



**Kiara v Kenya Breweries Ltd (Cause E016 of 2020)
[2023] KEELRC 2401 (KLR) (6 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2401 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CAUSE E016 OF 2020
ON MAKAU, J
OCTOBER 6, 2023**

BETWEEN

ALFRED ISAAC MURIMI KIARA CLAIMANT

AND

KENYA BREWERIES LTD RESPONDENT

JUDGMENT

1. The claimant was employed by the respondent on 12th February, 2009 as a Trade Developer and rose through the ranks to become Area Business Development Manager earning a monthly salary of Kshs.359,051.61. On 30th July, 2020 he received a show cause letter charging him with breach of code of Business. Thereafter he was called for disciplinary and then he was dismissed summarily. He appealed and the dismissal was reduced to a normal termination with right to payment of salary in lieu of notice.
2. He was dissatisfied and brought this suit praying that;-
 - a. A declaration that the Respondent has treated the claimant in a manner that breached his Constitutional Rights under Articles 28 and 41 of *the Constitution* of Kenya.
 - b. A declaration that the Respondent's termination of the claimant's employment vide the letter of 20th August, 2020 was unprocedural, unfair and unlawful.
 - c. A declaration that the claimant is entitled to payment of his terminal dues and compensatory damages, calculated as follows:
 - a. 3 months' salary in lieu of notice Kshs.359,051.61/-
 - b. 12 months compensation for unfair termination of employment Kshs.359,051.61 x 12 months=Kshs.4,308,619.32
 - c. General damages for unfair termination.



- d. Interest in 3 (a), (b), (c) until payment in full.
 - e. Cost of this suit.
3. The respondent admitted the employment relationship with the claimant but denied the alleged unfair termination of his employment. It averred that the claimant was negligent in carrying out his duties in quarter 3 of 2020 leading to a loss of Kshs.3,273,069. Further he breached the Alcohol and Substance Use and Misuse Policy leading to unprofessional conduct due to working under the influence of alcohol. Finally, he had poor team management and thereby exposed the company to loss.
4. It averred that the claimant was accorded a fair hearing including appeal where his dismissal was reduced to a normal termination with payment of one month salary in lieu of notice. Therefore, it averred that the termination was fair and prayed the suit to be dismissed with costs.

Evidence

5. The claimant testified as CW1 and called no other witness. His evidence was that on 28th August, 2020 he received a dismissal letter citing three reasons namely:
 - a. Negligence in carrying out his duties.
 - b. Breach of Alcohol, drugs and substance use and misuse policy.
 - c. Poor team management.
6. He stated that the same charges were repeated in the show cause letter and they were false. He denied being the cause of the overspending of Kshs.3,273,069.00 in the promotion called Mdundo and stated that the spending was system based. He further denied the allegation that he attended work under the influence of alcohol. He stated further that the employer never brought any witnesses to substantiate the charges against him but he called four to support his case. He contended that the dismissal was unfair and that is why it was reduced to normal termination with payment of salary in lieu of notice. He produced ten (10) documents as exhibits to support his case.
7. On cross examination, he admitted that as the Area Business Manager, he had administrative role and six (6) staff members were reporting to him directly. He was also in charge of promotional activities with responsibility of constant updating and implementation of promotion.
8. He admitted that in his area, there was Mdundo na Balozi, and Premium Bucket serve promotions. In mdundo wa balozi, one was required to buy a particular quantity of balozi beer and get free beers or discounted price to support local Artists. In the premium bucket serve promotion, one was required to buy five (5) bottles at a price of four (4) or six (6) bottles at the price of five (5) bottles.
9. He testified that once a customer paid for a particular quantity in the two promotions, a corresponding discount or free issue was automatically generated in the system in favour of the customer. The intention was to increase volume and set sales for the business. There was a budget but he denied being aware of it. He denied that he was the one to sign off for the release of the free materials during the promotion and maintained that everything was system generated. He also denied that he was responsible for reconciliation of the material sold and those freely released during the promotions.
10. He denied that it was his responsibility to give approval to distributors after the promotion.
11. As regards working under the influence of alcohol, he denied that he was warned thrice by a Mr. Kerago Ngugi for working while intoxicated. However, he recalled that he was warned after he was invited for a drink by his seniors after work. The warning came the following day and it was in October 2018. He



- admitted that another incidence occurred in 2020 and he was issued with a show cause letter accusing him of attending duty while under the influence of alcohol.
12. Regarding the alleged poor team work, he admitted that he was required to have a monthly planner setting his coaching schedules but he started issuing coaching notices within 24 hours. However, he maintained that he had the discretion to do so.
 13. He admitted that he was served with show cause letter dated 30th July, 2020 and responded on 7th August 2020. On 21st August he was notified of disciplinary hearing and asked to be accompanied by another person. He attended with witnesses and thereafter he was given dismissal letter.
 14. He appealed by letter dated 4th September, 2020 asking for the dismissal letter to be withdrawn and the request was accepted vide the letter dated 21st October, 2020.
 15. On re-examination, he contended that the person in charge of inputting data in the system was the supervisor. He contended further that he was not able to know whether there was any over use of stocks. He denied the alleged fraud since the resources went to the customers. He maintained that he was just getting business. Finally, he contended that he appealed because the reasons for the dismissal were not valid.
 16. The respondent called its Head of Emerging Channels, Mr.Nicholas Kerago Ngugi who testified as RW1. As at August, 2020, he was the Divisional Sales Manager (Regional Manager) Mt.Kenya region and the claimant was reporting to him. He adopted his statement dated 21st January, 2021 as evidence in chief and produced six (6) documents as exhibits. His evidence in brief was that the first reason for dismissing claimant was misappropriation. He stated that the claimant was in charge of six (6) people who were reporting to him. He was also overseeing five (5) distributors. He was in charge general operations including crates execution management and promotions.
 17. RW1 explained that stocks are sent from Headquarters to the distributors and it was the responsibility of the claimant to ensure that the stock is sold to bars in the area. It was further his duty to ensure that any stocks for promotions sent to the distributors are managed properly. According to RW1, the claimant was expected to be aware of the opening stocks at every distributor for sale and also for promotions. However, the claimant failed in his duty including failing to approve promotional stocks given and that led to overspend of Kshs.3,273,069.00.
 18. RW1 stated that the overspend arose from the distributors continuing with promotion after the promotion stocks ran out and that forced the respondent to compensate them.
 19. He further stated that the claimant was supposed to make weekly reports of the promotion stocks but he failed to do so leading to the overspending. He testified that there is a budget and timelines for promotions for every area and therefore the area manager and sales representatives are supposed to manage crates of promotional stocks budgeted for the area.
 20. The second reason for dismissing the claimant was breach of policy on alcohol drugs and substance use. RW1 testified that the claimant was warned in 2018 for breach of the said policy but in 2019, he attended work under the influence of alcohol, he was smelling alcohol and he got aggressive to the team that had come from coaching exercise. A few months after the above incidence RW1 questioned the claimant about promotional resources and he became aggressive and he was smelling alcohol.
 21. RW1 gave the third reason for dismissal as claimant's poor teamwork. He testified that the standard procedure was that every 25th day of the month, the claimant was supposed to send a full planner for the following month regarding coaching and other trade activities. However, the claimant failed to do



- that and started to give 24 hours' notice of activities which brought complaints from his team. He was also not respecting them. He contended that there was a proper basis for dismissing the claimant.
22. On cross examination, he stated that he worked with the claimant from 2019 and the claimant did his work well when he was sober but when under the influence of alcohol, he was totally a different person. He reiterated that the claimant was dismissed for alcohol use, negligence of duty and poor management. RW1 was not involved in the disciplinary hearing but he contended that going by the minutes filed the process followed was the one provided in the policy.
 23. He admitted that he never served the claimant with warning letter but he served him with two show cause letters. He further admitted that he never used alcohol blow to test whether claimant was intoxicated but he maintained that he was smelling alcohol. He further admitted that no witness told the disciplinary committee that the claimant was abusing alcohol. He contended that the policy never required a blood test to determine whether an employee is intoxicated.
 24. RW1 testified that there was routine performance appraisal of staff including the claimant but he had not filed any report. He admitted that the claimant was never placed under Performance Improvement Plan (PIP). However, he maintained that he observed the claimant's performance during the period they worked together and it was not good.
 25. RW1 contended that Mdundo na balozi was a nationwide promotion and there was a budget and the overspending occurred due to failure to keep proper records. There was failure to do weekly reporting and conciliation. In Nyeri area only over Kshs.3 million was overspent. He maintained that the stocks from the warehouse went to the distributors but the management fell under the area manager. When he realized that the claimant was not doing his reports and conciliation he raised the matter with him.
 26. RW2 was the respondent's HR Business partner, Ms.Annette Ngugi. She adopted her written statement dated 30th March 2023 as her evidence in chief. In brief her statement was that the three reasons cited for the dismissal of the claimant were valid and that he was accorded a fair hearing before the dismissal. She therefore prayed for the suit to be dismissed with costs.
 27. On cross-examination, she confirmed that she never worked with the claimant. She further confirmed that the respondent rewards good performance base on profits and meeting of targets. She admitted that promotion is a reward for good performance. She stated that the claimant was issued with warning letters but none was filed in court. She admitted that no warning letter was given to the claimant for poor performance. She admitted that the witnesses called by the claimant during the disciplinary hearing said that he was a good manager who never abused alcohol. The witnesses were staff reporting to him. She further admitted that she had not filed any contrary evidence.
 28. She testified that the claimant was issued with a show cause letter to explain his failure to prepare weekly reports and reconciliation on the promotions. She admitted that the said promotion were the first time he failed to prepare the reports and conciliation.

Submissions

29. The claimant submitted that his dismissal was unlawful as the allegation of alcohol abuse, negligence of duty, and poor management of his team were false. He contended that no evidence was adduced during the disciplinary hearing to prove the allegations against him. Further no such evidence was adduced before this court to substantiate the allegations. Consequently, he contended that the allegations were baseless.



30. With respect to abuse of alcohol, he cited the case of *John Riba Maugo v Riley Falcon Security Services Ltd* (2016) eKLR where the court held that drinking or smelling alcohol per se is not a ground for summary dismissal under section 44(4) (b) of the *Employment Act*.
31. As regards neglect of duty and poor performance, he submitted that it was confirmed that during the hearing, that during the two promotions, the products came from the warehouse to the customers directly and he was not in control of the DMS system that checked out the products during the promotion. He contended that the respondent has admitted that the overall responsibility of the national promotions rests with the Customer Marketing Team of which he was not a member.
32. He contended the said national promotions had an activity owner who shares activity mechanism including timelines and budget of the promotion, it was using the DMS system and it had a starting date and end date when the activity would drop off automatically from the system when the end date arrived. The failure to drop off automatically led to the alleged “overspend” which was due to his fault or negligence. Consequently, he submitted that the alleged Kshs.3,273,069.00 was not lost due to his negligence and no audit report or other documentary evidence has been tabled before the court to prove this allegation.
33. For emphasis, he cited the case of *James Samba Mukala v Ol Tukai Lodge Ltd* (2013) eKLR where it was held that employer must show what measures were in place to enable it assess performance and what measures were taken to address the poor performance.
34. He further submitted that the alleged poor team management was not supported by any evidence. He contended that the same team he was accused of mismanaging, testified in his favour during the disciplinary hearing and denied the alleged impromptu coaching session and poor leave management.
35. As regards the procedure followed, he submitted that he was not given any opportunity to cross examine his accusers. Therefore he contended that he was denied a fair hearing which rendered unfair the procedure followed.
36. Finally, he submitted that the conversion of the dismissal to normal termination was not supported by the evidence in minutes of the disciplinary hearing which showed that all the witnesses refuted the allegations against him.
37. The respondent, on the other hand, submitted that the termination of the claimant’s employment was fair and lawful because it was grounded on valid reasons. The first reason being that he breached the company Alcohol, Drugs and Substance Use and Misuse Policy by undertaking his duties while under the influence of alcohol.
38. It was submitted that the claimant was warned for the offence in October 2018 but he repeated the offence on 1st September 2019 after coaching and accompaniment session while conducting a feedback session. DW1 noticed that the claimant was incoherent and aggressive and his breath smelled alcohol. He repeated the offence again when he was summoned by the DW1 to discuss issues relating to promotional resources. DW1 smelled alcohol breath and when he enquired why he was intoxicated he became aggressive. The case of *Augustino Mutwiri Murungi & another v United Millers Limited* (2019) eKLR and *Samuel Tanui Kiptan v Interconstruction Co.Ltd & 4 others* (2018) eKLR were cited to fortify the submission that intoxication is a valid ground for dismissing an employee.
39. The respondent submitted that the claimant was also guilty of negligence in carrying out his duties contrary to section 44 (4) (c) of the *Employment Act* and clause 9(3) of his contract of employment. It contended that it was the duty of the claimant to receive resources from the Headquarters and distribute the same to distributors and allocation of sales representatives who were answerable to him.



However, the claimant failed to give approval before the stocks were collected from the distributors and further failed to undertake weekly reconciliation of sales and promotional stock.

40. Specifically, it was submitted that during Mdundo na Balozi and Premium Bucket Serve Promotions, the claimant failed to carry his responsibility of monitoring the stocks approved for release and ensure that the activities were carried within budget. As a result, there was an overspend of Kshs.3,273,069.00. It submitted that, had the claimant did his weekly duties, he would have noted the overspend and stopped it before it rose to Kshs.3,273,069.00. For emphasis, reliance was placed on [*Benjamin Chepkairo v Kenya Urban Roads Authority*](#) (2016) eKLR, [*Joseph Ondieki Akuma v Tandu Alarm Systems Ltd*](#) (2020) eKLR and [*James Odhiambo Kaye v National Bank of Kenya Ltd*](#) (2020) eKLR.
41. The respondent further submitted that the termination was done in accordance with a fair procedure as the claimant was served with a show cause letter after investigations were done, he was heard by a disciplinary committee and finally by an appeal panel. At the end of the process the dismissal of the claimant was reduced to a normal termination.
42. The respondent maintained that the provision of section 41 of the [*Employment Act*](#) and clause 3 of its Disciplinary Policy were fully complied with. For emphasis, the case of [*Amos Kitavi Kivite v Kenya Revenue Authority*](#) (2020) eKLR was cited.
43. As regards the reliefs sought, the respondent submitted that the claimant's contract provided for one month termination notice and urged that the claim for three months' salary in lieu of notice lacks merit. Further it submitted that the claim for unfair termination was also unmerited because the termination was fair. Besides he caused the company to incur a loss of Kshs.3,273,069.00. For emphasis reliance was placed on [*Joseph Mwaniki Nganga v United Millers Ltd*](#) (2022) eKLR.
44. Finally, the respondent submitted that the claim for General damages is not provided for in section 49 (1) of the [*Employment Act*](#) and therefore it is unjustified.

Analysis and determination

45. Having carefully considered the pleadings, evidence and submissions, the issues for determination are:
 - a. Whether the termination of the claimant's employment was grounded on a valid and fair reasons.
 - b. Whether a fair procedure was followed.
 - c. Whether the reliefs sought are merited.

Reasons for termination

46. The reasons for the summary dismissal of the claimant were three but after the appeal, they were reduced to two. The letter communicating the appeal decision is dated 21st October, 2020 stated in part that: -

“Having reviewed your appeal request on its merits pursuant to Section 3.7.5 of the EABL Disciplinary Policy, it is our finding that the grounds of negligence in performance of your duties, and breach of the Alcohol, Drugs and Subsistence Use and Misuse Policy were substantiated.

For this reason, the decision of the Disciplinary committee to terminate your employment is hereby upheld. The termination by way of summary dismissal shall be revised to a termination in lieu of notice with effect from 28th August, 2020. In this respect you will



be paid one (1) month's salary in lieu of notice in accordance with your contract of employment.”

47. I have considered the evidence adduced by the two sides. There is admission by the claimant that in October 2018 he was warned for breach of the Alcohol, Drug and Substance Use and Misuse Policy in the presence of his seniors. He admitted that he repeated the offence in 2020 and he was served with a show cause letter by his Line Manager (RW1).
48. The claimant further admitted that he as the Area Business Development Manager, he had administrative responsibility. Other responsibilities included constant updating and implementation of promotions. However, he denied having any responsibility in the Mdundo na Balozi, and Premium Bucket Serve Promotions contending that the activity had an owner at the Headquarter. He denied knowledge of the promotions budget, and that he was the one to sign off for release of the free material during the promotions. He also denied that it was his responsibility to undertake conciliation of the material sold and those freely released during the promotions.
49. RW1 testified that it was the responsibility of the claimant to ensure that the stock is sold to bars in his area after the stocks were sent from the Headquarters. Further, it was his duty to ensure that any stocks for promotions sent to the distributors are managed properly. Further he was supposed to know the opening stocks at every distributor whether for sale or promotions but he failed to do so.
50. Having considered the evidence before the court, I am persuaded that the weight of the evidence tilts in favour of the respondent. The claimant was in charge of sales and promotions in his area of work which extended to several counties. He admitted during the disciplinary hearing that he failed to keep an eye on what was happening in the said promotions because of work load. The respondents' case is that if the claimant was diligent, the loss suffered during the said promotions could not have risen to over Kshs.3 million.
51. In view of the foregoing observations, I find that the respondent was right in terminating the services of the claimant on ground of negligence of duty and breach of its policy on Alcohol use. Consequently, I hold that the employer in this case has proved on a balance of probability that the reasons for the impugned termination were valid and fair as required by section 45 (2) of the [Employment Act](#).

Procedure followed

52. Section 41 of the [Employment Act](#) provides that:-
 - “(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, an 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 grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”
53. There is evidence on record that the claimant was served with a show cause charging him with three offences, he responded and thereafter he was accorded an oral hearing in the company of his chosen



fellow employees. His representations and those of his witnesses were considered but a verdict of summary dismissal was returned by the Disciplinary committee. Finally, the claimant appealed and the summary dismissal was reduced to normal termination with notice after only two offences were found to have been substantiated. The decision of the appeal panel was conveyed vide a letter dated 21st October, 2020.

54. Weighing the foregoing against the provisions of section 41 of the *Employment Act*, I am satisfied that the termination was done in accordance with a fair procedure. The claimant was made aware of his offence, and he was accorded a fair opportunity to air his defence. His representations were considered in the first instance and on appeal before a decision to terminate his services was reached.

Reliefs

55. Having found that the termination of the claimant's services was grounded on valid and fair reasons, and that fair procedure was followed, I decline to hold that the termination was unjustified, unfair and unlawful. For the same reason, I decline to award him compensation for wrongful termination. However, he is awarded one-month salary in lieu of notice which was offered by the respondent vide the letter dated 21st October, 2020.
56. The claim for severance pay also lacks merits because the claimant did not lose his job on account of redundancy. By dint of section 40 of the *Employment Act*, severance pay is a remedy available only when an employee's employment is terminated on account of redundancy. However, he will benefit from pension or any other social security provided under his contract of employment or the employer's HR Policy or the law.
57. The claim for loss of future earning of Kshs.77,555,147.40 he would have earned before his normal retirement is also declined because it has no foundation either in law or his contract of employment.

Conclusion

58. I have found that the claimant's employment contract was fairly and lawfully terminated. I have also found that he is not entitled to the reliefs sought except one month salary in lieu of notice being Kshs.359,051.61. Consequently, I enter judgment for the claimant in the sum of Kshs.359,051.61 plus interest at court rates from the date of filing the suit. The award shall be paid subject to statutory deductions. Since the respondent had offered to pay the one month salary even before filing the suit, I will not award the claimant costs of the suit.

DATED, SIGNED AND DELIVERED AT NYERI THIS 6TH DAY OF OCTOBER, 2023.

ONESMUS N MAKAU

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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE

