



**Kenja v Raiply Woods (K) Limited (Cause 185 of 2018)
[2023] KEELRC 2576 (KLR) (12 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2576 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE 185 OF 2018
MA ONYANGO, J
OCTOBER 12, 2023**

BETWEEN

MOSES MWANGI KENJA CLAIMANT

AND

RAIPLY WOODS (K) LIMITED RESPONDENT

JUDGMENT

1. The Claimant in this case filed his Statement of Claim dated 9th April 2018 seeking for the following orders:
 - a. A declaration that the Claimant suffered unfair termination of employment
 - b. That Court orders the Respondent to reinstate the Claimant to his work fully
 - c. Kshs. 431,317.6 in terminal benefits as agreed in the indemnity agreement
 - d. Costs of this suit and Interests on at court rates from time of filing suit until payment in full
 - e. A Certificate of service as per Section 51 of the *Employment Act*
 - f. Any other further and better relief the Honourable Court may deem just and fit to grant

The Claimant's case

2. The Claimant avers in his Statement of Claim that he was employed on permanent basis by the respondent as a mechanical fitter with effect from August, 1993.
3. He states that as at the time of the termination of his employment he was earning a gross salary of Kshs 25,428 plus a house allowance of Kshs 3,800.



4. He further states that he served the Respondent with loyalty, diligence and full commitment until 8th April, 2016 when the Respondent wrongfully and unlawfully terminated his services.
5. The Claimant avers that the Respondent unprocedurally, unlawfully and unfairly dismissed him from employment based on unproven claim of gross misconduct that he was absent from work. He averred he was off duty on 18th March 2016 as he had been diagnosed with neuro issues and had been given 4 days off. According to the Claimant, the off-duty permission was granted by his immediate supervisors and leave forms were signed to this effect.
6. He further avers that he reported back to work on 27th March 2016 and worked till around 10am when he was dismissed from work.
7. The Claimant particularized and sought payment of Ksh 431,317,6 as his terminal dues.

The Respondent's Response to Memorandum of Claim

8. The Respondent filed its Response on 18th June 2021 denying the averments in the claim and averred that all requirements of the law, including affording the Claimant a fair hearing were adhered to before the Claimant was summarily dismissed.
9. The Respondent avers that if the claimant's employment was indeed terminated as alleged, then the respondent must have satisfied itself that there were valid grounds to warrant his dismissal and thus the claim herein is misconceived.
10. This suit was disposed of by way of documents, witness statements and written submissions after the court was informed that the Claimant was unable to attend court due to mental instability. That the Claimant had a long history of mental instability. The court also took into account the age of the case and the fact that it was not known when and/or if the Claimant would be well enough to attend court and testify. The Claimant relied on submissions filed on 5th April 2019 whereas the Respondent filed its submissions on 26th April 2023.

The Claimant's Submissions

11. The Claimant identified the issues for determination to be:
 - i. Whether the Claimant was an employee of the Respondent;
 - ii. Whether the Claimant's employment was unlawfully, unprocedurally and unfairly terminated by the Respondent;
 - iii. Whether the Claimant is entitled to compensation for unlawful, unprocedural and unfair termination from employment as prayed for in the Statement of claim;
 - iv. Whether the Claimant is entitled to an award of certificate of service;
 - v. Who should pay the costs.
12. On the first issue, it was submitted that the Claimant was an employee of the Respondent as evidenced by copies of pay slips and treatment notes from Huruma District Hospital.
13. With regard to the second issue, counsel submitted that for a termination to be considered lawful and procedural, it should satisfy both the procedural fairness test and substantive test. It was the Claimant's submission that there is no evidence that the Claimant was subjected to either the disciplinary procedure set out in section 41 of the [Employment Act](#), or the Respondent's internal disciplinary



procedural rules. It was further submitted that the Claimant was not given a fair reason for his termination.

14. On the issue of issuance of certificate of service, counsel for the Claimant submitted that the Claimant had worked for the Respondent diligently for over 23 years and that he was entitled to be issued with the said certificate as stipulated by section 51 of the *Employment Act*.
15. In conclusion the Claimant urged the court to award him compensation for unfair termination. He also prayed for costs and interests.

The Respondent's submissions

16. The Respondent submitted that the claim herein is not merited as the Claimant had time and again had disciplinary issues and had been pardoned and warned before. It is the Respondent's submissions that a perusal of the Claimant's file as annexed in the Respondent's bundle of documents showed numerous warning letters issued to the Claimant.
17. The Respondent's counsel submitted that the Claimant had been warned for persistent absenteeism from duty which culminated in a notice to show cause dated 6th April 2016.
18. It was further submitted that the Respondent held a disciplinary meeting where the Claimant was given an opportunity to be heard after which he was dismissed vide a letter dated 8th April, 2016 setting out the reasons for the dismissal.
19. According to the Respondent, the Claimant was dismissed for a lawful cause and due process was followed.
20. The Respondent submitted that the claim for unfair termination is unmeritorious and as such, the Claimant is not entitled to the reliefs he is seeking.

Determination

21. I have carefully considered the pleadings and the submissions of the parties including the cited authorities and, in my view, the issues for determination are:
 - i. Whether the Claimant's employment was terminated fairly, legally and procedurally;
 - ii. Whether the reliefs sought are merited.
22. It is not in dispute that the Claimant was an employee of the Respondent.
23. The law relating to fair termination is contained in Section 41, 43 and 45(2) of the *Employment Act*. It is trite that before an employer terminates an employee's employment, the employer must not only prove that it had valid reasons for the said termination but must also ensure that the laid down procedure is complied with.
24. Section 43 of *Employment Act* 2007 provides inter alia:
 - " 43. Proof of reason for termination
 - (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
25. The burden of proof in termination of employment claims is on the employer who is required to prove that the reasons for the termination as valid.
26. Section 45(1) of the *Employment Act* provides that:
- “No employer shall terminate the employment of the employee unfairly. A termination of employment by an employer is unfair if the employer fails to prove: -
- a) That the reason or reasons 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 was that the Employment was terminated in accordance with fair procedure”.
27. The Claimant has in support of his case averred that he was unfairly dismissed from employment based on unproved claims of misconduct being absence from work. The Claimant submitted that he was lawfully absent from work as he was on sick off and had signed the sick leave forms which had been approved by his supervisors.
28. The Respondent on the other hand maintained that the Claimant was dismissed from employment on grounds of persistent absenteeism. It contended that the Claimant had been issued with several warning letters which culminated in a notice to show cause letter dated 6th April 2016 and the subsequent dismissal letter dated 8th April 2016.
29. Under section 44(4) of the *Employment Act* absenteeism is gross misconduct that would justify dismissal of an employee but only if the absence is without permission or other lawful cause.
30. I have perused the pleadings and particularly the documents forming part of the Respondent’s bundle of documents. It is evident from the show cause letters dated 17th November 2015, 30th December 2015, 12th January 2016, 5th February 2016, 6th April 2016, 9th July 2016, and the suspension letter dated 8th February 2016 that the Claimant had been warned severally for absenteeism.
31. I have further noted that although the Claimant had been in employment of the Respondent for 23 years, the Claimant’s absenteeism started sometimes in late December 2015. No evidence was produced of any incidents of absenteeism or of any other form of misconduct by the Claimant before July 2015.
32. The Claimant in his statement of claim pleaded that he was absent on the material day on account of sickness, as he had been diagnosed with neuro issues. The *Employment Act* and the CBA that the Claimant was subject to both recognise the right to sick off and termination on grounds of medical incapacity.
33. The court has also taken judicial notice of the fact that during the pendency of this claim the Claimant was reported to have been suffering from mental incapacity.



34. It is my view that the Claimant's sudden change of behaviour and apparent regular absenteeism may have been a result of mental instability which the Respondent failed to recognise and therefore treated the same as misconduct rather than illness that required a more sympathetic approach.
35. The Respondent in its pleadings and submissions alluded to the fact that the Claimant was subjected to a hearing as stipulated by section 41 of the *Employment Act*. There is however no evidence on record to prove that a disciplinary hearing was conducted.
36. The evidence on record shows that the Claimant was on 6th April issued with a notice to show cause why disciplinary action should not be taken against him. He was required to respond to the same by 7th April 2016 before 3 pm.
37. In his response he stated that he was absent with permission. The response is reproduced below:

Moses M. Kenja

Box 241

Eldoret

P/NO 1192

To the Personnel Manager

Raiplywood (k) Ltd

Box 241

Eldoret

Dear Sir

Re: Show Cause Why

I Moses Kenja have been asked to show cause why disciplinary action should not be taken against me.

On 18th March 2016, I came to work as usual even though I was not feeling well. I told Mr. Otieno, Mr. Tom Akoo, Mr. Imbwaga and some few workmates. I was given gate pass to go to the hospital of which I was given 4 days of sick off. I later came back and I told Mr. Otieno that still I had not recovered well. He told me to go back home until I feel well.

Yours

Moses Kenja

P/No. 1192

38. The letter of dismissal dated 8th April 2016 which does not make any reference to a disciplinary hearing, is reproduced below:

Mr. Moses Mwangi Kenja

P/No. 1192

PP, Plant

Re: Dismissal

This is to inform you that you have been dismissed from employment w.e.f 8/4/2016 for the following offences;

1. Since 18th March 2016 to date, you have been absent from duty without leave.



2. You have been warned several times to no avail including a final a final warning on 20/12/2015 for the same offence.

Your terminal dues, which will be paid after clearance, will include:-

- a. Days worked upto 8/4/2016.
- b. Annual leave balance as at 8/4/2016.

Yours faithfully

Raiply Woods (k) Ltd

R.T.O Nyamwalo

Personnel Manager

39. In the absence of proof that the Claimant was subjected to a disciplinary hearing in terms of section 41 of the Employment Act, and in view of the fact that he had a valid reason as well as permission to be away at the time he was alleged to be absent without permission, the termination was unfair in terms of Section 41 of the Employment Act

Whether the Claimant is entitled to the reliefs sought

40. In view of the findings above, I order that the Claimant be deemed to have been terminated on medical grounds and be paid terminal dues in accordance with clause 18 of the CBA. He is entitled payment of 2 months salary in lieu of notice as provided in clause 19 of the CBA. He is further entitled to annual leave for 2016 up to the date of termination and to 21 days' pay for each completed year of service.
41. The Claimant is also entitled to be issued with a certificate of service in terms of section 51 of the Employment Act unless the same has already been issued to him.
42. I therefore award the Claimant the following:
- i. 21 days for each completed year of service as per clause 18 of CBA (29228X21 years) Kshs. 430,534
 - ii. Notice (2 months) Kshs. 58,456
 - iii. Pro rata leave Kshs. 5125.40
 - iv. The Claimant shall have the costs of this suit
 - v. Interest shall accrue from date of judgment

DATED AND DELIVERED VITUALLY AT ELDORET THIS 12TH DAY OF OCTOBER 2023

MAUREEN ONYANGO

JUDGE

