



**Burugu v Nairobi Bottlers Ltd (Cause 499 of 2019)
[2023] KEELRC 2679 (KLR) (27 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2679 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 499 OF 2019
SC RUTTO, J
OCTOBER 27, 2023**

BETWEEN

FRED KARIITHI BURUGU CLAIMANT

AND

NAIROBI BOTTLERS LTD RESPONDENT

JUDGMENT

1. The Claimant herein, Mr. Burugu was employed by the Respondent as a driver with effect from 1st April 2019. According to the Claimant, he worked diligently and over the years, and on numerous occasions, he was recognized by the Respondent for his good work. From the record, the Claimant was subjected to a disciplinary process and summarily dismissed from employment on 11th July 2017. The Claimant has termed his termination unlawful and consequently seeks the following reliefs against the Respondent:
 - a. A declaration that the Claimant's summary termination from employment was unfair and unlawful;
 - b. A declaration that the Claimant is entitled to the equivalent of 12 months' salary of Kshs 1,597,376.52 in damages for wrongful termination;
 - c. Interest on (b) above;
 - d. Costs of the suit.
 - e. Any other reliefs the Court may deem fit and just to grant
2. In response to the Claim, the Respondent filed a Reply dated 4th September, 2019 through which it avers that during the disciplinary hearings, the Claimant admitted to fraudulently and unlawfully receiving money he was not entitled to. It termed the Claimant's dismissal lawful and properly done.



According to the Respondent, the reliefs sought by the Claimant have no basis in law and should be dismissed.

3. During the hearing which took place on 15th February 2023 and 26th April 2023, both parties called oral evidence.

Claimant's case

4. The Claimant testified in support of his case and for starters, he adopted his witness statement to constitute his evidence in chief. He further produced the bundle of documents filed alongside his Claim as exhibits before Court.
5. The Claimant testified that before his summary dismissal, the Respondent issued him with a show cause letter dated 22nd June 2017, which alleged that he had on various dates between February and May 2017, received excessive allowances on daily and night deliveries.
6. He was later summoned to appear before the disciplinary committee on 27th June 2017 through a Disciplinary Enquiry Notification Form. He appeared before the committee on the said date and subsequently on 11th July 2017. It is on 11th July 2017, that he was summarily dismissed.
7. The letter of dismissal stated that he had been summarily dismissed because the Respondent could no longer trust him. He was surprised at the dismissal, as the reason given by the Respondent did not fall under the circumstances an employer may dismiss an employee summarily as prescribed by the [*Employment Act*](#).
8. He contends that his dismissal was unlawful and consequently, he asked the Court to find as much.

Respondent's case

9. Ms. Sylvia Omieno, testified on behalf of the Respondent as RW1. She started by identifying herself as the Respondent's Human Resources Business Partner-Supply Chain. She proceeded to adopt her witness statement and bundle of documents filed on behalf of the Respondent, to constitute her evidence in chief.
10. RW1 told Court that on or about 22nd June 2017, it came to the Respondent's attention that the Claimant had on several occasions fraudulently received allowances intended for deliveries yet he had in fact not made any deliveries.
11. Further, between the months of February 2017 and May 2017, the Claimant had been receiving daily and night out allowances in excess of what he was entitled to. Despite the foregoing, the Claimant never at any point brought it to the attention of the Respondent Company that he was receiving money he was not entitled to.
12. Pursuant to the Labour Laws, the Respondent issued a notice to show cause outlining the offences committed by the Claimant and requiring him to tender in their reply to the same by 23rd June 2017. The Claimant never issued any Reply as required in the notice to show cause.
13. Consequently, and in accordance with the law, the Respondent issued the Claimant with a Disciplinary Enquiry Notification Form notifying him of the date, venue and time of the disciplinary hearing in relation to the charges raised in the notice to show cause. The Respondent further informed the Claimant of his right to representation.
14. It was RW1's further evidence that the Respondent proceeded to conduct a hearing on 27th June 2017 wherein the Claimant was read to the charges he was facing. During the said meeting, the Claimant



- admitted and accepted to receiving night out and daily allowances more than he was entitled to in instances where he had not made any delivery to validate his receipt of the money.
15. According to RW1, the Claimant was required by the Respondent's code of business conduct to be an employee with integrity and was thus required to escalate any errors with regard to the excess payments with the relevant person within the company something which the Claimant failed to do and thus was in blatant disregard of the company's Code of Conduct.
 16. At the point of the conclusion of the disciplinary hearing, the panel decided that a further hearing was necessary before proceeding to decide on the charges. The Claimant was thus placed on suspension for two weeks and a further disciplinary hearing was scheduled.
 17. Another hearing was conducted on 11th July, 2017 wherein he again admitted that he had received money that he was not entitled to and upon being accorded an opportunity to defend himself further, the Claimant opted to defend a different employee who had been charged with the same charges. The Claimant thus maintained his acceptance of the charges levelled against him.
 18. The Respondent consequently dismissed the Claimant from employment on the basis of having lost their trust in him for lack of integrity. The Respondent further informed the Claimant of his right of appeal against the decision of the panel to terminate him. The Claimant did not lodge any appeal.
 19. Upon termination, the Respondent proceeded to tabulate the money due to the Claimant less, any statutory deductions. The Claimant was paid what was due to him.
 20. RW1 contended that the Claimant's termination was fair and lawful.

Submissions

21. It was the Claimant's submission that no investigation had been conducted by the County Human Resource Manager to determine that there was a Code violation and therefore no determination had been made in that regard. It was his contention that it is only after a determination had been made that a Code violation had occurred, could the Respondent institute a disciplinary process.
22. The Claimant further maintained that the lack of adherence to the laid down procedure in the Code rendered the entire disciplinary process by the Respondent unfair and unlawful. He argued that the Respondent was bound by the Code and was enjoined to follow all the steps to safeguard the rights of its employees. For this reason, he submitted that the entire procedure adopted by the Respondent was defective and therefore unfair to him.
23. The Claimant stated in further submission that his acceptance of the overpayments emanating from a process that he was not involved in cannot be used by the Respondent to lay a basis for a charge that he lacked in integrity.
24. Placing reliance on the case of *Postal Corporation of Kenya vs Tanui (2019) eKLR*, the Respondent submitted that the Claimant was accorded all the procedures required. That specifically, he was asked to show cause and invited to two hearings, where he was accorded an opportunity to defend himself.
25. The Respondent further submitted that it had a fair and valid reason to terminate the Claimant's employment on account of violation of his duties through engaging in activities that are against the company policies and that proper procedure was followed.
26. It was the Respondent's further submission that the Claimant also admitted that the process was done fairly and that he was also given an opportunity to appeal the termination.



Analysis and determination

27. Flowing from the pleadings, the evidence on record, and the opposing submissions, the Court singles out the following issues for determination:
- i. Whether the Respondent had a valid and fair reason to terminate the employment of the Claimant.
 - ii. Whether the Claimant's termination was in accordance with fair procedure.
 - iii. Is the Claimant entitled to the reliefs sought?

Valid and fair reason?

28. In order to prove fair termination under the *Employment Act* (Act), an employer is required to prove that there was substantive justification to warrant the termination of an employee. Substantive justification entails proof of reasons for the termination of an employee. The operative sections of the law in this regard are, Sections 43 and 45 (2) (a) and (b) of the *Employment Act*. Section 43 provides 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.
29. 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 employee's conduct, capacity or compatibility; or
 - ii. based on the operational requirements of the employer; ...
30. These provisions essentially set the standard for determining whether an employee's termination was substantively fair.
31. In the case herein, the Claimant was summarily dismissed on grounds that between February and May 2017, he received payment through the Respondent's Mpesa account as driver's claim for night out and daily allowances, more than what he was entitled to. According to the Respondent, the Claimant in certain instances, did not make any delivery to validate receiving the pay and did not highlight to the relevant parties that he had received the money erroneously.
 32. It is not in dispute that the Claimant received excess payment from the Respondent in respect of night out and daily allowances. It is also common



ground that he did not participate in the processing of the payments and that he was only recipient in this case.

33. During the disciplinary hearing Mr. Momanyi, the Claimant's immediate supervisor took the meeting through the process of payment of the allowances and apparently, the process involves more than one person. During cross examination, RW1 admitted that three people (Teresa, Salim, and Muturi) were to confirm the details in the honor book and what had been paid to the driver. That they would check the invoices and the night outs on the routes the driver had taken. Thereafter, they would put a ticket and hand over the book for payment.
34. Applying the standard established under Section 43(2) of the Act, the question is whether a reasonable employer would terminate the employment of an employee if faced with the same set of circumstances as herein. As it is, this is a subjective test.
35. With regards to the fairness of a sanction, Ngcobo JA in the persuasive South African decision in *Nampak Corrugated Wadeville v Khoza* (JA 14/98) [1998] ZALAC 24 determined as follows:

“The determination of an appropriate sanction is a matter which is largely within the discretion of the employer. However, this discretion must be exercised fairly. A court should, therefore, not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether it could have imposed the sanction imposed by the employer, but whether in the circumstances of the case the sanction was reasonable... It seems to me that the correct test to apply in determining whether a dismissal was fair is that enunciated by Lord Denning MR in *British UK Limited v Swift*, supra, at p.93 para 11, which is:

Was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might have reasonably dismissed him, then the dismissal was fair.” Underlined for emphasis”
36. As it is, the Claimant's only mistake was to receive excess payments and fail to alert the Respondent as much. As stated herein, the Claimant was not responsible for processing and making the actual payments. As a matter of fact, the charges as spelt out in the Disciplinary Enquiry Notification Form stated that the Claimant did not highlight to the relevant parties that he had received the money erroneously. Basically, it was an overpayment occasioned by other parties other than the Claimant.
37. Therefore, as the Respondent acknowledged that the money was paid in error, it is my view that in the circumstances, dismissal was not a fair sanction. In my estimation, the decision to dismiss an employee under the circumstances herein, is not a decision a reasonable employer would take if faced with similar circumstances.
38. In my considered view, a reasonable employer faced with the same set of circumstances as the Respondent, would have recovered the excess payments made in error, from the Claimant's salary or payments due to him. In this case, the sanction meted out against the Claimant was not reasonable and fair in the circumstances. This is moreso noting that there is no evidence let alone the slightest indication that the Claimant contributed in any way to the overpayments for



instance, by overstating the amount he required as night out allowance. As I see it, the sanction was not commensurate with the allegations levelled against the Claimant.

39. Applying the reasonableness test to the instant case and for the reasons I have given herein, it is my finding that the decision by the Respondent to dismiss the Claimant was not fair in the circumstances. Therefore, the Claimant's termination was without a valid and fair reason in terms of Section 45(2) (a) and (b) of the Act.

Fair procedure?

40. Under Section 45(2) (c) of the Act, an employer is bound to prove that it terminated an employee in accordance with fair procedure. What constitutes a fair procedure is spelt out under Section 41 of the Act. It entails notification and hearing. In particular, an employer is required to notify the employee of the allegations he or she is required to respond to and thereafter grant 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 his own choice.
41. This provision was echoed by the Court of Appeal in the case of *National Bank of Kenya v Anthony Njue John* [2019] eKLR, as follows:
- “Section 41 of the Act, enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands the reasons for which the employer is considering to terminate the employee's employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice; and to hear and consider any representations which the employee may advance in response to allegations levelled against him by the employer.”
42. In this case, the disciplinary process against the Claimant was commenced by way of a show cause letter dated 22nd June 2017. Through the said show cause letter, the Claimant was notified of the allegations against him and asked to respond to the same. Seemingly, he did not tender a written response.
43. He was subsequently issued with a Disciplinary Enquiry Notification Form, through which he was advised of the hearing of his case on 27th June 2017. He was also informed of his right to be accompanied to the said hearing by a fellow employee of his choice.
44. The Claimant does not deny appearing for the disciplinary hearing on 27th June 2017 and subsequently on 11th July 2017. The record of the disciplinary hearing reveals that the Claimant was given an opportunity to articulate his case and give his side of the story.
45. In light of the foregoing, I am persuaded that the procedure applied by the Respondent prior to terminating the Claimant's employment met the minimum requirements of a fair hearing as envisaged under Section 41 of the Act. Here is why. The Claimant was notified of the reasons for which the Respondent was contemplating terminating his employment and was further afforded an opportunity to appear before a disciplinary panel in person, to render his explanation in answer to the allegations.
46. The total sum of my consideration is that in as much as the Respondent has proved to the requisite standard that it observed the basic requirements of a fair hearing within the meaning of Section 41 of the Act, it failed the test in substantive fairness hence ultimately, the Claimant's termination was unfair.



Reliefs?

47. As the Court has found that the Claimant's termination although procedural, was without a valid and fair reason, the Court will award him one (1) month's salary in lieu of notice and compensatory damages equivalent to five (5) months of his gross salary. This award has further taken into account the length of the employment relationship.

Orders

48. In the final analysis, I enter Judgment in favour of the Claimant against the Respondent and he is awarded: -

- a. One (1) month's salary in lieu of notice being the sum of Kshs 67,709.03.
- b. Compensatory damages in the sum of Kshs 338,545.15 which sum is equivalent to five (5) months of his gross salary.
- c. The total award is Kshs 406,254.18.
- d. Interest on the amount in (c) at court rates from the date of Judgment until payment in full.

49. The Claimant shall have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF OCTOBER, 2023.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Burugu

For the Respondent Ms. Nyambura instructed by Mr. Wathuta

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

