



**Atula v Techpack Industries Limited (Cause 611 of 2018)  
[2023] KEELRC 3110 (KLR) (24 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3110 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 611 OF 2018  
SC RUTTO, J  
NOVEMBER 24, 2023**

**BETWEEN**

**PETER ODHIAMBO ATULA ..... CLAIMANT**

**AND**

**TECHPACK INDUSTRIES LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant avers that he was employed by the Respondent in the year, 2008 as a machine operator on renewable yearly contracts. According to the Claimant, he served the Respondent with loyalty, dedication and diligence. The Claimant further avers that he was orally terminated by the Respondent's Human Resource Manager. On account of the foregoing, the Claimant seeks against the Respondent the sum of Kshs 359,550.00, being leave days, notice pay and compensation for unlawful termination.
2. The Respondent opposed the Claim through its Memorandum of Response in which it avers that in the course of employment, the Claimant did not report to work on several occasions and was issued with warning letters. The Respondent has denied unlawfully dismissing the Claimant from employment and avers that it is him who constructively dismissed himself from employment. Consequently, the Respondent has asked the Court to dismiss the Claim with costs.
3. During the hearing which proceeded on 13<sup>th</sup> April 2023 and 21<sup>st</sup> June 2023, both parties called oral evidence.

**Claimant's Case**

4. The Claimant testified in support of his case and for starters, he adopted his witness statement to constitute his evidence in chief. He further produced the documents filed on his behalf as exhibits before Court.



5. It was the Claimant's case that he fell ill on or about the month of June 2017 and he was absent due to sickness. After three (3) days, he informed the Respondent as much through the Human Resources Manager, by the name Mr. Wanjama who insisted that he should be at work. Subsequently, Mr. Wanjama told him that he had been instructed by the Production Manager to sack him (Claimant). He wasn't invited to any meeting and was not given a termination letter or any other document from the office.
6. Concluding his testimony in chief, the Claimant denied absconding duty and asked the Court to allow his claim as prayed.

### **Respondent's case**

7. The Respondent called oral evidence through its Human Resource Manager, Ms. Rita Njeru, who testified as RW1. At the outset, she similarly adopted her witness statement and the bundle of documents filed on behalf of the Respondent to constitute her evidence in chief.
8. RW1 stated that every time the Claimant absented himself from work, there was no communication made to the Human Resource Manager stating his reason for absenteeism from work. That cumulatively, the Claimant was issued with seven (7) warning letters on absenteeism.
9. That on or about 7<sup>th</sup> July 2017, the Claimant was absent from work and had not made any communication to the Respondent as to his whereabouts. Investigations were conducted and the Claimant was located on his enquiry as to why he had not reported to work.
10. RW1 further stated that he was unwell and was seeking medical treatment of which, he was requested to provide medical documents to prove his sickness but he was unable to avail the same and in fact, never went back to work again.
11. She stated that the Claimant was issued with a letter dated 20<sup>th</sup> July 2017, requesting him to give a detailed as well as a satisfactory explanation to the management and the disciplinary committee on his absenteeism from work but he never responded and never resumed work. Instead, he rushed to Court and filed this claim.
12. In RW1's view, the Respondent did not unlawfully dismiss and or terminate the Claimant from employment.

### **Submissions**

13. It was submitted on behalf of the Claimant that from the evidence tendered before court, he was not accorded an opportunity to be heard. It was his position that there was no official communication of his termination other than the verbal dismissal by Mr. Wanjama who was not called by the Respondent to counter the evidence and allegations he had made.
14. In further submission, the Claimant stated that the letter allegedly written to him and dated 20<sup>th</sup> July 2017 was never posted to him as the certificate of postage, is a forgery.
15. The Claimant maintained that even if the letter was sent, which he still denies, the Respondent has not produced any minutes to show how his issue was dealt with and the outcome of a disciplinary meeting before his services were terminated. In support of his submission, the Claimant placed reliance on the case of Kenya Union of Commercial Food and Allied Workers vs Meru North Farmers Sacco Limited (2013) eKLR.



16. He further submitted that while he was dismissed from employment on account of absenteeism, his reasons for being absent were well explained and the medical documents were given to his supervisor who did not attend court to counter this position.
17. On its part, the Respondent submitted that the Claimant wilfully chose to absent himself from his lawful place of employment and chose not to pursue any internal grievance mechanisms to mitigate the allegations levelled against him.
18. The Respondent further submitted that the Claimant was well aware that the terms of his contract indicated that he was to be employed for a period of one year beginning 1<sup>st</sup> October 2016 up until 30<sup>th</sup> September 2017. That when the Claimant left and his contract lapsed, there was no mandatory obligation for the same to be renewed. To this end, the Respondent referenced the cases of *George Onyango vs The Board of Directors Numerical Machining Complex Limited (2014) eKLR* and *Rajib Barasa & 4 Others vs Kenya Meat Commission (2016) eKLR* and argued that parties are bound by the terms of their contracts and that there is no mandatory obligation for the same to be renewed.

### **Analysis and determination**

19. Flowing from the pleadings on record, the evidentiary material before me and the opposing submissions, it is clear that the Court is being called to determine the following issues: -
  - i. Whether there was a justifiable reason to terminate the employment of the Claimant;
  - ii. Whether the Claimant was subjected to a fair process prior to termination;
  - iii. Is the Claimant entitled to the reliefs sought?

### **Whether there was a justifiable reason to terminate the services of the Claimant**

20. The starting point in determining this issue is Section 43(1) of the *Employment Act* (Act) which requires an employer to prove the reasons for an employee's termination from employment and failure to do so, such termination is deemed to be unfair. In addition, Section 45 (2) (a) and (b) of the Act provides that 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; ...
21. It was the Claimant's case that he was terminated orally by the Respondent's Human Resource Manager sometime in June 2017 after he fell ill and was absent from work on that account. According to the Respondent, the Claimant absented himself from work on or about July 2017 and when asked about his absence, he indicated that he was unwell but did not provide medical documents to prove his sickness.
22. It is therefore evident from both parties that the employment relationship was severed following the Claimant's absence from work. The question is, was the absence justified?
23. As stated herein, it was the Claimant's case that his absence from work was on account of illness. Despite the Claimant's assertions, he did not adduce any evidence to confirm that he was unwell as alleged and that he informed the Respondent as much.



24. Pursuant to Section 30 (1) of the Act, an employee is entitled to sick leave of at least 7 days with full pay and thereafter, to sick leave of 7 days with half pay, subject to production of the requisite certificate of incapacity to work signed by a duly qualified medical practitioner.
25. It is worth pointing out that subsection (2) of Section 30 provides that “For an employee to be entitled to sick leave with full pay under subsection (1), the employee shall notify or cause to be notified as soon as is reasonably practicable his employer of his absence and the reasons for it.” Underlined for emphasis
26. The pertinent question that arises in the circumstances is whether the Claimant notified the Respondent of his need for sick leave and actually applied for the same in line with the requirements of the aforementioned statutory provision. As it is, this is not evident from the record.
27. Worthy to note is that the Act has placed the burden on the employee to notify the employer of the reasons for his or her absence from work on account of ill health in order to be entitled to sick leave.
28. In this case, the Claimant stated that he notified the Respondent of his illness but failed to prove the same. Further, it is not clear whether he applied for sick leave as required. What’s more, he did not attach any evidence to indicate that he forwarded his medical report, treatment notes or a doctor’s sick-off to the Respondent, so as to communicate his medical situation and capacity to work.
29. During cross-examination, the Claimant testified that he had the medical reports and that he forwarded the same to the Respondent and his Advocate. If that position is true, one wonders why the Claimant did not exhibit the same in support of his case. After all, that was very crucial evidence to support his case.
30. In light of the foregoing circumstances, the Claimant did not prove that he acted as required under the law and for that reason, his absence from work was unexplained. This lends credence to the Respondent’s assertion that the Claimant absconded duty without any justification.
31. The Respondent having failed to receive any notification from the Claimant as regards his illness and more so, a report indicating as much from a certified medical practitioner, availed it the grounds and cause to take disciplinary action against him for desertion of duty, which notably, is a ground for dismissal under Section 44 (4) (a) of the Act.
32. The next issue for determination is whether the Respondent subjected the Claimant to a fair process prior to his exit from employment.

### **Whether the Claimant was subjected to a fair process**

33. Section 45 (2) (c) of the Act, enjoins an employer to prove that it terminated an employee in accordance with fair procedure. The specific requirements of a fair process are provided for under Section 41 of the Act in the following manner: -
  - “(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.”

34. In the case herein, it is apparent from the record that the Claimant was issued with a letter dated 20<sup>th</sup> July 2017, asking him to avail himself to the management and disciplinary committee on account of his absenteeism.
35. What stands out is that the said letter was dispatched to the Claimant through a postal address indicated as “P.O Box 34, Ndigwa”.
36. Notably, the Claimant’s employment contracts indicate his postal address as “P.O Box 34, Uyoma”. It is therefore evident that the said letter was posted to a postal address that is totally different from the one disclosed and used by the Claimant.
37. It is therefore doubtful that the Claimant received the said letter. Consequently, it cannot be ascertained that the Claimant was indeed notified of the reasons for which the Respondent was considering terminating his employment.
38. Testifying under cross-examination RW1 stated that there was a meeting to discuss the Claimant’s conduct. However, she did not exhibit a record of the said meeting in the form of minutes. In any event, she did not indicate, let alone suggest that the Claimant was in attendance at the said meeting.
39. Therefore, in as much as the Respondent was justified in terminating the Claimant’s employment on account of his absence from duty, it is doubtful that it complied with the requirements of a fair process as envisaged under Section 41 of the Act. Considering the Respondent’s evidential burden under Section 45(2)(c) of the Act, I cannot help but find that the Claimant’s termination was unlawful.

#### **Reliefs?**

40. As the Court has found that the Claimant’s termination although substantively justified was not in consonance with the requirements of a fair process, he is awarded one month’s salary in lieu of notice and compensatory damages equivalent to two (2) months of his gross salary. This award takes into consideration the Claimant’s own contribution to the termination of the employment.
41. The claim for unpaid leave also succeeds as the Respondent did not exhibit any leave records in accordance with its legal obligation under Section 74(1)(f) the Act, to demonstrate the leave days taken by the Claimant and those outstanding. However, this shall be prorated as per the Claimant’s contract of employment that was in force at the time.

#### **Orders**

42. Against this background, I enter Judgment in favour of the Claimant against the Respondent and he is awarded: -
  - (a) One (1) month’s salary in lieu of notice being the sum of Kshs 16,516.00.
  - (b) Compensatory damages in the sum of Kshs 33,032.00 being equivalent to two (2) months of his gross salary.
  - (c) Unpaid leave days being the sum of Kshs 6,744.00.
  - (d) The total award is Kshs 56,292.00.
  - (e) Interest on the amount in (d) at court rates from the date of Judgment until payment in full.



- (f) The Claimant shall also have the costs of the suit.
43. The Claimant shall also be entitled to a certificate of service in line with Section 51(1) of the Act. This shall issue within 30 days from the date of this Judgment.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF NOVEMBER, 2023.**

**STELLA RUTTO**

**JUDGE**

Appearance:

For the Claimant Ms. Waweru instructed by Mr. Gachomo

For the Respondent No appearance

Court Assistant Abdimalik Hussein

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 had 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 *Civil 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.

**STELLA RUTTO**

**JUDGE**

