



**Nyakundi v Ready Consultancy Company Limited (Cause 720 of 2018)
[2023] KEELRC 2696 (KLR) (27 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2696 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 720 OF 2018
SC RUTTO, J
OCTOBER 27, 2023**

BETWEEN

DISMAS OGETO NYAKUNDI CLAIMANT

AND

READY CONSULTANCY COMPANY LIMITED RESPONDENT

JUDGMENT

1. The Claimant avers that he was employed by the Respondent on a contractual basis from 1st February 2015, as a machine attendant. The Claimant's employment contract was renewed over the years, with his last contract slated to run from 1st June 2017 to 1st June 2018. This was not to be as the Claimant avers that he was stopped from attending to his work on 23rd January 2018. According to the Claimant, he was not given sufficient reason as to why the Respondent chose to stop his services without notice and without following the laid down procedure. Consequently, the Claimant seeks the following reliefs against the Respondent:
 - a. A declaration that the Respondent's action of indefinitely stopping the Claimant from attending to his duties as per the contract agreement of employment were unlawful and illegal;
 - b. An order compelling the Respondent to pay the Claimant a sum of Kshs 277,975.50 made up as follows:
 - i. Twelve (12) months' salary for unfair termination Kshs 202,164.00
 - ii. Three (3) month's salary in lieu of notice Kshs 50,541.00
 - iii. Salary for the month of January 2018 Kshs 16,847.00
 - iv. Service gratuity @ 15 days for each year worked Kshs 8,423.50
 - c. An order compelling the Respondent to pay the Claimant for leave days earned but not given.



- d. An order compelling the Respondent to pay the Claimant interest on the above at the rate of 25% from the date of termination of employment until payment in full.
 - e. An order compelling the Respondent to issue the Claimant with a Certificate of Service.
 - f. An order compelling the Respondent to pay the Claimant costs of the suit.
2. Through a Memorandum of Response filed on 21st February 2019, the Respondent avers that at the material time, it had seconded the Claimant to PATCO Company Limited, where it is a labour provider. It is the Respondent's case that the Claimant undertook his duties carelessly and recklessly as he overloaded a machine with an excess of 94 kilograms over the machine's working capacity of 70 kilograms leading to a total breakdown of the machine. The Respondent further avers that it considered the Claimant's transgression to fall within the transgressions which allow for summary dismissal under Section 44 of the Employment Act hence proceeded to issue the Claimant with a summary dismissal letter. The Respondent contends that the Claimant is not entitled to the claims as pleaded hence has asked the Court to dismiss the Claimant's suit with costs.
 3. During the hearing which took place on 4th July 2023, both parties called oral evidence.

Claimant's case

4. The Claimant testified in support of his case and at the outset, adopted his witness statement to constitute his evidence in chief. He further produced the bundle of documents filed alongside his Claim, as his exhibits before Court.
5. The Claimant testified that he worked with all manner of diligence and professionalism. He averred that this was the reason his contract of employment was renewed consecutively and yearly from 2015.
6. Recounting the events that resulted in his dismissal from employment, the Claimant stated that on 23rd January 2015, he was operating one machine after which he was instructed by the Assistant Production Manager to operate a machine that had already been loaded with the mixture by his colleague who was instructed to clean the working area.
7. At the time he was instructed to continue operating his colleague's machine, he did not know the exact amount of the mixture as he was not the one who mixed and loaded the contents. It was the Claimant's evidence that he was just finalizing his colleague's work.
8. In the process of operating the machine, the Director measured the mixture and found it to be in excess after which he alleged that he (Claimant) was the one who was responsible.
9. It was his case that his machine was not overloaded.
10. That this led to the Respondent's action to stop him indefinitely from attending to his duties as per the contract of employment terms indicating that they will call him back to resume his duties.
11. The Claimant averred that since then, the Company has never called him back to resume his duties and only wrote to him to show cause why disciplinary action should not be taken against him for the alleged conduct. He maintained that he was not liable because he did not take part in measuring the contents that were in the machine.
12. He further stated that the Respondent did not issue him with a notice of termination as required by law. That further, he was not given any credible reason whatsoever as to why the Respondent chose to terminate his services in a manner not provided for under the law.
13. Concluding his testimony in chief, the Claimant asked the Court to allow his claim as prayed.



Respondent's case

14. The Respondent called oral evidence through its Human Resource Manager, Mr. Bernard Ogola, who testified as RW1. Similarly, he adopted his witness statement and bundle of documents filed on behalf of the Respondent, to constitute his evidence in chief.
15. RW1 told the Court that while in his employment at PATCO Industries, the Claimant who was a trained and scheduled production machine attendant, undertook his duties so carelessly and recklessly with abandon and without any care.
16. That the Claimant overloaded the machine with an excess of 94 kilograms over the machine's working capacity of 70 kilograms leading to the total breakdown of the said machine hence stoppage in production, wastage of raw materials and loss in income and the cost of repair.
17. RW1 further testified that it was the finding of PATCO Industries and the Respondent that the Claimant's action was a result of extreme negligence and carelessness contrary to his training, work experience and expectations and predisposed him to summary dismissal.
18. It was RW1's evidence that the Claimant was quite familiar with the machine and he understood the nature of the work. That further, he did not take action to avert the loss.
19. That the Respondent issued the Claimant with a Notice to Show Cause to which he gave a written representation and he was thereafter invited to a formal hearing where he was allowed to give evidence, ask questions and invite witnesses.
20. At the end of the due process, it was the conclusion of the Respondent's management that no plausible explanation had been given by the Claimant for the gross negligence save for his attempt to blame his colleague who had no responsibility over the machine and his admission and plea for forgiveness was found not justified.
21. The Claimant was issued with a letter of summary dismissal letter in accordance with the law and procedure.
22. According to RW1, the Claimant's termination was justified and he is not entitled to compensation.

Submission

23. In his submissions, the Claimant stated that his termination was unlawful and a clear violation of the principles of natural justice. He proceeded to argue that his dismissal was malicious and was conducted in blatant disregard of the law. Citing the cases of Josephat Otieno Kongo vs Riley Services Limited and Ben Panhill Sifuna vs Urban Roads Authority, the Claimant submitted that the alleged disciplinary minutes did not stipulate the agenda, who stated what, questions asked, evidence adduced and by who. It was his further contention that the reason for termination was not processed and tested by inviting him to any hearing.
24. It was the Claimant's further submission that the Respondent never cared to follow due process in terminating him. He maintained that he was never heard and the decision and reason to terminate him was not served upon him.
25. On the other hand, the Respondent submitted that it has demonstrated that there existed valid grounds to justify the termination of the Claimant and that he was accorded due process prior to his dismissal.



Analysis and determination

26. Flowing from the pleadings by both parties, the evidentiary material on record, as well as the opposing submissions, the following issues stand out 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?

27. Under the *Employment Act* (Act), an employer is required to prove that it had a valid and fair reason to warrant the termination of an employee. This is known as substantive justification and is addressed under Sections 43 and 45 (2) (a) and (b) of the 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.
28. On its part, 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; ...
29. These provisions essentially set the standard for determining whether an employee's termination was substantively fair.
30. Back to the case at hand, the reasons advanced by the Respondent for summarily dismissing the Claimant from its employment, are with respect to his performance of duty. In this regard, the Claimant was alleged to have overloaded the mixing machine with an extra load of 94 kilograms. It was the Respondent's case that the overload led to excess production of the quantity of the product by 94 kilograms leading to a breakdown of the machine which was later fixed at a cost. According to the Respondent, the machine's capacity was 70 kilograms.
31. In support of its case, the Respondent exhibited the Claimant's response to the show cause letter in which he states in part:
- “This was due to my workmate who had already loaded the machine with the raw materials that I didn't know the exact kgs. This happened because he was moved by the Assistant Production Manager from the machine to start cleaning the area.



So, I was instructed to complete to prepare the gum. So, by adding ten kgs of sugar, I found myself overloading the machine because I was operating two machines. I kindly request the management to forgive me for the mistake.”

32. From the Claimant’s response above, it is clear that he admitted to overloading the machine.
33. The Claimant’s case in court was that the machine he was accused of overloading was not the one assigned to him and that he was just completing the production that had been started by his colleague.
34. In addition, it is worth noting that the Claimant’s admission was supported by the Chief Engineer of PATCO Industries, who stated in his letter dated 4th March 2017, that it is the Claimant who was operating the machine and that he overloaded it by 94 kilograms which resulted in its breakdown
35. From the record, the Claimant was not an inexperienced employee, having worked as a machine attendant, for close to 3 years. Therefore, he ought to have known the capacity of the machine and more importantly, how much it could take. Further, RW1 testified that the machines contain measurements to show the quantity of the materials in the machine. This position was not controverted by the Claimant.
36. In my view, a reasonable machine attendant with the experience of the Claimant would have known that overloading the machine would result in its breakdown. In this case, an excess load of 94 kilograms over a machine whose capacity is 70 kilograms was too excessive. This was improper performance of duty on the Claimant’s part.
37. Therefore, in as much as the Claimant was not the one who had started production on the machine, that was not an excuse to continue overloading it. If he had acted reasonably and prudently, he ought to have confirmed from his colleague how much raw material had been loaded before proceeding to load further.
38. By continuing to load the machine beyond its capacity, the Claimant acted negligently and improperly in the performance of his duties as a machine attendant.
39. Under Section 43(2) of the Act, the reason or reasons for termination of an employee are matters that the employer at the time of termination genuinely believed to exist, and which caused the employer to terminate the services of the employee. In this respect, the standard of proof is on a balance of probability as opposed to, beyond reasonable doubt.
40. From the circumstances attendant to this case, it can very well be said that by his own actions, the Claimant led the Respondent to genuinely believe that he performed his duties carelessly and improperly as a machine attendant.
41. To this end, I cannot help but find that the Respondent had a valid and fair reason to terminate the Claimant’s employment on account of improper performance of his duty.

Whether the Claimant’s termination was in accordance with fair procedure

42. The requirement of fair procedure is generally provided for under Section 45(2)(c) of the Act. Section 41 stipulates the specific requirements of what entails a fair process. These requirements are with respect to notification and hearing. Specifically, 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 shop floor union representative of his own choice.



43. This provision was echoed by the Court of Appeal in the case of *National Bank of Kenya vs 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.”

44. In this case, the Claimant does not dispute that he received a Notice to Show Cause from the Respondent and that he responded to the same. The main contention as I see, is whether the Claimant attended the disciplinary hearing. On his part, the Claimant has denied attending the disciplinary hearing. In this regard, he contends that the disciplinary hearing took place in his absence.

45. The Respondent on the other hand maintained that the Claimant attended the disciplinary hearing. To this end, the Respondent exhibited a copy of the minutes of the said disciplinary hearing in support of its case.

46. Notably, the record of the said disciplinary proceedings only constitutes findings and observation. Conspicuously missing, is the Claimant’s explanation during the disciplinary hearing.

47. It is also notable that the Respondent did not adduce evidence confirming that the Claimant was invited to the disciplinary hearing. During cross-examination, RW1 stated that the Claimant was called to attend the disciplinary hearing via a phone call. There being no documentary evidence on record, several questions linger, for instance, was the Claimant notified of his right to be accompanied and to adduce evidence in support of his defence? Further, what was the time frame given to him to appear for the disciplinary hearing?

48. The answers to these questions are definitely not on record as the Respondent did not adduce evidence confirming that the Claimant was notified of the disciplinary hearing and his rights.

49. Under Section 45(2)(c) of the Act, it is the employer who bears the burden of proving that an employee was terminated in accordance with a fair procedure. Therefore, the burden lay on the Respondent to confirm that the Claimant was subjected to a fair process in terms of Section 41 of the Act.

50. In absence of any evidence to prove that the Respondent complied with all the elements of a fair hearing stipulated under Section 41 of the Act, I am led to conclude that it did not discharge its evidential burden as by law required.

51. The net effect of my finding is that in as much as the Respondent was substantively justified in terminating the Claimant’s employment, there is no evidence that the disciplinary process against him was in compliance with the spirit of Section 41 of the Act hence in the end, his termination was procedurally unfair hence unlawful.

Reliefs?

52. As the Court has found that the Claimant’s termination although substantively justified was procedurally unfair, he is awarded one (1) month’s salary in lieu of notice and compensatory damages equivalent to one (1) month of his gross salary. This award takes into account the length of the



employment relationship and more importantly, the remainder of the Claimant's contract period which in this case, was six (6) months.

53. The claim with regards to the salary for the month of January 2018 succeeds as the Respondent did not exhibit evidence to prove that the Claimant was paid accordingly. The Respondent's submission that the Claimant's salary was paid on 3rd January 2018, does not hold as it is not plausible that the salary or that month was paid at the beginning of the month. Indeed, it is not logical to state that the salary remitted on 3rd January, 2018, was for the month of January, 2018.
54. Similarly, the claim for service pay is allowed as there is no evidence that the Claimant fell within the exclusions under Section 35(6) of the Act. In this regard, the Respondent did not adduce evidence to prove its assertion that it was remitting National Social Security Fund (NSSF) contributions in favour of the Claimant. If the Respondent's submission is to be believed, one wonders why it didn't exhibit a schedule of remittances to the NSSF to prove as much.
55. The Claimant is further awarded leave pay as the Respondent did not exhibit his leave records in line with its obligation under Section 74(1) (f) of the Act. Be that as it may, the same will be prorated for the period served by the Claimant under the contract of service that was in force at the time.

Orders

56. It is against this background that 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 16,847.00.
 - b. Compensatory damages in the sum of Kshs 16,847.00 being equivalent to one (1) months of his gross salary.
 - c. Unpaid leave prorated at six (6) months being the sum of Kshs 5,896.45.
 - d. Service pay for two (2) completed years of service being the sum of Kshs 16,847.00.
 - e. The total award is Kshs 56,437.45.
 - f. Interest on the amount in (e) at court rates from the date of Judgment until payment in full.
 - g. The Claimant shall also have the costs of the suit.
57. As the employment relationship has not been disputed, the Claimant shall be entitled to a Certificate of Service in line with Section 51(1) of the Act. This shall issue within 30 days from the date of this Judgment.

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

STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Ombati

For the Respondent Mr. Emirundu instructed by Ms. Omamo

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

