



**Kamidi v DHL Worldwide Express (K) Ltd (Cause 52 of 2019)  
[2023] KEELRC 3436 (KLR) (23 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3436 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 52 OF 2019  
NZIOKI WA MAKAU, J  
NOVEMBER 23, 2023**

**BETWEEN**

**ANGELA KAMIDI ..... CLAIMANT**

**AND**

**DHL WORLDWIDE EXPRESS (K) LTD ..... RESPONDENT**

**JUDGMENT**

1. The Claimant instituted this suit against the Respondent for wrongfully dismissing her from its employ. She averred that the Respondent employed her on 1<sup>st</sup> April 2012 as an Import Service Desk Executive earning a gross salary of Kshs. 60,200/-. She was placed on a 90-day probation period which she successfully completed and her employment was then confirmed in July 2012. She further averred that she applied and was promoted to the supervisory position of Import Service Desk Supervisor on 1<sup>st</sup> July 2015 and that after completing her probation, the appointment was made permanent. That she met all the requirements of her job in her roles as Import Service Desk Executive and as Supervisor and that the Respondent never cited her for poor performance during her annual performance appraisals. Moreover, her commitment and dedication to her work was affirmed in April 2015 when the Respondent recognised her as Employee of the Month and in 2016 when she received a Long Service Award.
2. It was the Claimant's averment that she proceeded on maternity leave in September 2016 and resumed duty in January 2017. That however upon resumption, she was unfairly and illegally placed on a performance management plan for having failed to meet her previous year's target, despite the fact that she had been on official maternity leave for at least four (4) months. Further, when she lost her brother in March 2017, she took seven (7) days' leave but upon returning to work, her supervisor called and advised her that she had been replaced in her supervisory role by a person who was reporting to her. She was then to return to her previous title of an Import Service Desk Executive and was in essence demoted albeit with reduced responsibilities. According to the Claimant, the demotion was verbal and



unprocedural and was meant to demoralise her. She averred that surprisingly, just before termination of her employment, the DHL International Office invited her to a supervisory training in South Africa in January 2018 with her title still indicated as that of Import Service Desk Supervisor.

3. As per the Claimant, the events leading to termination of her employment emanated from her alleged involvement in the disappearance of a customer's shipment from the Respondent's Bonded Warehouse. She narrated that on 16<sup>th</sup> January 2018, she received clearing documents from her colleague, Ms. Winnie Chepkwony, for onward processing of the said shipment that had been securely kept in the Respondent's Bonded Warehouse under the custody of customs officials. That her colleague's advice was that the receiving client had verbally authorised for the same to be picked up by their clearing agent, Adel Freighters. That her colleague updated the clearing system and handed over the documentation to the authorised clearing agent, who was required to pay the required custom duties and have the goods released from the Bonded Warehouse. The Claimant contended that the Bonded Warehouse was manned by customs officials from the Kenyan Government and was a completely different department from where she worked. She further narrated that on 5<sup>th</sup> February 2018, the Gateway Manager called her and requested her to explain the circumstances under which the said shipment was updated in the system for clearance. She was also questioned by the Security Manager and authorities and she wrote statements in all three instances of questioning. She maintained that the cleared goods were neither in her custody nor in her department and that she acted in good faith when she released the clearing documents to the clearing agent.
4. The Claimant's stance was that she was shocked when the Respondent dismissed her from employment on 12<sup>th</sup> February 2018 for alleged abetting of a fraudulent scheme hatched by her colleagues, culminating in the disappearance of the said shipment and the loss of Kshs. 111,390/- in charges and Kshs. 145,058/- in taxes. She asserted that she was unfortunately unlawfully dismissed through a letter dated 9<sup>th</sup> February 2018 and that her basic salary was Kshs. 105,600/- at the time of the termination. She averred that she was entitled to leave travelling allowance of Kshs. 5,000/- and that upon her dismissal, she was neither paid any terminal benefits nor given a certificate of service. Furthermore, she had suffered discrimination due to her pregnancy prior to the termination, which was contrary to the Constitution of Kenya and the Employment Act, 2007.
5. The Claimant also averred that the disciplinary process leading to her summary dismissal was not in accordance with the law and practice in labour relations and was further not adhered to by the Respondent because: she was never issued with a show cause letter detailing the offences she had allegedly committed; she was subsequently denied the opportunity to respond to the show cause letter and the allegations therein; she was denied the opportunity to have a hearing, with another employee present; and she was never accorded the opportunity to appeal against her summary dismissal. In view of the foregoing, the Claimant thus prayed for:
  - a. General damages for discrimination on account of pregnancy and particularly for going on maternity leave;
  - b. 1 month's pay in lieu of notice, in addition to terminal benefits as stated in her letter of termination, including bonus due and not paid;
  - c. 12 months' salary compensation for unlawful termination;
  - d. Costs of this suit, together with interest thereon at court rates from the date of the judgment until payment in full;
  - e. Certificate of service.



## Respondent's Case

6. In reply, the Respondent averred in its Memorandum of Response that the Claimant served it in the capacity of Import Service Desk Executive albeit with an average performance. It also acknowledged having promoted her to the supervisory position as averred. According to the Respondent, putting the Claimant on a Performance Management Plan was meant to motivate her to improve her performance in light of her unsatisfactory performance. That the Claimant had on several occasions been issued with warnings because of her below average performance and that her time in its employ had sporadic periods of good performance. For instance, the Claimant was issued with a warning letter dated 26<sup>th</sup> April 2012 on account of unprofessional conduct barely a month into the job. It further averred that the Claimant was assigned roles according to her performance as was the Respondent's prerogative.
7. The Respondent denied that it unlawfully dismissed the Claimant, neglected to settle her terminal dues and issue her with a certificate of service as alleged. It asserted that the Claimant together with other employees were severally awarded an annual salary increase to cater for cost of living adjustment as was characteristic of the Respondent organisation. According to the Respondent, it was forced to put the Claimant on Work Performance after her performance failed to turn around as expected and demoted her to her previous position as accepted by her.
8. The Respondent's case was that when the Claimant was handed the paperwork for clearance of the subject shipment, she was required to countercheck that everything was in order, update the system and move the paperwork to the reception for the appointed broker to collect. That however, the Claimant noticed that the authorization for clearance was missing and instead of raising and addressing the issue, proceeded to move the paperwork to the reception. The Respondent asserted that no broker collected the shipment which was returned to the Claimant at the end of the day on 15<sup>th</sup> January 2018. Further, the shipment did not go through the due customs clearance as the release order had not been signed by either customs or DHL Gtw Manager. It was the Respondent's contention that the Claimant's allegation of having relied on alleged verbal instructions from one Winnie Chepkwony was untenable since she was well aware of the system in place to ensure proper clearance. It averred that the Claimant's dismissal was in accordance with the law and the Respondent's company regulations after she allowed a shipment to be released without customer authorization. The Respondent questioned why the Claimant continued working while she was being discriminated against and victimised and why she never protested being put on Work Performance. It prayed for the Court to thus find:
  - a. That the Claimant's allegations of wrongful and unfair termination are false and not merited and should be dismissed with costs.
  - b. That this Honourable Court should find that the Respondent does not owe the Claimant any dues at all.
  - c. That the Claimant's claim for general damages for discrimination on alleged account of pregnancy and particularly for going on maternity leave is unfounded and must be dismissed.
  - d. That the Claimant's claim for payment in lieu of notice is not rightfully before this Court as the Respondent paid the Claimant her salary for the month.
  - e. That the Claimant's claim for 12 months compensation for alleged unlawful termination is also baseless and must fail.
  - f. The claim for Certificate of Service is also baseless as the same has not been denied by the Respondent.



- g. That this Honourable Court be pleased to dismiss with costs the Memorandum of Claim.

## Evidence

9. The Claimant reiterated under cross-examination that she was terminated on account of her pregnancy but admitted she had not filed the complaint in court. She also acknowledged that she never filed a complaint with the Respondent regarding her demotion. In re-examination, the Claimant asserted that the days she was absent for her brother's funeral and during her maternity are the period indicated as when she did not perform.
10. The Respondent's witness Mr. John Kamau Irungu (RW1), testified that the Claimant was given a warning on 15<sup>th</sup> November 2012 for failing to follow up on the paper work and the lapses in air cargo paperwork. That the Claimant got another warning on 31<sup>st</sup> December 2012 for mishandling a walk-in client and that the next warning issued to her in November 2013 was after she failed to improve. He asserted that the Claimant was given a Disciplinary Warning on 13<sup>th</sup> May 2014 that was to run for three (3) months and was in regard to performance. On the events leading to her termination, RW1 testified that the shipment was cleared without proper documents and that it got lost and never got to the client and the Claimant and another lady and gentleman were found culpable. That the Claimant was paid her terminal dues and issued with a certificate of service through her Counsel. Although he was not the HR then, RW1 admitted in cross-examination having not seen a show cause letter in the records and acknowledged that a statement was made during the investigations. He could not also confirm whether or not there was a hearing and admitted that the Claimant's warnings in her personnel file had indeed expired. He asserted that the Claimant was rated below performance in 2016 and that she was underperforming before she left for her maternity leave in August 2016. RW1 stated in re-examination that the Claimant was given an opportunity to respond to the allegations and affirmed that the Claimant's actions were a serious offence as the Respondent risked having their licence taken away. That the reason the Claimant was terminated from employment was because of loss of shipment that cost the Respondent Kshs. 800,000/- to 900,000/- and also because of the issue of taxes.
11. Mr. Evans Amukala Ingoyi (RW2), the Respondent's Head of Security with 10 years' experience working for it, produced the Investigation Report as evidence before Court. He testified that he investigated a shipment under Air waybill 9604231895 valued at USD 7,103 that was discovered missing from the Warehouse. That his findings were that three staff interacted with the said shipment upon its arrival in Nairobi and the paperwork had been prepared by Ms. Winnie Chepkwony for purpose of giving it to the clearing agent. That Ms. Winnie was to print the release order, bill of shipment and invoice of shipment and letter of authorisation or email from consignee authorising the clearance by agent. That after the printing, Ms. Chepkwony handed over the file to the Claimant which was missing one key document – the letter authorising clearance of the consignment and that the Claimant reviewed the paperwork and cleared it to proceed to the next stage. RW2 asserted that the Claimant was expected to return the file to Ms. Chepkwony as there was no authorisation from consignee but the file ended up being forwarded to the reception and returned to the Claimant after nobody claimed it. He further testified that the investigations also established that the subject shipment was receiving daily scans in the system to show it was in the Warehouse yet the shipment was not physically there. That the scans were being processed by an employee named Mr. Leonard Koech, who was among the three staff found answerable. RW2 further asserted that when a customer's shipment is lost, DHL has to refund the customer the value of that shipment and pay for the cost of the shipment. That he recommended in his Report for the Claimant to be held liable for failure to be a check and balance. He stated under cross-examination that his recommendations were not final and were subject to management review and that the Claimant would have accessed the Report from the offices of the



HR and MD. That the issue of whether or not to have a hearing was handled at the HR department and that what he knew was that there was either summary dismissal or a hearing. According to RW2, customs were not aware of the shipment. In re-examination, he stated that the Respondent did not at any point work with oral authorisations and that the owner of a shipment must write to authorise the clearance through the specific agent.

### Claimant's Submissions

12. The Claimant submitted that the issues for determination before this Court are as follows:
  - a) Whether the Respondent wrongfully dismissed the Claimant.
  - b) Whether the Claimant is entitled to compensation for wrongful dismissal and one month's salary in lieu of notice.
  - c) Whether the Claimant was discriminated upon owing to her pregnancy and maternity leave.
  - d) Who should bear the cost of the suit?
  
13. The Claimant submitted that in determining whether or not an employee has been wrongfully dismissed, this Honourable Court has always considered the reasons for the dismissal or termination of an employee and whether such dismissal or termination was procedurally fair, as provided under sections 41, 43 and 45 of the *Employment Act*, 2007. That section 43 of the *Employment Act* requires an employer to prove the reason or reasons for terminating or dismissing the services of an employee and if the employer fails to do so, the termination shall be unfair. That section 45 of the *Act* provides that no employer shall unfairly terminate the employment of an employee and that termination is unfair if the employer fails to prove that the reason for the termination is valid, fair and in accordance with fair procedure. That this Court has emphasized the importance of procedural aspects of dismissal of employees and procedural fairness such as in the case of *Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd* [2013] eKLR and decision of the Court of Appeal in the case *Naima Khamis v Oxford University Press (E.A) Ltd* [2017] eKLR. It was the Claimant's submission that after the Respondent had carried out its investigation, the same should have been put to her to defend herself and she should have been called for a disciplinary hearing in which she could have been accompanied by a colleague. That however, this procedure did not take place as she was merely handed the Dismissal Letter that callously indicated that her services were no longer required. The Claimant's stance was that her dismissal was thus wrongful as the Respondent did not offer a valid reason for her dismissal and that this Court should so declare. As regards the prayers sought, the Claimant submitted that sections 49 and 50 of the *Employment Act* give remedies for wrongful dismissal and unfair termination. That in her case, the appropriate remedy would have been reinstatement and under the current circumstances, she urged the Court to exercise its discretion and award maximum compensation of 12 months' gross salary at the time of dismissal as under section 49(1)(c) of the *Act*. That the same would amount to Kshs. 1,267,200/- since her salary at the time of dismissal was Kshs. 105,600/- per month. On notice pay, the Claimant submitted that the Respondent did not give her one month's notice as required by section 35(1) of the *Employment Act* and that if a person is terminated without any notice, the employer will be required to pay the person one month's gross pay in lieu of notice. That she was therefore entitled to Kshs. 105,600/- being notice pay. It was the Claimant's further submission that since the termination letter also promised that she would be paid "any leave days pending" and having averred that she was not paid her pending leave, she was entitled to the same.
  
14. On the issue of discrimination, the Claimant submitted that Article 27 of the *Constitution* of Kenya guarantees equality and freedom from discrimination. That Article 27(5) specifically provides that a person shall not discriminate directly or indirectly against another person on any of the grounds



specified or contemplated in clause (4), with pregnancy being one of the grounds specified in clause (4). It was the Claimant's submission that it was when she returned from her maternity leave and from compassionate leave after losing her brother that her managers started accusing her of non-performance. That she was thereafter demoted and coerced into accepting a lower position of Import Service Desk Executive, that eventually led to her dismissal. She contended that she met her target before proceeding on her maternity leave but was unfairly adjudged when the whole year performance was evaluated without considering maternity leave. She submitted that demotion is a very demoralising step to take and that she was not charged and taken through a disciplinary hearing process. That throughout her career, she had never been faulted for not achieving her target and that it was only because of her pregnancy and maternity leave that she was said not to have met her targets. That the said treatment was unfair and for which she demands compensation. The Claimant further submitted that since she had proven her case on wrongful and unfair termination and on account of pregnancy and non-payments of some terminal benefits, costs should follow the suit.

### Respondent's Submissions

15. On whether the Claimant's dismissal was unfair, the Respondent submitted that section 45(2) of the *Employment Act* encapsulates the precepts of substantive and procedural fairness in termination of employment contracts and the same reiterated by the Court of Appeal in the case of *Kenafri Industries Limited v John Gitonga Njeru* [2016] eKLR. Further, that section 43(2) of the *Employment Act* defines the term "reasons for termination of a contract" as the matters 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. It further submitted that any reasonable employer would have dismissed its employee on account of theft because the employer-employee relationship becomes untenable due to lack of trust. That in the case of *Reuben Ikatwa & 17 others v Commanding Officer British Army Training Unit Kenya & another* [2017] eKLR, the Court of Appeal held that an employment tribunal must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The Appellate Court further observed that if such tribunal finds that the decision to dismiss the employee falls within the band of reasonable responses adopted by the employer, the dismissal is fair but if it falls outside the band, it is unfair. It was the Respondent's submission that it had had concerns with the Claimant's poor performance all through her employment but the same was not the reason that led to her dismissal. It contended that nothing would have been easier than for the Claimant to call Ms. Winnie Chepkwony as a witness to corroborate her averments in support of her innocence. That in the absence of such testimony, her averments remain unsupported and cannot be relied upon by this Court. The Respondent further submitted that the legal principles governing summary dismissal are well elaborated under section 44 of the *Employment Act*, which defines summary dismissal as when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled. It relied on section 44(4) of the *Act* that outlines the circumstances that amount to gross misconduct and therefore justifiable grounds for dismissal, emphasising on section 44(4)(g) that provides for when an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property. The Respondent's case was that the Claimant's actions of aiding the theft of the Air waybill 9604231895 can be classified as a gross misconduct under section 44 (4) (g) of the *Employment Act* and was thus a justifiable ground for dismissal. That consequently, the Claimant's dismissal was substantially fair having been based on a valid and fair reason.
16. The Respondent submitted that in regards to the procedure, sections 41(2) and 45(2)(c) of the *Employment Act* provide the foundation for adoption of a fair procedure in matters pertaining termination of an employee's contract of service or dismissal of an employee from employment. That the Claimant admitted in her pleadings of having been summoned by the Respondent's Gateway



Manager to defend herself and thereafter given an opportunity to prepare a written statement. That the Claimant was also questioned by the Security Manager on the lost consignment and given an opportunity to prepare another written statement and that during hearing of this suit, she admitted to having made the said statements before her dismissal but had omitted to file the same in Court. That the Claimant was also afforded a chance to defend herself against the findings of the Investigator's Report and that in sum, her dismissal was procedurally fair. The Respondent relied on the case of *Ongaro v Judicial Service Commission & another* (Petition E007 of 2021) [2022] KEELRC 1186 (KLR) (14 July 2022) (Judgment) wherein the Court cited with approval the decision of the Nigerian Supreme Court in *BA Imonikbe v Unity Bank PLC* S.C 68 of 2001 as follows:

“Accusing an employee of misconduct, etc by way of a query and allowing the employee to answer the query, and the employee answers it before a decision is taken satisfies the requirement of fair hearing or natural justice. The appellant was given a fair hearing since he answered the queries before he was dismissed.” (Emphasis by Respondent)

17. As regards the issue of discrimination on account of pregnancy, the Respondent submitted that the Claimant admitted during hearing of the suit that she had not produced any documentation such as complaint letters to the HR Manager on the said discrimination. It cited sections 107 and 108 of the *Evidence Act*, Cap 80 Laws of Kenya providing that whoever asserts the existence of facts must prove that those facts exist and that the burden of proof lies on that person who would fail if no evidence at all were given on either side. That this position is also reiterated in the case *Kipkebe Limited v Peterson Ondieki Tai* [2016] eKLR. It was the Respondent's submission that the Claimant's dismissal was solely based on her involvement in the theft of the Air waybill 9604231895 as indicated in the Termination Letter dated 9<sup>th</sup> February 2018. That the Claimant having failed to prove the allegations of discrimination, the same should be treated as mere allegations. On the reliefs sought, the Respondent submitted that for the one month's notice pay, the Court should refer to section 44(1) of the *Employment Act* which indicates that summary dismissal takes place when an employer terminates the employment of an employee without notice. Further, under clause 8(a) of the Claimant's Letter of Offer dated 21<sup>st</sup> March 2012, summary dismissal is indicated as a way of termination of service without notice. That the Claimant cannot therefore claim payment of the sum of Kshs. 105,600/- yet there was no requirement for notice to be given under summary dismissal. It urged the Court to forfeit this claim. The Respondent further submitted that the Claimant cannot be entitled to general damages for discrimination on account of pregnancy as she had not provided evidence to corroborate the same. For payment of pending leave days, it submitted that the Claimant had also not produced any computation to show this Honourable Court how the sum of Kshs. 16,244/- was arrived at and that the said sum was thus not justified and cannot be relied upon. That in any event, the Claimant was paid all her pending leave days as indicated in her termination letter. On the claim for 12 months' salary for unfair dismissal, the Respondent submitted that it had proven before this Court that the Claimant's dismissal was both substantively and procedurally fair and she was therefore not entitled to any compensation for unfair dismissal. That however in the unfortunate event that the Court finds that the Claimant's dismissal was unfair hence warranting compensation, it beseeched the Court to be guided by the following provisions of section 49(4) of the *Employment Act* reproduced verbatim as follows:

49.

- (4) A labour officer shall, in deciding whether to recommend the remedies specified in subsections (1) and (3), take into account any or all of the following—

...



the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and

...

- (k) any conduct of the employee which to any extent caused or contributed to the termination;
- (l) any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and ...

18. It was the Respondent's submission that the Claimant solely contributed to her dismissal due to her involvement in the theft of Air waybill 9604231895 that had a value of USD 7,103, which sum it had to refund to the customer. That she further facilitated the theft of the said consignment by hiding the clearing documents in her drawer once the same were returned to her by the Respondent's receptionist. Further, the theft led to a loss of money in KEBS charges and taxes due to KRA and risked the revocation of the Respondent's license. That the Claimant did not in any way reasonably mitigate the loss suffered by the Respondent but rather exposed it to financial losses due to her unprofessional conduct. It submitted that from the foregoing, the Claimant was therefore not deserving of the maximum 12 months' salary compensation for unfair dismissal. The Respondent relied on the case of *Ol Pejeta Ranching Limited v David Wanjau Muhoro* [2017] eKLR wherein the Court stated that the trial Judge must justify or explain why a claimant is entitled to the maximum award; that the exercise of discretion must not be capricious or whimsical. In the Respondent's opinion, if at all the Claimant must be compensated for unfair dismissal, a maximum of 3 months' salary compensation being Kshs. 316,800/- would be sufficient compensation. It prayed that the Claimant's Claim dated 26<sup>th</sup> January 2019 be dismissed with costs as her dismissal was fair.

19. The Claimant was terminated for alleged poor performance. It was impeccable timing from the Respondent as at this time, the Claimant had just resumed from her maternity leave and some compassion leave after she lost her brother. When an employer chooses the wrong time to dismiss an employee, repercussions ensue. In this case, the Respondent even declined to issue a certificate of service until a suit was mounted against it. Whereas the Respondent asserts there was reason for dismissal, the manner of execution of the said dismissal was manifestly unjust. The Respondent at first demoted the Claimant even before ascertaining the reason for the alleged poor performance. The Claimant was not given a chance to improve as what followed was a termination for alleged disappearance of a shipment. Investigations by the Respondent indicated the scheme was hatched and perpetuated by Ms. Winnie Chepkwony and her cronies and the Claimant was just a patsy. Nevertheless, the Respondent heaped all the blame on her and dismissed her from employment. The Respondent did not pay the Claimant for the leave days due which was an amount of Kshs. 16,244/-. The Claimant is therefore entitled to the following reliefs:-

- a. One month's notice – Kshs. 105,600/-
- b. 6 month's salary as compensation – Kshs. 633,600/-
- c. Costs of the suit.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF NOVEMBER 2023**

**NZIOKI WA MAKAU**

**JUDGE**

