



**Wabaya v Thuo t/a Hills Cycle Mart (Cause 1642 of 2017)
[2023] KEELRC 2171 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2171 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1642 OF 2017
SC RUTTO, J
SEPTEMBER 22, 2023**

BETWEEN

SADICK WANJALA WABAYA CLAIMANT

AND

DANIEL KANJA THUO T/A HILLS CYCLE MART RESPONDENT

JUDGMENT

1. The instant suit was commenced by way of a Memorandum of Claim filed on 23rd August, 2018, in which the Claimant avers that he was employed by the Respondent as a shop attendant with effect from 2nd June, 2008. He avers that he performed his duties well with diligence, enthusiasm, resourcefulness, reliability and honesty until he was summarily dismissed from employment on 25th November, 2016. It is his case that he was not provided with a written contract of service and that his dismissal was verbal. The Claimant has termed his dismissal as unfair, inhumane and callous hence seeks against the Respondent the sum of Kshs 865,198/= being compensatory damages, compensation for rest days, public holidays, leave pay, house allowance, notice pay and severance pay.
2. The Respondent challenged the Claim through its Statement of Response dated 19th June, 2018. The Respondent avers that the Claimant was terminated on account of theft/loss of its goods. The Respondent further states that the Claimant's employment was terminated procedurally and for good cause. The Respondent has further lodged a counterclaim against the Claimant in the sum of Kshs 380,251/=. Consequently, the Respondent prays that the Claimant's suit be dismissed with costs and judgment be entered against him in the sum of Kshs 380,251/=.
3. The matter proceeded for hearing on 2nd May, 2023, during which both sides called oral evidence.



Claimant's Case

4. The Claimant testified in support of his case and to start with, he sought to adopt his witness statement to constitute his evidence in chief. He proceeded to produce the documents filed together with his Claim as exhibits before Court.
5. It was the Claimant's testimony that he was verbally dismissed from employment on 25th November, 2016. According to the Claimant, this was after he had informed the Respondent of his intention to resign with effect from 31st December, 2016. He avers that he was never issued with a warning letter and neither was he called for a disciplinary meeting. Being aggrieved, he reported the matter to the Kenya Union of Commercial Food and Allied Workers which issued the Respondent with a demand notice dated 30th November, 2016.
6. The Claimant further stated that on 30th November, 2016 at 1500 hours, the Respondent maliciously and without any justification made a false report to the Kamukunji Police Station accusing him of theft by servant which action was only aimed at frustrating and pre-empting his right to claim his rightful and lawful terminal benefits.
7. It was the Claimant's evidence that he has presented himself on several occasions at Kamukunji Police Station with the sole objective of co-operating with the investigations officer to conclude investigations. However, the indolence of the Respondent has depicted indifference and unwillingness to substantiate his allegations.

Respondent's Case

8. The Respondent testified in support of his case. He started by adopting his witness statement to constitute his evidence in chief. He further produced the documents filed on his behalf as exhibits before Court.
9. It was the Respondent's testimony that he has a shop which is located in Kiriani Building in Kamukunji opposite the Machakos Bus Station. He knows the Claimant who used to initially ferry goods for customers outside his shop and subsequently, he engaged him to load and off load goods and carry out deliveries to clients. He subsequently employed the Claimant as a casual worker specifically to be in charge of attending to his shop at a daily wage of Kshs 500/= with the mode of payment being done via Mpesa and/or cash.
10. It was the Respondent's further evidence that he started to suspect irregularities in the manner in which the business was being run for some time and decided to undertake further investigations. On or around 25th November, 2017, the Claimant was placed on suspension after it was realised there were discrepancies in the stock and books of accounts which could no longer be ignored. He engaged a 3rd party to do an audit and come up with a report of the business.
11. He also reported the Claimant to Kamukunji Police Station and obtained an OB with regards to the same. While in the process of undertaking investigations, he received a demand letter from the Claimant's Advocate. The said letter had huge demands and accusations of unlawful termination. The Respondent contended that he had not communicated in any way to the Claimant that the work relationship had come to an end.
12. It was his testimony that he was in the process of arranging a disciplinary hearing process when he received the Claimant's demand letter. On 12th January, 2016, he invited the Claimant via a Notice to Show Cause letter to answer the said discrepancies to no avail.



13. According to the Respondent, the Claimant's Claim for 12 months compensation is not valid as there were valid reasons to terminate his employment and he followed due process. He also avers that he has never operated his business on Sundays as this is a rest day hence the Claimant's claim in this regard is not valid. He also does not operate during public holidays. The Claimant also went on his leave days and none is due or outstanding.
14. The Respondent RW1 further stated that he has audit reports that indicate loss of stock of Kshs.380,251/=. The Claimant was in charge of the store and he has not explained how these items worth Kshs 380,251/= went missing from the store. It was the Respondent's view that when the Claimant knew he was being suspected of loss of stock/theft, he brought these proceedings. He would like to be compensated for the losses attributable to the Claimant. He also believes that the Claimant's actions and behaviours are in bad faith and geared towards evading punishment by the law and to frustrate further investigations by the police.
15. He has never had bad intentions towards any of his employees and specifically the Claimant since he had entrusted him with his property and has never asked him to leave work at any point.

Submissions

16. It was submitted on behalf of the Claimant that he was never given a chance to be heard and was never summoned to any disciplinary committee. Placing reliance on the case of *Jane Nyandiko vs Kenya Commercial Bank Limited* (2017) eKLR, it was the Claimant's further submission that he was never notified of the reasons for his termination and was not given a chance to be heard before the said termination.
17. The Respondent did not file any submissions as the same were missing from the Court's physical record and were not traceable on the online portal.

Analysis And Determination

18. I have considered the pleadings by both parties, the evidence, as well as the submissions on record and isolated the following issues for determination: -
 - i. Whether the Respondent had a fair and valid reason to terminate the employment of the Claimant;
 - ii. Was the Claimant accorded procedural fairness prior to being terminated from employment?
 - iii. Is the Claimant entitled to the reliefs sought?

Valid And Fair Reason?

19. Section 43 as read together with Section 45 (2) (a) and (b) of the *Employment Act* (Act) are the key statutory provisions in determining this issue. On its part, Section 43 requires an employer to prove the reasons for termination while Section 45(2) (a) and (b) provides that a termination of employment 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; ...



20. In this case, it is notable that no letter of termination was presented before Court hence the reason for the Claimant's termination cannot be ascertained therefrom. From the Claimant's perspective, he was verbally terminated from employment following his indication to the Respondent that he intended to resign. On the other hand, the Respondent avers that the reason for termination of the Claimant's services was due to loss/theft of his stock. In support of his case, the Respondent exhibited a Stock Transaction Report which comprised amongst others, an Accountant's Certificate dated 14th February, 2017 and a statement of stock movement. According to the Accountant's Certificate, there was a deficit of Kshs 380,251/= in the stock count as at 23rd November, 2016. The pertinent question thus, is whether the Claimant was responsible for the loss of the Respondent's goods. The answer to this question lies in the nature of the duties and responsibilities assigned to the Claimant at the material time.
21. Whereas the Respondent stated that the Claimant was the employee in charge of stores, he did not exhibit a written contract of service or a job description for that fact, enumerating the duties and responsibilities assigned to the Claimant. This is further noting that the Claimant stated that he was employed as a shop attendant. These are distinct roles and the question as to whether the Claimant was responsible for the loss/theft of the Respondent's goods can only be resolved upon perusal of his contract of service or job description, stipulating his duties and responsibilities.
22. In absence of a written contract of service or job description, it is hardly possible to ascertain whether indeed, the alleged loss of the Respondent's goods is attributable to the Claimant.
23. Being the employer in this case, hence bearing the onus of proving that the reason for the Claimant's termination was fair and valid, it is this Court's finding that the Respondent has failed to link the Claimant to the loss/theft of his goods.
24. Applying the provisions of Section 45(2) (a) and (b) of the Act, to the case herein, it is this Court's finding that the Respondent has failed to prove to the requisite standard that it had a fair and valid reason to terminate the Claimant's employment on account of loss/theft of his goods.

Procedural Fairness?

25. Turning to the question of fair procedure, 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.
26. It was the Respondent's case that the Claimant's services were terminated procedurally. In support of its case, the Respondent exhibited a copy of an undated notice to show cause. Notably, the same is addressed to the Respondent as opposed to the Claimant. Testifying under cross examination, the Respondent stated that he never issued the Claimant with the said notice to show cause. Therefore, it cannot be ascertained whether the Claimant was indeed notified of the reasons for which the Respondent was considering terminating his employment. In any event, the letter constituting the notice to show cause is not addressed to the Claimant.
27. The Respondent further exhibited a copy of minutes of a disciplinary hearing of 24th April, 2017. The said minutes indicate that the Claimant was absent from the proceedings. However, there being no evidence that the Claimant was duly notified of the said hearing, his absence from the proceedings does not come as a surprise.



28. What this essentially means is that the Claimant's termination fell below the threshold established under Section 41 of the Act hence was procedurally unfair within the meaning of Sections 45(2) (c) of the Act.
29. In the end, the Court is satisfied that the Claimant's termination from employment was devoid of substantive justification and procedural fairness within the meaning of Sections 41, 43, and 45 of the Act.
30. In total sum, the Claimant's termination was unfair and unlawful.

Reliefs?

31. As the Court has found that the Claimant's termination was both unfair and unlawful, he is awarded one (1) months' salary in lieu of notice and compensatory damages equivalent to seven (7) months of his gross salary. This award takes into consideration the length of the employment relationship as well as the circumstances attendant to the Claimant's termination.
32. The claim for unpaid leave also succeeds as the Respondent did not exhibit any leave records in accordance with his legal obligation under Section 74(1) (f) of the *Employment Act*, to demonstrate the leave days taken by the Claimant and those outstanding. However, in light of Section 28(4) of the *Employment Act*, the same is limited to 18 months preceding the separation.
33. The claim for rest days and unpaid public holidays is denied for want of proof and specificity. My position is fortified by the determination by the Court of Appeal in *Patrick Lumumba Kimuyu vs Prime Fuels (K) Limited* [2018] eKLR, where the learned Judges cited with approval the case of *Rogoli Ole Manadiegi vs General Cargo Services Limited* (2016) eKLR, thus: -

“Addressing a similar issue this Court in its decision in *Rogoli Ole Manadiegi vs. General Cargo Services Limited* (2016) eKLR expressed as follows;

“It is true the employer is the custodian of employment records. The employee, in claiming overtime pay however, is not deemed to establish the claim for overtime pay by default of the employer bringing to court such employment records. The burden of establishing hours or days served in excess of the legal maximum, rests with the employee. The claimant did not show in the trial court when he put in excess hours, when he served on public holidays or even rest days... he did not justify the global figure claimed in overtime, showing specifically how it was arrived at...”

The Court disallowed that claim. This case is on all fours with the above case and we reiterate the above finding. The finding by the trial court that the appellant had failed to prove his claim with regard to compensation for public holidays and Sundays worked is without fault. That ground of appeal must therefore fail.”

34. Applying the above determination to the case herein, it is this Court's finding that the Claimant has not proved and established the public holidays and rest days he alleges he was required to work without being compensated accordingly. As such, this relief cannot be sustained.
35. The claim for severance pay is also declined as the same is only awarded pursuant to Section 40(1) (g) of the *Employment Act*, in instances where termination has occurred on account of redundancy, which was not the case herein.



Orders

36. In the end, I enter Judgment in favour of the Claimant against the Respondent and he is awarded: -
- a. One month's salary in lieu of notice being the sum of Kshs 17,000.00.
 - b. Compensatory damages in the sum of Kshs 119,000.00 which sum is equivalent to seven months of his gross salary.
 - c. Unpaid leave in the sum of Kshs 17,850.00.
 - d. The total award is Kshs 153,850.00.
 - e. Interest on the amount in (d) at court rates from the date of Judgment until payment in full.
37. The Claimant is also entitled to a Certificate of Service in terms of Section 51(1) of the [Employment Act](#).
38. The Claimant shall have the costs of the suit.

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

STELLA RUTTO

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 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

