



**Sombo v General Plastics Limited (Cause 2059 of 2016)  
[2023] KEELRC 2166 (KLR) (20 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2166 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 2059 OF 2016  
NZIOKI WA MAKAU, J  
SEPTEMBER 20, 2023**

**BETWEEN**

**HAMISI SOMBO ..... CLAIMANT**

**AND**

**GENERAL PLASTICS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant instituted the instant claim through a Statement of Claim dated September 30, 2016. He seeks in the main, the following prayers:-
  - a. Severance pay for the years worked.
  - b. Salary for the month of July.
  - c. Leave days earned.
  - d. Damages for unlawful, unfair and wrongful termination of employment.
  - e. Issuance of a certificate of service
  - f. Costs of the suit and interests thereon.
2. The Claimant averred that his dismissal was illegal, unfair and unprocedural as it did not follow the law. The Claimant averred he was entitled to a fair hearing and that did not happen. He averred that no proper investigation was carried out and the decision to dismiss him was influenced by Martin Mwendwa who had a grudge against him and had vowed to have the Claimant dismissed.
3. The Respondent filed a Memorandum of Response dated March 3, 2017, wherein the Respondent averred that the Claimant was engaged in a fight with a fellow employee on July 15, 2016 during employment hours. The Respondent upon receipt of the complaint lodged by the employee who was in the fight with the Claimant, it suspended the Claimant and issued the Claimant with a notice to



show cause why disciplinary action should not be taken against him. The Claimant responded to the notice to show cause and admitted to engaging in a fight with his assistant contrary to expectation of the employer. The Claimant was called to the disciplinary hearing after which the Respondent found the Claimant guilty of gross misconduct and subsequently summarily dismissed the Claimant through a letter dated July 30, 2016. The Respondent averred the suit should be dismissed with costs to the Respondent.

4. At the hearing on June 14, 2023, only the Claimant attended and the Claimant adopted both his witness statement and supplementary witness statements dated September 29, 2016 and produced his bundle of documents also dated September 29, 2016. He stated that he was an employee of the Respondent as a radio controller having been employed in from 1994 to 2016. He testified that he had worked for 22 years uninterrupted and earned a monthly salary of Kshs 22,161.06. The Claimant stated that the incident that occurred on July 15, 2016 led to his dismissal. He testified that on the material day, he reported to work as usual and met his co-worker John. He stated that their usual lunch break was typically 30 minutes but that on this day John ended up taking a 2 hour break leading to slow work flow. He stated that he went to the gate to check on John who he found shooting the breeze and generally wasting time outside the premises instead of resuming his work. He testified that upon inquiring from John the reason John was late and took so long on his lunch break, John replied rudely, became violent and hit him. The Claimant testified that their boss named Martin broke up the fight and took them both to the Human Resources office where the Claimant was accused of fighting with a knife and was sent home. He stated that he was summoned to a disciplinary committee and was asked to give an explanation of the incident. He was then suspended and sent home for two weeks. The Claimant testified that he received a letter of dismissal and was asked to return all the company items that were in his possession which he did and that he was offered a cheque for Kshs. 55,000/- in settlement of his dues but he declined the sum as being insufficient taking into consideration his years of service and the manner of his termination. He testified that he had worked diligently and competently for the Respondent for 22 years and had been unfairly targeted as the company was undergoing financial challenges and planned to let go of older employees like him. He stated that he was not given a fair hearing during the disciplinary proceedings as he was not allowed to defend himself in accordance with the law.
5. The Claimant and Respondent submitted on the matter as follows. The Claimant submits that the issues for determination are:
  - i. Whether the Claimant's termination was unfair
  - ii. Whether the Claimant's termination was unprocedurally
  - iii. Whether the claimant is entitled to the reliefs sought.
6. As to whether the termination was unfair and unlawful, he submitted that termination of employment is governed by sections 41 and 43 of the *Employment Act*, 2007. The Claimant submitted that going by his testimony, not only did the Respondent not follow fair procedure, it did not have a valid enough reason to dismiss the Claimant from its employ. The Claimant cited the case of *Patrick Abuga v ICPAK* per Radido J. where the court held that "section 41 of the *employment Act* 2007 has made procedural fairness part of employment contract in Kenya. The ingredients of procedural fairness as I understand is within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. Secondly, it would follow naturally if the employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard in person, writing or through a representation or shop floor union representative. Thirdly,



it is an obligation on the employer to consider any representation by the employee before making the decision to dismiss or give other sanction

7. The Claimant submitted that he was not taken through a fair disciplinary process as he was summoned to a committee on July 18, 2016 and asked to narrate the incident that happened on July 15, 2016 and later on the same day received a show cause letter. He submits that a show cause letter is issued to an employee to answer allegations of misconduct prior to a disciplinary hearing. He submitted that he responded to the said show cause letter but was not invited for an oral hearing neither was there a notice issued to him of a disciplinary hearing before his dismissal. The Claimant submitted that the entire proceedings took less than 3 days and that this was insufficient time for the Claimant to prepare his defence and for the Respondent to undertake proper investigations.
8. The Claimant cited the case of *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR on procedural fairness and substantive justification tests. He submitted that his dismissal did not meet the tests enumerated in the foregoing case. The Claimant submits that his position was unionized and that he had a right to have a representative accompany him or represent him at a disciplinary hearing. He cited the case of *Mary Mutanu Mwendwa v Ayuda* [2013] eKLR where the Court held that the *Employment Act* has made it mandatory by virtue of section 41 for an employer to notify and hear any representations an employee may wish to make whenever termination is contemplated by the employer and is entitled to have a representative present. He further relied on the case of *Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited* [2013] eKLR where it was held that “the right to be accorded a hearing and be accompanied by a fellow employee or union representative during the hearing is a sacrosanct right”. The Claimant submits that the Respondent's accusations were serious but the Respondent did not investigate the situation fully and only subjected the Claimant to the consequences. The Claimant submits he was suspended for a period of two weeks which was enough for the Respondent to carry out and conclude proper investigations. He submitted that during a disciplinary suspension the Respondent was required to have a hearing before the committee during which they should adhere to the principles of natural justice - audi alteram partem. The Claimant submits that the dismissal was not fair as it did not involve the Claimant's colleague John who was the one who attacked him. He submitted that he was solely blamed for the incident while investigations had not been properly done as the Respondent did not take its investigations full circle as it did not let the Claimant know the conclusion of the investigations neither did they take the Claimant's assistant John through the disciplinary process as he was retained as an employee after the Claimant's dismissal. The Claimant submits the Respondent claimed that he had a knife yet it was a tool of trade provided by the employer so it was not illegal to have it and not premeditated. The Claimant submitted that the Respondent did not call an eye witness to support their case against the Claimant. The Claimant submitted that the suspension was also indefinite as the Respondent did not communicate how long it would give feedback after he responded to the show cause letter. He submits he was in a state of limbo as he did not know whether he would get his job back and had to go and inquire about the verdict after getting frustrated by the lack of communication. He submitted that he was entitled to receive full compensation for the unfair and unlawful termination and cited the cases of *Joseph Mwaniki Nganga v United Millers Limited* [2022] eKLR and *Kenfreight (EA) Limited v Benson K Nguti* [2016] eKLR.
9. The Claimant submitted that he was entitled to severance pay in terms of section 40(1)(f) of the *Employment Act* which is paid at the rate of not less than 15 days' salary for each completed year of service. He submitted that the severance pay for the years worked amounted to Kshs 357,540/- for the 22 years he had completed in service to the Respondent. The Claimant submitted that he was entitled to costs of the suit as well.



10. The Respondent on its part submitted that the issues for determination were:
  - i. Whether the Claimant was wrongfully and/or unlawfully dismissed from employment by the Respondent.
  - ii. Whether the Claimant is entitled to any damages if the answer to issue one above is not in the affirmative.
11. The Respondent submitted that the services of the Claimant herein were lawfully terminated by the Respondent. The Respondent submitted that the Employment Act and particularly section 47(5) states that "For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer." It submitted that from the foregoing provision, the onus lay on the Claimant to prove that his services to the Respondent were unfairly terminated. The Respondent submits that the Claimant alleges that principles of natural justice were not applied but that however, he is wrong as the Constitution of Kenya 2010 is clear on the exercise of the right to fair hearing under Article 49. The Respondent submitted that the Claimant was given an opportunity to be heard by the Respondent's board which he admits. The Respondent submits that furthermore, the Claimant admitted to the alleged gross misconduct through the response to show cause dated July 30, 2016. The Respondent submits this letter is clear on why the employee was dismissed. It submits his assertions that he was unfairly dismissed have no basis in law and that in addition, section 44 of the Employment Act sets the grounds of summary dismissal and to be specific, section 44(g) states that "an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property" is a lawful justifiable ground of summary dismissal.
12. The Respondent submits that the circumstances in this case are that the Claimant's act of engaging in a physical fight is assault, a criminal offence under the Kenyan law and that the Claimant's assertions that he was not accorded an opportunity to speak are baseless as he has not proved any. The Respondent relied on the case of Walter Ogal Anuro v Teachers Service Commission [2013] eKLR where the court held that, "...for a termination of employment to pass the fairness test, there must be both substantive Justification and procedural fairness. Substantive Justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination." The Respondent submits that the substantive justification in the present case is that the Claimant was guilty of an offence which he admitted of committing while in the course of work in the Respondent's premises. The Respondent submits the Claimant was issued with a notice to show cause why disciplinary measures should not be taken against him a fact he has not disputed. The Respondent asserts the Claimant's case was heard and the Respondent's board summarily dismissed him. Accordingly, it submits that the Claimant's summary dismissal was justifiable and was conducted as per the law. As to whether the Claimant is entitled to any damages, it submits that the Claimant is not entitled as the previous issue was answered in the negative as the termination of the Claimant's employment was lawful. It submits that it therefore follows that damages sought for unlawful termination cannot and should not be granted. The Respondent cited the case of Meshack Auta Ongeri v Nyamache Tea Factory Company Limited (2019) eKLR where Marete J. stated that "...The second issue for determination is whether the Claimant is entitled to the relief sought. He is not. Having lost on a case of unlawful termination of employment he becomes disentitled to the relief sought."



13. The Respondent submits that from the evidence adduced, the Respondent's case overwhelms the Claimant claim as it has been sufficiently and successfully been controverted by the Respondent. It thus urges the dismissal of the suit with costs.
14. The Claimant was dismissed after he engaged in an altercation at the workplace, the Respondent aptly calls it a kerfuffle, and the Respondent proceeded to hear the Claimant and dismissed him from employment. The Claimant asserts that the Respondent was not present at the hearing of this case to offer any testimony. That does not detract from the fact that the Claimant had to prove his case. The Claimant in his show cause narrated how John had attacked him and when Koech, a driver with the Respondent witnessed the attack, Koech rushed and called Martin who is the Claimant's supervisor. It is not disputed that the Claimant had gone to fetch John from the gate when John had overstayed on the lunch break and that there was a heated exchange which led to the altercation and when Martin who was the Claimant's boss came to separate the two, he felt it necessary to take the matter forward to the HR office. It was not lost on the Court that the Claimant was dismissed yet John was retained in employment. John was the one on the wrong for having overstayed during his lunch break and the fact that he was a crony of Martin Mwendwa is perhaps what led to the dismissal. There was no fairness in meting out a punishment that singled out one of two employees. The Claimant did not admit to any wrongdoing and instead insists he merely held of the aggressor who punched him and nailed him to the wall before the driver named Koech came to his rescue.
15. The foregoing is ample to demonstrate the Claimant was dismissed in a one-sided and predetermined show which bent over backwards to accommodate the aggressor John. As such, the termination is deemed to have been unfair and unjust within the meaning of section 43 of the *Employment Act*. The Claimant had diligently served the Respondent for 22 years. This was the first incident that was reported as far as the record shows and the dismissal was therefore unjustified given the inability of the Respondent to demonstrate fairness. The Claimant is therefore entitled to the following reliefs:-
  - a. Severance pay for the years worked – Kshs 357,540/-
  - b. Salary for the month of July – Kshs 22,161.60
  - c. Leave days earned – Kshs 22,161.60
  - d. Compensation for unlawful, unfair and wrongful termination of employment set at 3 months – Kshs 66,483.80
  - e. Certificate of service
  - f. Costs of the suit
  - g. Interest at court rates on the sums in (a), (b), (c) and (d) above from the date of judgment till payment in full.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF SEPTEMBER 2023**

**NZIOKI WA MAKAU**

**JUDGE**

