



REPUBLIC OF KENYA



Nzioki v Tusker Mattresses Ltd (Employment and Labour Relations Cause 550 of 2017) [2023] KEELRC 2462 (KLR) (13 October 2023) (Judgment)

Neutral citation: [2023] KEELRC 2462 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 550 OF 2017
AN MWAURE, J
OCTOBER 13, 2023**

BETWEEN

ANTHONY KIMILU NZIOKI CLAIMANT

AND

TUSKER MATTRESSES LTD RESPONDENT

JUDGMENT

Introduction

1. The claimant filed a memorandum of claim dated 2nd March 2017.

Claimant's case

2. The claimant in his claim states he was employed by the respondent as a shop floor assistant on 4th February 2002 and the claimant took his job with zeal and diligence until the 14th July 2014 when he received a termination letter.
3. Initially he received a suspension letter on 28th June 2016 and the suspension was for one week in order to investigate a claim of obtaining money un procedurally amounting to kshs 71,000/-.
4. Apparently, he was invited to a disciplinary meeting on 14th July 2016 at 10 am at Tusky's supermarket offices along Mombasa Road. This was by a letter dated 5th July 2016.
5. The claimant was instructed that he was entitled to be represented by a fellow employee of his choice and to cross examine the respondent's witness. He was also to present his own case and to call witness to support his case and finally to obtain necessary information he needed for his evidence.
6. He says the hearing was a travesty as the meeting was moved from 10am to 7.30 am ensuring the claimant did not have enough time to prepare his case and call his witnesses. He says he was not allowed to have a witness of his choice.



7. He says the meetings of the proceedings was a smoke screen and all goes to show his termination was unlawful and there was no reason given to terminate him.
8. The claimant therefore prays for damages as set out in the memorandum of claimant paragraph 15.

Respondents case

9. The respondent filed a statement of response dated 21st April 2017. He said the claimant did serve the respondent from 14th February 2002 to 14th July 2016 when his services were terminated.
10. He says that following an audit report done by the respondent on 8th June 2016 the claimant was suspected to have un procedurally and against respondent's policy obtained kshs 71,000 as a branch manager in Chap Chap Thika branch.
11. He says on 28th June 2016 he wrote to the claimant to show cause within 2 days why disciplinary action should not be taken against him. He was suspended for one week to allow investigations. The respondent claimant responded within 2 weeks and not 2 days and he accepted he took the 71,000/-.
12. He says he was invited on 14th July 2016 for disciplinary meeting and he says claimant did not raise any questions on unprocedural accounts in the meeting. He says claimants admitted he had obtained money on several occasions un procedurally.
13. He says finally a decision was taken to terminate the claimant on 18th July 2016 and claimant was informed the reasons for termination being obtaining Kshs 71,000 un procedurally. The claimant's evidence was also contradicted by the witnesses and also claimant was found to have breached company's policy despite knowing of the same.
14. Respondent states claimant was paid his terminal duties. He avers that the claimant's case should be dismissed with costs.
15. The claimant filed a reply to the statement of defence dated 16th May 2017. He says that the respondent did not incur any losses and kshs 71,000 was lawfully obtained from chief cashier for purposes of getting change and full amount was timely returned and fully utilized for this benefit of the respondent's Thika Chap Chap supermarket branch.
16. The respondent did not turn up for hearing though was served with a hearing notice dated 29th March 2023. The affidavit of service dated 11th April 2023 was filed in court.
17. The claimant did not also give evidence in Court but was ordered to file an affidavit to support his claim which he did not file but only filed his submissions dated 2nd May 2023.
18. The submissions were filed by the claimant but the respondent did not file their submissions.

Analysis and determination.

19. The issue for determination is whether claimant was lawfully terminated and is he entitled to any reliefs as prayed.
20. The fundamental requirement in determining a case of lawful and fair termination of an employee is prove by the employer of a valid reason to terminate employment. The same provisions is well articulated in sections 43 and sections 45 of the [employment act](#). Section 43(1) of the [employment act](#) provides:



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.

21. And section 45(1) provides as follows:

No employer shall terminate the employment of an employee unfairly.

22. The claimant was ordered by the court to file an affidavit to support his claim on 12th April 2023 and he apparently did not do so. He only filed submissions. The pleadings and his witness statement are therefore not supported and neither is the respondent's pleadings supported or produced in court. Mere pleadings which are not supported by an affidavit or statement will not be considered in court as provided in section 25(3) of the Labour Relations Court (Procedure rules). The section 25(3) of the Labour Relations Act Provides:

Evidence before court may be given orally or if a judge so orders by affidavit or a written statement and the court may at any stage of hearing require attendance of deponent or an author of written statement for purposes of examination of the facts deponed or written.

23. The court therefore finds the parties did not satisfy the requirements of hearing of the suit as pleadings alone are not sufficient to support a suit.

24. The exhibits presented by the respective parties are also not produced in court. The court will not perform the work of the litigants to direct them how to proceed with a suit.

25. The claimant was specifically ordered by the court to file an affidavit of support together with his submissions but only filed the submissions.

26. The court finds the claimant has not therefore proved his case under the circumstances hereto.

27. The court is supported by the case Civil Appeal 57 of 2017 Robert Ngande Kathathis vs Francis Kivuua Kitonde where court referring to CMC Aviation Ltd vs Cruisant Ltd No 11 of 1978 said:

“pleadings contain the averments of the parties concerned and only these are proved or disapproved or there is an admission of them or any of them by the parties they are not evidence and no decisions could be founded upon them. Proof is the foundation of evidence.”

28. The court therefore holds that the claimant did not adduce evidence to prove his case and so the same is dismissed accordingly.

29. Each party will meet its costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 13TH DAY OF OCTOBER, 2023.

ANNA NGIBUINI MWAURE

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 has 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 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

