



**Musango v DHL Express (Cause 1510 of 2018)
[2023] KEELRC 3111 (KLR) (24 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3111 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1510 OF 2018
SC RUTTO, J
NOVEMBER 24, 2023**

BETWEEN

URBHANUS MUSANGO CLAIMANT

AND

DHL EXPRESS RESPONDENT

JUDGMENT

1. The instant Claim was commenced by way of a Memorandum of Claim filed on 9th November 2018, in which the Claimant avers that he was engaged by the Respondent as an Import/Export Agent and thereafter promoted to the position of Imports Supervisor on 17th May 2010. According to the Claimant, he performed his duties honestly and diligently until his termination on 9th February 2018.
2. The Claimant further avers that the grounds for his termination were baseless, untrue and founded on malice hence rendering the termination, unlawful, unfair and wrongful. On account of the foregoing, the Claimant seeks against the Respondent, the sum of Kshs 4,183,740/= being service gratuity, notice pay, compensation for unlawful termination, shift allowance and payment for Employee of the Year 2017.
3. Opposing the Claim, the Respondent filed a Response dated 7th December 2018, contending that the Claimant's service was rife with misconduct and lack of diligence. The Respondent further avers that the Claimant failed and neglected to discharge his duties and exposed it to liability and possible censure by the Kenya Revenue Authority and in turn, tarnished its reputable business name. That consequently, it was left with no option but to terminate the Claimant's contract as he was unable to fulfill his job requirements. Against this background, the Respondent has asked the Court to dismiss the Claim with costs.
4. The matter proceeded for hearing on 24th July 2023, during which both parties called oral evidence.



Claimant's case

5. The Claimant testified in support of his case and to start with, he adopted his witness statement to constitute his evidence in chief. He further produced the list and bundle of documents filed on his behalf as exhibits before Court.
6. It was the Claimant's evidence that he received a letter of suspension on 22nd January 2018, following which he received the termination letter on 9th February 2018.
7. The grounds for termination were, sanctioning the importation of shipments and their clearance without payment of taxes, or evidence of customs approval of waiver of taxes and delivery of the same to third parties; violation of the Customs Act and failure to adhere and comply with the legal parameters set by Kenya Revenue Authority pertaining to the end to end shipment clearance process; failure to adhere to compliance standards and the company policies documented in the Respondent's global operating procedures and inability to perform assigned duties as outlined in his job description.
8. He further stated that on 13th February 2018, he appealed against his termination and the Respondent invited him for a hearing on 12th March 2018.
9. The Claimant contended that the Respondent in raising the accusations against him, failed to give a breakdown of the shipments according to the Imports Three (3) Shifts all headed by Supervisors. That it was assumed all the Shipments including the Weekend and Night Shift were all handled by himself, a fact he maintained is untrue.
10. It was the Claimant's case that after tendering a solid explanation backed with evidence during the hearing, he received a letter from the Respondent stating that the appeal had failed and that the termination was upheld.
11. According to the Claimant, his termination was unfair and wrongful as there was no valid ground/ reason for the said termination.
12. He formally made demands to the Respondent to pay up the requisite terminal dues as well as compensation for the wrongful and unfair termination, which they refused.
13. Closing his testimony in chief, the Claimant asked the Court to allow his claim as prayed.

Respondent's case

14. On its part, the Respondent called oral evidence through Mr. Abdallah Ali Wereh and Mr. John Kamau Irungu who testified as RW1 and RW2 respectively. Mr. Abdallah was the first to go. He identified himself as the Respondent's Gateway Manager and similarly, he adopted his witness statement to constitute his evidence in chief. He further produced all the documents filed on behalf of the Respondent as exhibits before Court.
15. It was RW1's evidence that the Claimant's direct supervisor was the Imports Manager, Mr. Solomon Wandaire who reported to the position he (RW1) is holding now.
16. He testified that the Claimant was in-charge of all shipments coming into the Respondent's bonded warehouse. That he ensured compliance with customs and worked hand in hand with the relevant authorities such as the Kenya Bureau of Standards and Kenya Revenue Authority.
17. He is aware that during the Claimant's employment, he was issued with various warning letters for failing to follow the clearance procedures. Citing examples, RW1 stated that the Claimant cleared



various shipments as low value instead of high value goods. Other shipments were cleared as high value instead of low value.

18. That in other instances, no duty was paid because the Claimant assessed the value of the shipment below USD 50 which is exempted from taxes. This was contrary to the import declaration/duty computation for the respective airwaybills being numbers 3016816246, 3016816703, 3016726016 and 3016695485.
19. That the Claimant was suspended to pave way for investigations on the disputed shipments.
20. He is also aware that the Respondent sanctioned a disciplinary hearing to give the Claimant an opportunity to rebut the findings of the investigations. After the hearing and further deliberations, the disciplinary committee proceeded to terminate his services. Being dissatisfied with the decision of the Respondent, the Claimant appealed and subject to the appeal hearing, the committee upheld their decision to terminate him.
21. In RW1's view, the Respondent followed due process prior to the Claimant's termination and paid him his dues.
22. Mr. John Irungu who testified as RW2, identified himself as the Head of Human Resources at the Respondent company. He also adopted his witness statement to constitute his evidence in chief.
23. It was RW2's testimony that during the pendency of his employment with the Respondent the Claimant exhibited lack of diligence, indiscipline, failure to follow due process and non-adherence of Company rules and regulations.
24. He stated that the Claimant was issued with three warning letters for his disobedient behavior, failure to adhere to Company policies and failure to perform his duties as set down in his job description.
25. RW2 further stated that the Claimant was issued with a notice of suspension on 22nd January 2018 pending investigations with respect to clearance of several shipments. A disciplinary hearing was conducted on 5th February 2018 after the investigations.
26. That as a result of the disciplinary hearing, the Claimant's employment with the Respondent was terminated with effect from 9th February 2018.
27. Following the decision of the disciplinary board, the Claimant was given an opportunity to appeal the decision. The Claimant appealed the decision made to terminate him and he was informed by the Respondent that he was at liberty to be accompanied by a colleague of his own choice to be his witness. The hearing was scheduled for 16th March 2018 and the Claimant chose not to have any witness present.
28. RW2 further stated that the Claimant's appeal was unsuccessful as it was found to lack merit therefore his dismissal was upheld. He was informed as much vide a letter dated 27th March 2018.
29. According to RW2, during the appeal, other anomalies were brought to the attention of the disciplinary board from the auditing process that was taking place in the Respondent Company.
30. That part of the reason for the dismissal being upheld was because the Claimant had allowed shipments to be released without customs hence exhibiting a total disregard of the Respondent's regulations and law.



Submissions

31. On his part, the Claimant submitted that he was never issued with a Notice to Show Cause by the Respondent, as is required under the law. He argued that he was only issued with a Notice of Suspension signed by the Getaway Manager on 22nd January 2018. That after the issuance of the letter of suspension was a hearing date of 5th February 2017. It was his submission that during the said disciplinary, he did not receive a fair hearing from the Respondent.
32. The Claimant maintained that there was nothing fair in the disciplinary process he was taken through. He termed the same as a technicality since the Respondent had already made up its decision to terminate his employment and further communicated the same despite an appeal pending.
33. It was the Claimant's further submission that the reasons supplied by the Respondent are untrue, unreasonable and tailored to kick him out of employment.
34. He further submitted that the Respondent has not proved the reasons for the termination of his employment thus this failure ought to be deemed unfair within the meaning the Section 45 of the Act. On this score, the Claimant placed reliance on the case of Muthaiga Country Club vs Kudheih Workers (2017) eKLR.
35. The Claimant maintained that the Respondent did not act in accordance with justice and equity in terminating his employment and urged the Court to find as much.
36. On the part of the Respondent, it was submitted that the Claimant was expected to oversee the importation of goods by ensuring verification of customs documents and customs clearance procedures. That this was not restricted to shipments the Claimant handled personally but also shipments handled by the import/export agents under his supervision.
37. The Respondent further argued that being a reputable logistics company, it was at risk of having its license revoked noting the same amounts to a violation of the law. That at no point in time, did the Claimant take responsibility for his actions as an Imports Supervisor, instead he apportioned blame on his colleagues.
38. It was the Respondent's further submission that the Claimant did not furnish it with any evidence that he double-checked the customs documents with respect to the remaining airwaybills to ensure compliance with customs procedures. The Respondent maintained that this caused it to believe that the Claimant had neglected his duty as provided under its Standard Global SOP Finance by violating customs procedures. On this issue, the Respondent cited the cases of Samuel Kalomit Murkomen vs Telkom Kenya Limited (2017) eKLR and Joseph Mwaniki Nganga vs United Millers Limited (2022) eKLR to bolster its arguments.
39. The Respondent strongly refuted the Claimant's allegation that he was unfairly terminated and reiterated that there was not only substantive justification for his termination but that due process was followed.

Analysis and determination

40. Having considered the pleadings, the evidentiary material before Court and the submissions on record, the issues falling for determination can be distilled as follows: -
 - a) Whether the Respondent has proved that it had a valid and fair reason to terminate the Claimant's employment;



- b) Whether the Respondent accorded the Claimant procedural fairness prior to termination;
- c) Is the Claimant entitled to the reliefs sought?

Fair and valid reason?

- 41. Section 43(1) of the *Employment Act* (Act) requires an employer to prove the reasons for termination of employment and failure to do so, such termination is deemed to be unfair. Additionally, Section 45 (2) (a) and (b) of the Act provides that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and related to the employee's conduct, capacity or compatibility; or based on its operational requirements.
- 42. As can be discerned from the Claimant's letter of termination, his exit from the Respondent's employment was triggered by the following reasons:
 - a) Sanctioning the importation of shipments and ensuring their clearance without payment of taxes, or evidence of customs approval of waiver of taxes and delivery of the same to third parties. The shipment airwaybill numbers were identified as; 1162712983, 4931202975, 1052993023, 2595924586 and 3016871944.
 - b) Violation of the Customs Act occasioned by failure to adhere and comply with the legal parameters set by the Kenya Revenue Authority pertaining to the end to end shipment clearance process.
 - c) Failure to adhere to compliance standards and the company policies documented in the Respondent's global operating procedures.
 - d) Inability to perform his assigned duties as outlined in his job description.
- 43. The Claimant distanced himself from the allegations levelled against him and stated that three out of the referenced shipments had an invoice value of less than USD 50 which are exempted from taxes by the Kenya Revenue Authority. He further contended that one shipment arrived at 0003 hours and was cleared at 0127 hours, during which period, he was not on shift. It was his contention that he had not worked on the night shift for two years. With regards to another shipment, the Claimant stated that taxes had been waived by the Kenya Revenue Authority agents and the shipment underwent the required customs clearance procedures of verification.
- 44. The Claimant further denied breaching the Customs Act and contended that the Respondent failed to disclose the exact section he had breached.
- 45. On the accusation that he failed to perform his duties, the Claimant stated that during his employment, he had been an outstanding employee receiving awards, prizes, accolades, and appreciation notes, leading to his promotion in 2010.
- 46. On its part, the Respondent stated that the Claimant was the Import Supervisor hence was in charge of overseeing that airwaybills are cleared with customs before releasing the shipments. It contended that the buck stopped with the Claimant.
- 47. Revisiting the record, it is evident that the shipment airwaybills in question and which actually led to the Claimant's termination were 1162712983, 4931202975, 1052993023, 2595924586 and 3016871944.
- 48. It is notable that the invoices with regards to airwaybill numbers 4931202975 and 1162712983 in respect of Bamburi Cement and Sean Robertson indicate the tax due as 0.00 (zero). With regards to



airwaybill number 2595924586 in respect of Barclays Kenya, the value is indicated as R181.50 hence was below USD 50.

49. The record further reveals that airwaybill number 3016871944 is stamped by Kenya Revenue Authority on its face, and indicates that the same is to be released as “S38”.
50. RW1 testified that any shipment below USD 50 must be stamped before being released from the bonded warehouse. It was his case that it is the supervisor who stamps the airwaybill. Be that as it may, this position was not evident from the Standard Global SOP Finance exhibited by the Respondent.
51. Indeed, the clearance process of the shipments is so crucial hence it ought to have been well documented by the Respondent and the Claimant’s role as the Import Supervisor properly captured therein. As a matter of fact, it is notable that the Standard Global SOP Finance exhibited by the Respondent did not state the parties involved in the clearing process, their respective roles and the procedure to be followed in undertaking such clearance.
52. Therefore, the Respondent’s argument that the Claimant was in charge of stamping the airwaybills and overseeing that the said airwaybills were cleared with customs before shipment was not supported by evidence. This is more so noting that the Claimant’s job description was not availed.
53. Further, the Claimant stated that the imports three shifts are all headed by Supervisors. This implies that there were other Supervisors besides the Claimant. It is notable that the Respondent did not dispute this position and indeed, prove that the Claimant was the only Supervisor in charge of all the three shifts and specifically, that the airwaybill number 1052993023 was cleared by an agent who was working directly under the Claimant’s supervision and that it was his role to countercheck the airwaybills and ensure that they are duly cleared before the items are released from the bonded warehouse.
54. In light of the foregoing gaps and being cognizant of the Respondent’s evidential burden under Section 45(2) (a) and (b) of the Act, it is clear that it has failed to substantiate its accusations against the Claimant that he sanctioned importation of shipments and their clearance without payment of taxes or evidence of customs approval of waiver of taxes and delivery of the same to third parties.
55. The Claimant was further alleged to have violated the Customs Act occasioned by his failure to adhere and comply with the legal parameters set by the Kenya Revenue Authority. In the same breath, he was accused of failure to adhere to compliance standards and the company policies documented in the Respondent’s global operating procedures.
56. However, the Respondent failed to specify the statutory provision in the Customs Act breached by the Claimant, as well as the specific compliance standard, he failed to adhere to.
57. Indeed, the Respondent did not point the Court to the relevant statutory provision in the Customs Act and the procedure in the Standard Global SOP Finance, the Claimant was accused of breaching.
58. This ties to the observation I have made herein that the Respondent’s Standard Global SOP Finance does not provide the clearance process of the shipments, the parties involved and their respective roles.
59. Noting that the allegations levelled against the Claimant were connected to his failure to comply with the law and procedures, it behoved the Respondent to prove by way of evidence that indeed, the Claimant fell short of the same and acted contrary to the law and procedural requirements.
60. In light of the foregoing, I cannot help but find that the Respondent did not satisfy the requirements of Section 45(2) (a) and (b) of the Act in that it had a fair and valid reason to terminate the Claimant’s



employment based on his performance of duty or conduct. As such, it has not proved that there was substantive justification to warrant termination of the Claimant.

Procedural fairness?

61. Besides proving that there was a valid and fair reason to terminate the employment of an employee, an employer is required under the Act to further prove that it accorded such an employee procedural fairness prior to terminating his or her employment.
62. This is the position under Section 45(2) (c) of the Act which stipulates that for termination to be fair, it ought to be in line with fair procedure. As to what constitutes fair procedure, Section 41(1) requires an employer to give the employee notification of the allegations for which it is considering termination of the employment contract and to accord the employee a hearing prior to termination. It is worth pointing out that the employee is entitled to have another employee or a shop floor union representative of his choice present during such an explanation.
63. In this case, the record bears that the Claimant was suspended from duty through an undated letter which was signed on 22nd January 2018 by the Gateway Manager. The Claimant was notified that the suspension was pending investigations with respect to clearance of several shipments.
64. According to the Respondent a hearing was conducted on 5th February 2018, following which the Claimant was terminated from employment.
65. The Claimant has poked holes in the process applied by the Respondent in terminating his employment. For starters, he stated that he was not issued with a Notice to Show Cause. Indeed, none was exhibited before the Court.
66. This brings up several questions, first, was the Claimant notified ahead of the hearing, of the reasons for which it was considering termination of his employment? Further, did the disciplinary hearing flow from the same allegations the Claimant was initially charged with? And further, was the Claimant aware of the allegations he was to face during the disciplinary hearing? I pose these questions for the reason that the Respondent further failed to exhibit a hearing notice through which the Claimant was invited to the disciplinary hearing.
67. It is also notable that the Respondent did not exhibit a record of the disciplinary hearing in the form of minutes. Hence the question, was the Claimant afforded an opportunity to defend himself? And if so, was his defence considered by the disciplinary committee? More importantly, did the hearing conform to the procedure stipulated under Clause 11.2 of the Respondent's Disciplinary Code?
68. Indeed, the foregoing issues, could only be resolved by way of evidence with regards to the steps undertaken by the Respondent before the hearing and during the hearing.
69. Pursuant to Section 45(2) (c) of the Act, it is the employer who bears the burden of proving that an employee was terminated in accordance with fair procedure. In absence of any evidence of a notification and disciplinary record, I cannot help but conclude that the Respondent did not discount the Claimant's assertions that he was not accorded a fair hearing within the meaning of Section 41 of the Act.
70. In total sum, the Respondent in this case failed to discharge its burden by proving that the procedure it applied against the Claimant was fair and in accordance with the spirit of Section 41 of the Act. I am therefore led to conclude that the Claimant's dismissal was not lawful.



Reliefs?

71. As the Court has found that the Claimant's termination was not fair and lawful, he is awarded one (1) month's salary in lieu of notice and compensatory damages equivalent to seven (7) months of his gross salary. This award takes into account the length of the employment relationship as well as the circumstances attendant to the Claimant's termination.
72. The Claim for service gratuity for 14.9 years is declined as the same is not provided for under the Claimant's contract of service. There is therefore no basis for award of the same.
73. The claim for shift allowance is equally declined for the reason that, following the Claimant's promotion, his salary was revised upwards and notably, it excluded payment of shift allowance that was in his initial letter of appointment. This lends credence to the Respondent's argument that following the Claimant's promotion, he was placed in a managerial position hence the allowances initially paid to him were withdrawn.
74. What's more, in distancing himself from the allegation that he cleared the shipment with regards to airwaybill number 1052993023, the Claimant testified that he had not worked the night shift for two years. Hence one wonders the basis for his claim for shift allowance. Suffice to say, the Claimant cannot have his cake and eat it too.
75. The claim for Employee of the Year 2017, is similarly declined as the Claimant did not prove entitlement to the same. It is worth noting that the email of 20th December 2017, did not provide that a monetary award would be given to the winner. Hence it is not clear how the Claimant settled on the sum of Kshs 70,357.00. In any event, the Claimant testified that he went to Cape Town upon being voted Employee of the Year 2017. Needless to say, his claim is without basis.

Orders

76. It is against this background that I enter Judgment in favour of the Claimant against the Respondent and he is awarded the following reliefs: -
 - (a) One (1) month's salary in lieu of notice being the sum of Kshs 119,393.00.
 - (b) Compensatory damages in the sum of Kshs 835,751.00 being equivalent to seven (7) months of his gross salary.
 - (c) The total award is Kshs 955,144.00.
 - (d) Interest on the amount in (c) at court rates from the date of Judgment until payment in full.
 - (e) The Claimant shall have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2023.

STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Haggai

For the Respondent Ms. Kimathi instructed by Ms. Nguu

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 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 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

