



Kerubo v Omega Risk Management Ltd (Employment and Labour Relations Cause 122 of 2018) [2023] KEELRC 2318 (KLR) (3 October 2023) (Judgment)

Neutral citation: [2023] KEELRC 2318 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS CAUSE 122 OF 2018**

**HS WASILWA, J
OCTOBER 3, 2023**

BETWEEN

JACKLINE KERUBO CLAIMANT

AND

OMEGA RISK MANAGEMENT LTD RESPONDENT

JUDGMENT

1. The claimant herein instituted this claim by a memorandum of claim dated 5th May, 2023 claiming to have been unfairly terminated and her rights under Articles 41, 47 and 50(1) breached. She prayed to be compensated for the unfair termination. She sought the following reliefs;
 - a. Declaration that the dismissal was unprocedural and unfair in the circumstances, the claimant is entitled to compensation as prayed for.
 - b. A declaration that the claimant's fundamental rights and freedoms guaranteed especially under Articles 41, 47 and 50(1) of *the Constitution* have been contravened by the Respondent.
 - c. Interests on amounts awarded from date of filling this claim until payment in full.
 - d. The Respondent gives the claimant a certificate of service in the meaning of section 51 of the *Employment Act*.
 - e. The Respondent releases the claimant's personal effects such as her security guard uniforms.
 - f. Costs of this claim.
 - g. Any other relief that this Honourable Court may deem fit and just to grant.



Claimant's case

2. The summary of the claimant's case is that she was employed by the Respondent on 30th October, 2010 as a prevention of loss officer stationed at Tuskys Magic Supermarket, Nakuru Branch.
3. She stated that she was placed on probation for three months and on 24th December, 2010, she was confirmed to the said position.
4. The claimant worked for the Respondent until 3rd March, 2018 when she received a summary dismissal letter on allegation of taking and soliciting gifts from customers on the 28th February, 2018.
5. On the events of that particular day, the claimant states that she was working at her station as usual when she was handed a shopping bag labelled Rina at the staff entrance by one Leonard Cheruiyot, an employee of the supermarket.
6. That she kept the said promotional shopping bag in her handbag in safe keeping for the said Leonard Cheruiyot, however when leaving the supermarket in the evening, she was frisked by the security guards and the said good bags confiscated. She was then directed to write a statement in relations to the said case.
7. The claimant maintains that she was unfairly terminated from her employment, because no reason or procedure was given for her termination. Furthermore, that the owner of the said goods did not face any consequences.
8. She stated that she was not paid for the days worked from 20th February, 2018 till his dismissal on 3rd March, 2018, a sum of Kshs 10,041. She also prayed for leave pay for the year 2018 of Kshs 19710 and pay for work done during public holidays in the year 2016 and 2017, a total of 28 days, amounting to Kshs 25,560.08. all adding up to Kshs. 54,771.43.
9. During hearing, the claimant testified as CW-1 and adopted her witness statement of 7th May, 2018, which basically reiterates the contents of the claim.
10. Upon cross examination, she testified that her duties were to prevent loss for the Respondent. She stated that on the material day on 28th February, 2018, at around 9pm, all staff were frisked as they leave the supermarket and she was found with three promotional bags written Rina, which bags were not for sale, neither were they sold in the supermarket. She added that the said promotional bags were given to her by one Leonard Cheruiyot, who was a staff member of Tuskys supermarket and that she was only given because she was the only one at the entrance at the time.
11. She testified that her position as a risk prevention officer was a position of trust and that she signed a code of conduct with the Respondent, which require among others for gifts to be left at the staff entrance before entering the supermarket.
12. On further cross examination, she stated that the said since Tuskys supermarket is no longer in operation, they are no longer in touch with the said Leonard and therefore he could not have called him as a witness. She then stated that she was given a certificate of service upon termination.

Respondent's case

13. The Respondent entered appearance on 25th September, 2019 and filed a defence to claim on even date denying the entire claim and stated that the claimant was indeed dismissed for soliciting gifts from the Respondent's customers/suppliers which is against company policy. Further, that the claimant



- admitted to that fact in her account of the incident report filed with the Respondent on the 28th February, 2018.
14. The Respondent stated that they followed the law in terminating the claimant as such the termination was justified.
 15. The Respondent called two witnesses in support of their case. Antony Kinungi, the Respondent's Risk manager, testified as RW-1. He adopted his witness statement filed on 19th May, 2023 and stated that he interacted with the claimant briefly on occasions where he used to relieve her team leader. He stated that all employees of the Respondent are trained for 2 weeks on the code of conduct before deployment. That the claimant breached the code of conduct on receiving gifts from the client/ suppliers of the client, an issue that they were made aware of, because it was an issue that was likely to compromise her judgement in delivering her duties.
 16. Upon cross examination, he testified that the claimant was terminated because of being found in possession of promotional carrier bags. He also stated that the claimant was not entitled to any disciplinary because of the position, she held.
 17. The second Respondent's witness was Karanja Njamaa, the managing director of the Respondent, who testified as RW-2. He also adopted his witness statement of 3rd May, 2023 and adopted the documents dated 24th September, 2018 as the Respondent's Exhibits. In addition, he stated that Risk prevention officer ensure no loss occurs at the Tuskys, through shop lifting among others. He testified that the claimant was found with promotional bags in her handbag, which issue was against the Respondent code of conduct and a ground for termination, which forced them to terminate her services by the letter of dismissal dated 2nd March, 2018. That the letter of termination clearly gave the claimant 14 days of appeal but she did not appeal the decision of the Respondent.
 18. On cross examination, he testified that, they were the ones to take action on their staff and there was no requirement for a formal report to be submitted to them by Tuskys Supermarket before they could take action. He stated that the mentioned person one martin and Cheruiyot were Tuskys staff members who were not within their jurisdiction for disciplinary action.
 19. RW-2 told this court that the claimant had been warned earlier in 2015 and her record was thus not clean. He also testified that there was a report by Elizabeth Jebet that alleged the claimant was not given fair hearing but since Jebet was a Tuskys staff, she is not supposed to interfere with their internal affairs. He restated that the termination was justified and the case herein should be dismissed.

Claimant's submissions

20. The claimant submitted on three issues; whether the claimant's actions warranted summary dismissal, whether the claimant's summary dismissal amounted to unfair termination and whether the claimant is entitled to compensation for un-procedural and unfair termination from employment.
21. On the first issue, the claimant submitted that summary dismissal without notice or with less notice that is provided for under statute is allowed only if the termination is one sanctioned under section 44(2) of the *Employment Act*. It was argued that the offense that was committed herein was not grave to warrant the summary dismissal with short notice and without disciplinary hearing as is required



under the *Employment Act*. To support this they relied on the case of *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR where the Court held that;-

“The standard applicable to summary dismissal is of a higher nature as this process is prone to abuse as the employer is in a more superior position than an employee.”

22. According that the summary dismissal meted against the claimant was of draconian nature, considering that the Respondent did not investigate the issues which have been emphasize time and against as was stated in the case of *Mary Chemweno Kiptui*(Supra) that ;

“A suspension therefore is ultimately a right due to an employer who on reasonable grounds suspects an employee to have been involved in misconduct, of poor performance or physical incapacity and wishes to remove such an employee from the work place to enable further investigation without subjecting the employee to further commission of more acts of misconduct, underperformance or the conditions leading to incapacity. The suspension period is a time available to an employer to control as the employee can be summoned back to work any time to undertake disciplinary proceedings or upon terms and given by an employer.”

23. It was argued that if the Respondent was apprehensive of the claimant conduct, it ought to have first suspended the claimant, carry out investigation, give the claimant a chance to defend herself, before taking action against her. Failure to which the termination of the claimant amounts to unfair termination because it lacked procedural fairness.

24. It was submitted that by the mere fact that the claimant was terminated without being subjected disciplinary procedure as is required under section 41 of the *Employment Act*, made the termination unfair. In this they relied on the case of *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR where the Court held that; -

“for the termination to pass the fairness test, it must be shown that there was not only substantive justification but also procedural fairness.”

25. The claimant also relied on the case of *Naomi Wangui Kungu V Board of Governors SCLP Samaj School* [2022] eKLR where the Court adjudged a summary dismissal to be unfair and wrong due to failure on the employer’s part to issue a notice to show cause. Furthermore, that the claimant was not subjected to any disciplinary hearing and therefore could not appeal the decision of the Respondent because it was not based on any procedure.

26. It was also submitted that to terminate the claimant for being in possession of promotional bags, without subjecting her to disciplinary hearing was in violation of her rights under *the Constitution* especially Articles 47, 49 and 50. Moreover, that the termination was discriminatory contrary to the provisions of section 5(3) of the *Employment Act*, in that the claimant was terminated, while her colleague, Leonard Cheruiyot, who she allegedly colluded with did not face any consequences.

27. On reliefs sought, it was submitted that the claimant has elaborated the way in which her termination was carried out, which was unfair and therefore, she ought to be awarded the reliefs sought under the claim as prayed.

Respondent’s Submissions.

28. The Respondent began by summarising the events leading to the claimant’s dismissal and submitted that on 28th February, 2018, the claimant received five shopping bags labelled Rina and kept the said



bags in her own personal handbag till evening and upon search, they were found inside her bag, a fact which she admitted in her witness statement and during hearing before this Court.

29. It was submitted that the claimant was afforded due process at the branch level in Nakuru by the Regional manager, one David Nyambane. A report was prepared by the Loss prevention coordinator, one Elizabeth Jebet, which was later forwarded to Nairobi, and eventual termination. It was argued that the claimant was thus dismissed for a good cause and subjected to disciplinary procedure through the questioning done by David Nyambane.
30. It was argued that the code of conduct, which was signed by the claimant on 22nd September, 2010, when she joined the Respondent's employment, provides inter alia for soliciting of gifts as a major violation, which attracted summary dismissal as punishment.
31. The Respondent submitted that arising from the said incident, the client, Tuskys Supermarket, required the claimant to leave their premises immediately. Secondly that the Respondent was apprehensive of losing business with the said client, informing the need to expeditiously remove unsatisfactory employee to avert more loss.
32. Accordingly, that the claimant was given an opportunity to respond to the allegation on the 28th February, 2018, given a chance to discuss the issue with the regional manager and further granted 14 days to appeal the termination, an indication that the claimant was accorded due process. He argued that fair hearing need not necessarily require an employee to appear before a formal disciplinary hearing. In this they relied on the case of Republic v Ghana Railways Corporation, where Justice Twumasi JA Held that;-

“the core idea implicit in the natural justice principle of audi alterem partem was simply that a party ought to have reasonable notice of the case he has to meet and ought to be given an opportunity to make his statement in explanation of any question and answer an arguments put forward against it. The principle does not require that there must be a formal trial of a specific charge akin to court proceedings...in dealing with the principles of Natural justice, one has to always bear in mind that the principles are substantive rather than procedural safeguards. Therefore the fact that a particular formal procedure is not adopted does not itself imply that the principle has not been applied in an appropriate case”
33. A similar view was upheld y the Court of Appeal in the case of CFC Stanbic Bank Limited V Danson Mwashako Mwashako [2015] eKLR where the court noted that employers may have good reasons to consider certain issues very fundamental in arriving at misconducts that constitutes grounds for summary dismissal.
34. Accordingly, that the misconduct by the claimant was grossly injurious to the business of the company that it would not have been reasonable to retain her in employment.
35. On the allegation of discrimination, the Respondent submitted that the said Leonard Cheruiyot was not their employee but an employee of Tuskys Supermarket, whom they could not take any disciplinary action against. Furthermore, that there is no evidence to support the allegation that the said employee was not taken any disciplinary action.
36. On the reliefs sought, the Respondent relied on the court of appeal case of Kenya Power & Lighting company Limited Vs Aggrey Lukorito Wasike [2017] eKLR and argued that if any orders are to be issued then conservative approach should be employed so that the claimant is not seen to be rewarded in the totality, taking into account her conduct that contributed to her termination.



37. I have examined all evidence and submissions of the parties herein. From the evidence before me, the claimant was dismissed vide a letter dated 3/3/2018 which indicated that the reason for dismissal was receiving promotional bags.
38. The claimant in her evidence indicated that she was given these promotional bags by a staff of Tuskys Supermarket one Cheruiyot and they were not for sale.
39. The respondent further indicated that the claimant acted in contravention of the respondent's code of conduct which forbid employees from receiving any gifts from their clients which would compromise their Judgment.
40. The RW1 in his testimony however indicated that they found the claimant guilty and she was not entitled to any disciplinary hearing.
41. This admission by RW1 contravenes the provision of Section 41 of the Employment Act 2007 which states as follows;-

“ 41.

Notification and hearing before termination on grounds of misconduct

(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”.

42. In view of the fact that the claimant was dismissed without being subjected to any fair hearing, I find her dismissal unfair as provided for under Section 45 (2) of the Employment Act 2007 which states as follows;-

“ 45. (1).....

(2) 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; and

(c) that the employment was terminated in accordance with fair procedure”.

43. It is my finding that the claimant was dismissed unfairly for lack of due process and I find for her and award her as follows;-

1. 1 month salary in lieu of notice = 12,597/=



2. 6 months salary as compensation for the unfair dismissal = $6 \times 12,597 = 75,582/=$
TOTAL = 88,179/=
Less statutory deduction
3. Issuance of certificate of service
4. The respondents shall pay costs of this suit plus interest at court rates with effect from the date of the Judgment.

DATED AND DELIVERED IN OPEN COURT THIS 3RD DAY OF OCTOBER, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Okumu for Claimant - present

No appearance for Respondent

Court Assistant – Fred

