminate his employment due to failure to account for the loss of the LPG in his possession.

Procedural fairness?

23. The requirement for fair procedure is generally provided for under section 45 (2) (c) of the Act. Additionally, Section 41 (1) of the Act makes specific requirements in regards to the process to be complied with by an employer. It entails notifying the employee of the allegations levelled against him or her and granting him or her the opportunity to make representations in response to the said allegations in the presence of a fellow employee or a shop floor union representative of own choice.
24. The Appellant averred that it issued the Respondent with a notice to show cause and that a meeting was held where he was given an opportunity to be heard.
25. Despite the Appellant's position, it did not place on record before me, evidence constituting the notice to show cause and the minutes of the disciplinary hearing. Without this crucial piece of evidence, it is not possible to ascertain whether the Respondent was given a fair hearing within the meaning of Section 41 of the Act prior to being terminated.
26. Several questions linger. For instance, how was the Respondent notified of the hearing? What was the time frame given to the Respondent to appear for the hearing? Was it sufficient and reasonable? Was the Respondent given an opportunity to explain his side of the story at the hearing? Was he allowed to be accompanied to the hearing? The answers to these questions cannot be found on the record hence casting doubt on the Appellant's version that the Respondent was accorded a fair hearing prior to being terminated from employment.
27. In considering the import of Section 41 of the Act, the Court of Appeal had this to say in the case of Postal Corporation of Kenya v Andrew K. Tanui [2019] eKLR:

“ 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 decision to the instant case and in absence of relevant evidence from the Appellant's end, I cannot help but find that the Appellant has not proved that it acted in compliance with the spirit of Section 41 of the Act. To this end, the Appellant failed to discharge its burden under Section 45(2) (c) of the Act.



29. In total sum, I find that the Respondent's termination from employment although substantively justified, was procedurally unfair as the Appellant failed to lead evidence to prove that it accorded the Respondent a fair hearing. Consequently, the Respondent's termination was unlawful.

Counterclaim?

30. The Appellant lodged a Counterclaim against the Respondent at the trial Court for the sum of Kshs 150,000/=. This was arising from the loss of 100kgs LPG, which loss it attributed to the Respondent. In its determination, the trial Court dismissed the Counterclaim.
31. By its very nature, the Appellant's Counterclaim constitutes a specific claim. The law is settled that a claim for special damages must not only be specifically pleaded but must also be strictly proved with as much particularity as the circumstances permit. In this case, the Appellant did not place before Court evidence to support its claim. For instance, how did it arrive at the figure of kshs 150,000/= ? As a matter of fact, there was no single document to guide the Court on the value of the LPG gas the Appellant sought to recover through its Counterclaim. In the circumstances, the Appellant did not discharge its legal burden of proof to strictly prove its claim.
32. My thinking accords with the determination by the Court of Appeal in *Capital Fish Limited v Kenya Power and Lighting Company Limited* (2016) eKLR:
- “The appellant apart from listing the alleged loss and damage, it did not ...lead any evidence at all in support of the alleged loss and damage. As it were, the appellant merely threw figures at the trial court without any credible evidence in support thereof and expected the court to award them. Indeed, there was not credible documentary evidence in support of the alleged special damages.”
33. It is on the premises of the foregoing that I disallow the Appellant's Counterclaim. Consequently, the same is dismissed in its entirety.

Remedies

Compensatory damages

34. The trial Court having found that the Respondent's termination was unfair and unlawful, awarded him compensatory damages in the sum of Kshs 237,244/=. Taking into account the Respondent's monthly salary, this award translates to an equivalent of seven (7) months of his gross salary. This award falls within the remedies available under Section 49 of the Act, to an employee whose employment has been terminated unfairly.
35. It is notable that the award of remedies under the aforesaid statutory provision is a question of judicial discretion, which is to be exercised prudently.
36. Section 49(4) stipulates the considerations which the court must take into account before determining what remedy is appropriate in each case. Such considerations include, the length of the employment relationship, the circumstances of the termination and the extent to which the employee caused or contributed to the termination.
37. In this case, as I have found that the Respondent by his own conduct gave the Appellant a valid and fair reason to terminate his employment, thus contributing to his own termination, it goes without saying that an award by way compensatory damages ought to take that into account.



38. Accordingly, I set aside the award equivalent to seven (7) months' gross salary and substitute the same with an award of three (3) months' gross salary.

One month's salary in lieu of notice

39. The award of one (1) month's salary in lieu of notice is sustained as the Court has found that the Respondent's termination was procedurally unfair hence unlawful.

Salary for the month of June and July 2019

40. With regards to the salary for 12 days worked in the month of February, 2018, the same is sustained as the Appellant did not contest the same.

Orders

41. The total sum of my consideration is that the Appeal is partially allowed as follows: -

- a. The award of compensatory damages to the Respondent, is sustained but reduced to Kshs 101,676.00 being equivalent to three (3) months of his gross salary.
- b. The award of one (1) month's salary in lieu of notice to the Respondent is sustained in the sum of Kshs 33,892.00.
- c. The award of salary for 12 days for the month of February, 2018 is sustained in the sum of Kshs 13,560.00.
- d. The decretal amount in the sum of Kshs 284,696.00 is hereby set aside and the award is determined at Kshs 149,128.00.
- e. The Counterclaim stands dismissed with no orders as to costs.
- f. Costs in this Court and at the trial Court shall be borne by the Appellant and shall be pegged on the final award.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2023.

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STELLA RUTTO

JUDGE

Appearance:

For the Appellant Dr. Chokaa

For the Respondent Mr. Odhiambo

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 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 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

