



**Kyusya v Scarce Commodities Ltd (Cause 392 of 2017)
[2023] KEELRC 2567 (KLR) (19 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2567 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 392 OF 2017
AK NZEI, J
OCTOBER 19, 2023**

BETWEEN

RICHARD MUTUA KYUSYA CLAIMANT

AND

SCARCE COMMODITIES LTD RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent vide a memorandum of claim dated 2/2/2017 and pleaded that he was employed by the Respondent as a driver on 21/1/2015, earning ksh. 26,721 per month, and worked diligently until 30/7/2016 when he was terminated on allegations of theft. That the termination was baseless, unfair, was against Section 41(1) of the Employment Act 2007; and that the Claimant was not paid his dues.
2. The Claimant sought the following reliefs against the Respondent:-
 - a. a declaration that the Claimant’s termination was unlawful and unfair.
 - b. payment in lieu of notice.....ksh. 26,751
 - c. off days since 21st January 2015.....ksh. 75,794.50
 - d. public holidays.....ksh. 11,146.25
 - e. severance pay.....ksh. 16,713.75
 - f. general damages and compensation for unlawful termination.....ksh. 600,000
 - g. Certificate of Service.
 - h. costs of the claim and interest at Court rates.



- i. any other or further award as the Court may deem fit.
3. Other documents filed by the Claimant included an affidavit in verification of the claim, the Claimant's written witness statement dated 2/2/2017 and an evenly dated list of documents listing three documents. The listed documents were a demand letter dated 13/10/2016, employment contract dated 21/1/2015, and a copy of payslip.
4. The Respondent entered appearance on 6/6/2017 and filed a response to the Claimant's claim on 27/6/2017. The Respondent admitted having employed the Claimant as pleaded, but denied having terminated his employment. The Respondent further denied the Claimants other allegations against it.
5. Other documents filed by the Respondent included a written witness statement of one Eric Okola Othieno dated 20/2/2022 and a list of documents dated 24/2/2020, listing five documents. The listed documents included a show cause letter dated 25/7/2016, an invitation to a disciplinary meeting dated 12/8/2016, a summary dismissal letter dated 24/8/2016 and a post receipt.
6. The Claimant filed a further list of documents on 13/8/2020, dated 7/8/2020, listing two documents. The listed two documents included a charge sheet in Criminal Case No. 6073 of 2016 (CM's Court Eldoret – *Republic v Salman Abdulrahman Ahmed*) and the Claimant's written statement dated 18/7/2016 on the accident involving the Respondent's truck.
7. On 25/11/2020, the Respondent filed a written witness statement of one Mukasa Henry Musyoka, the Respondent's Human Resource Manager, dated 19/11/2010. The Respondent filed yet another written witness statement, of Charles Owiti, the Respondent's Human Resource Coordinator.
8. Trial is shown to have opened on 23/9/2020 before Ndolo, J when the Claimant testified, was cross-examined and re-examined, and then closed his case. The Claimant adopted his filed witness statement as his testimony and produced in evidence the documents referred to in paragraphs 3 and 6 of this judgment. The Claimant further testified that on 15/7/2016, he was going to Kampala, and that an accident occurred. That he informed his boss who told him to wait. That he was attacked by some people who were brought to the scene by his supervisor, and he went to the police station and reported.
9. The Claimant further testified that on going back, he found that all the cargo in the truck had been stolen and when he refused to sign a letter admitting to pay for the stolen cargo, he was locked out on 23/7/2016; but was not taken to Court. That his supervisor was charged in Court.
10. Cross-examined, the Claimant testified that he was given a letter on 18/7/2016 which he refused to sign and was locked out for one week. That he was terminated on 30/7/2016.
11. The Respondent's case opened before me on 1/3/2023. The Respondent called one witness, Charles Owiti, who adopted his witness statement dated 21/2/2023 (filed on 1/3/2023) as his testimony. The witness also produced in evidence the Respondent's documents referred to in paragraph 5 of this judgment.
12. Cross-examined and re-examined, RW-1 testified that the Claimant lost 30,860 litres of fuel which he was transporting to Uganda, but was not charged over the loss. That the Claimant was suspended as investigations were concluded. That the witness (RW-1) had no evidence on record to show that the letters listed on the Respondent's list of documents (including the show cause letter) were posted to the Claimant. That the witness did not have the Claimant's postal address. That the postal receipt marked "E005" was in respect of an invitation to attend a disciplinary hearing on 16/8/2016. That the receipt was dated 25/8/2016 while the summary dismissal letter was dated 24/8/2016.



13. Having considered the pleadings filed and evidence adduced by both parties, issues that emerge for determination, in my view, are:-
- a. whether termination of the Claimant's employment was unfair.
 - b. whether the Claimant is entitled to the reliefs sought.
14. On the first issue, it was a common ground that the Claimant was employed by the Respondent, and that he was dismissed on 30/8/2016 vide a dismissal letter dated 24/8/2016. It was not disputed that the Claimant was earning a monthly salary of ksh. 26,751 at the time of dismissal.
15. On whether termination of the Claimant was unfair, it must be noted that as stated in Walter Ogal Anuro v Teachers Service Commission [2013] eKLR:-
- “...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.”
16. Section 43(1) and 45(2) of the Employment Act address the issue of substantive justification. Section 43(1) states as follows:-
- “(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or the 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.”
17. On the other hand, section 45(2) (a)&(b) of the Employment Act provide that termination of employment by an employer is unfair if the employer fails to prove that the reason for the termination is valid and fair.
18. In the present case, the dismissal letter exhibited by the Claimant states as follows:-
- “Re: Summary Dismissal
- In reference to your invitation to attend a disciplinary meeting on 15th August 2016 and a similar meeting on 18th August which you never showed up, the management has therefore decided to summarily dismiss you in accordance to the Employment Act 2007 Section 44 subsection 4(c) which states that an employee willfully neglects to perform any other work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty under his contract, to have performed carefully and properly and subsection 4(g) which 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.
- You will be paid your dues less statutory deductions and any monies owed to the company.
- Please acknowledge receipt of this letter by signing a copy of the same.”
19. Although it is rather hard to comprehend what communication the foregoing letter was intended to convey, it is clear from the letter itself that the same does not contain any reason and/or justification for terminating the Claimant's employment. It simply purports to quote a Section of the Employment Act. Further, the Respondent did not, either before the Claimant's termination or at the trial



herein, demonstrate that the Claimant was guilty of any wrong doing regarding his employment and performance of his duties. What came out during the trial was that the Claimant was involved in an accident while transporting fuel to Uganda; and that the goods were thereupon stolen. The Claimant was not shown to have been responsible for either the accident or the loss of goods. He was never charged in Court. the Respondent did not demonstrate substantive justification for termination of the Claimant's employment.

20. Further, the procedure adopted by the Respondent in terminating the Claimant's employment was far from being fair. The Respondent did not demonstrate compliance with Section 41 of the Employment Act, which provides a mandatory procedure that must be adopted by an employer contemplating terminating an employee's employment on grounds of misconduct, poor performance or physical incapacity. The Section provides as follows:-

“(1) Subject to Section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this part, the employer shall, before terminating the employment of an employee, or summarily dismissing an employee under Section 44(3) or (4) hear and consider any representations which the employee may on the ground of misconduct or poor performance, and the person, if any chosen by the employee within subsection (1) make.”

21. The Respondent's witness (RW-1) testified that he had nothing to show that the letters listed on the Respondent's list of documents had been given to/send to the Claimant. These letters included a purported show cause letter dated 25/7/2016, letters dated 12/8/2016 and 16/8/2016 respectively purporting to invite the Claimant for a disciplinary hearing and a summary dismissal letter dated 24/8/2016. No disciplinary (committee) minutes were exhibited, and it was not proved by the Respondent that the Claimant had been given an opportunity to be heard prior to termination of his employment.

22. I find and hold that termination of the Claimant's employment was unfair, and I so declare.

23. On the second issue, and having found that termination of the Claimant's employment was unfair, I award the claimant the equivalent of eight months' salary being compensation for unfair termination of employment. That is ksh. 26,751X8 = 214,008.

24. The Claimant is also awarded ksh. 26,751 being one month salary in lieu of notice pursuant to Section 35(1) (c) of the Employment Act.

25. The claims for off days and public holidays are declined as they were not specifically pleaded, and were not proved. The claim for severance pay is declined as termination of the Claimant's employment did not result from redundancy. The prayer for issuance of a Certificate of Service is allowed under Section 51(1) of the Employment Act.

26. Finally, and having considered submissions by Counsel for the parties, judgment is hereby entered for the Claimant against the Respondent for:-

a. compensation for unfair termination of employmentksh.
214,008



b. payment in lieu of notice.....ksh, 26,751

Total ksh. 240,759

27. The Respondent shall issue the claimant with a certificate of service pursuant to Section 51(1) of the Employment Act within thirty days of this judgment.

28. The claimant is awarded costs of the suit and interest at court rates.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 19TH OCTOBER 2023.

AGNES KITIKU NZEI

JUDGE

Order

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

Agnes Kitiku Nzei

Judge

Appearance:

..... for Claimant

..... Respondent

