



**Karambu v Chandaria Industries Ltd (Cause E094 of 2021)
[2023] KEELRC 3000 (KLR) (22 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3000 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E094 OF 2021
JK GAKERI, J
NOVEMBER 22, 2023**

BETWEEN

LYDIA KARAMBU CLAIMANT

AND

CHANDARIA INDUSTRIES LTD RESPONDENT

JUDGMENT

1. The claimant commenced this suit by a Memorandum of Claim dated January 4, 2021 alleging that termination of her employment by the Respondent was unlawful.
2. The claimant was employed by the respondent on February 24, 2017 as a Sales-Manager, Emerging Markets at Kshs 160,000/= per month which subsequently rose to Kshs 203,156.25.
3. The claimant's duties included visiting customers for feedback, review of account performance, pursuing new and emerging markets as well as product improvement and innovation and discharged her duties dutifully.
4. The claimant further avers that she was served with a notice to show cause on January 12, 2021 alleging that on January 6, 2021 he had given the respondent's car to a stranger, used unauthorised route and was found taking alcohol.
5. That the allegations were based on the sales report of January 9, 2021.
6. The claimant states that she responded to the notice to show cause on January 13, 2021 by noon as dictated by the letter and a disciplinary hearing was conducted on the same day where she explained that her deviation was occasioned by traffic and the allegations were false.
7. It is the claimant's case that on the material day, she visited Simbisa Brands, Quickmart Ruaka, had lunch between 1300 and 1400 hours and met the Branch Manager of Leestar Ruiru after the jam interfered with the plan to visit Quickmart EBP.



8. That the decision to dismiss the claimant was based on evidence not availed to her earlier.
9. The claimant faults the termination on the ground that she was not accorded sufficient time and opportunity to respond to the allegations, the disciplinary process was rushed, photo were taken without her knowledge or consent.
10. The claimant prays for;
 - i. 12 months compensation for unfair termination Kshs 2,437,875.00.
 - ii. One month's salary in lieu of notice Kshs 203,156.25.
 - iii. January salary Kshs 203,156.25.
 - iv. Cash Sales Commission for December and January Kshs 25,000/=.
 - v. Accrued leave Kshs 203,156.25.
 - vi. Service pay for 4 years at 15 days per year Kshs 406,312.50.
 - vii. Interest on the sum due from the date of termination.
 - viii. General and aggravated damages including exemplary damages for injury of reputation and malicious falsehood.
 - ix. Certificate of service.
 - x. A public apology.
 - xi. Costs of the suit and interest there on a court rates.

Respondent's case

11. By a Memorandum of Reply dated March 11, 2021, the Respondent admitted that the claimant was its employee and was summarily dismissed for *inter alia* taking alcohol during working hours, throwing alcoholic bottles out of the respondent's car, driving under the influence of alcohol, giving the car to a stranger, failure to explain change in her itinerary and failure to seek approval for the change.
12. That the respondent followed due process in the summary dismissal.
13. The Respondent further avers that the claimant's National Social Security Fund contributions were duly remitted to the NSSF and paid the claimant the sum of Kshs 136,472.66 for the days worked as at January 13, 2021.

Claimant's evidence

14. On cross-examination, the claimant testified that she had no authority to use the respondent's vehicle for personal use.
15. It was the claimant's testimony that on January 6, 2021, during the lunch hour, she had lunch at Jifiche Grill, a restaurant.
16. That she had customer issues to deal with, proceeded to Ruiru and picked a cheque from a customer along Thika Road.
17. The claimant testified that she was supposed to proceed to Quickmart, Eastern By-pass but turned back owing to traffic and went to the Restaurant behind Thika Road Mall (TRM).



18. The witness admitted that the vehicle she was driving has a tracking device.
19. It was the claimant's testimony that she responded to the notice to show cause in one day as directed and appeared before a disciplinary committee on the same day in the afternoon and had no time to have a representative and thus attended the hearing alone.
20. That she was shown the photographs taken at the restaurant before the date of the hearing.
21. The witness admitted that she was the one on the photograph and there were alcohol bottles on the table.
22. The witness testified that the minutes on record were not a true reflection of what transpired in relation to the photographs.
23. On re-examination, the claimant testified that she was having lunch at the restaurant and was not alone and there was no evidence that she was taking alcohol.
24. That change of the route required a call to the supervisor.

Respondent's witness

25. RWI, Catherine Mwangi testified that the claimant breached the employment contract by misusing the company's motor vehicle and failure to follow procedure and taking alcohol during office hours.
26. It was her testimony that although they did not obtain details as regards who was using the vehicle, it was in use when the claimant was having lunch.
27. That the committee relied on the report dated January 9, 2021, the Sales Report for the week which showed the places visited as agreed upon.
28. The witness confirmed that the claimant was performing her duties and had no previous record of indiscipline.
29. That the claimant was showed the photographs before the notice to show cause was issued but the tracking report was not given to her though discussed at the hearing, which RWI attended.
30. That the notice to show cause was given to the claimant on the afternoon of January 12, 2021.
31. RWII, Mr James Mutua confirmed on cross-examination that he was an uber driver. That on January 6, 2021 while driving on Mirema drive to pick a client, when overtaking the motor vehicle ahead of him, (a probox) a bottle was thrown on to the road from the right hand side of the motor vehicle.
32. That he followed the motor vehicle which stopped at a restaurant where five (5) persons were drinking, two ladies and 3 men and he took photographs of those at the table.
33. The witness confessed that he neither picked the bottle thrown out nor knew the Claimant.

Claimant's submissions

34. Counsel isolated five (5) issues for determination which the court condenses to two namely;
 - i. Whether termination of the claimant's employment by the Respondent was unfair.
 - ii. Whether the claimant is entitled to the reliefs sought.



35. As regards termination of employment, the claimant's counsel submitted that the respondent had not discharged the burden of proof as provided by the provisions of sections 107, 109 and 112 of the *Evidence Act*.
36. That the respondent tendered no evidence of misconduct by the claimant as the tracking record was not provided or the pictures of the claimant drinking.
37. Reliance was made on the decision in *Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others* (2013) eKLR to reinforce the submission as was the decision in *Galgalo Jarso Jillo v Agricultural Finance Corporation* (2021) eKLR on the requirements of sections 43 and 45 of the *Employment Act, 2007*.
38. Counsel submitted that the respondent led no evidence to show that the claimant was drinking or gave the motor vehicle to anyone else to fulfil the requirements of section 44 of the *Employment Act, 2007*.
39. According to counsel, the respondent had targeted the claimant for dismissal and looked for reasons but there was none.
40. Reliance was made on the sentiments of the Court in *John Rioba Maungo v Riley Falcon Security Services Ltd* (2016) eKLR on the ground of intoxication.
41. That the claimant did not report to work drunk or absented herself as she visited Simbisa Brands, Quickmart Ruaka and Quickmart EBP.
42. Counsel submitted that the claimant never gave the respondent's car to a stranger.
43. On the procedure employed by the respondent, counsel submitted that the termination was procedurally unfair.
44. Counsel cited the provisions of section 41 of the *Employment Act, 2007* and the decisions in *Nicholus Otinyu Muruka v Equity Bank Ltd* (2013) eKLR, *David Gichana Omuya v Mombasa Maize Millers Ltd* (2014) eKLR and *Anthony Mkala Chitavi v Malindi Water & Sewerage Co Ltd* (2013) eKLR as well *John Rioba Maungo v Riley Falcon Security Services Ltd* (2016) eKLR and *National Bank of Kenya v Samuel Nguru Mutonya* (2019) eKLR to urge that the respondent did not meet the requirements of section 41 of the *Employment Act, 2007*.
45. On the reliefs sought, counsel addressed the claimant's claim for aggravated damages exclusively submitting that the advertisement that the claimant was no longer an employee of the respondent was malicious as it harmed the claimant's employability.
46. That the claimant's suspension before investigation entitled the claimant to aggravated damages.
47. Reliance was made on the decision in *Emmanuel Kuria wa Gathoni v Commissioner of Police & another* (2017) eKLR.

Respondent's submissions

48. Counsel for the respondent identified similar issues on termination of employment and claimant's entitlement to the reliefs sought.
49. On termination, counsel relied on the provisions of Section 44 of the *Employment Act* regarding neglect to perform by an employee duty bound to perform or doing so carelessly and improperly.
50. Reliance was also made on the provisions of section 43(2) of the Act on the reason(s) for termination of employment to urge that the claimant did not follow the prescribed route or communicate the change.



51. That the claimant did not controvert the allegations nor provide reasons for the behaviour and worked for only 1 hour 15 minutes on the day.
52. Reliance was made on the sentiments of the court in *Phoeby Aloo Inyanga v Stockwell One Homes Management Ltd & another* (2022) eKLR to urge that after January 6, 2021, the relationship between the claimant and the Respondent was unsustainable.
53. On procedural aspects, counsel relied on the provisions of section 41 of the *Employment Act* and the decision in *Co-operative Bank of Kenya Ltd v Yator* (2021) eKLR to urge that the claimant was taken through a lawful disciplinary process as the respondent issued a notice to show cause, which the claimant responded to, was invited for a hearing and was accorded sufficient time to prepare for her defence and was heard. Thus, the termination of employment was lawful.
54. As regards the reliefs sought, counsel submitted that the respondent paid service pay, January salary and leave and the claimant was thus not entitled to the reliefs sought.
55. Counsel urged the court to dismiss the suit with costs.

Determination

56. The issues for determination are;
 - i. Whether termination of the claimant's employment was unfair.
 - ii. Whether the claimant is entitled to the reliefs sought.
57. As to whether termination of the claimant's employment was unfair, parties have adopted contrasting positions with the respondent maintaining that the dismissal was fair. The claimant argues that the respondent had neither a valid and fair reason nor did it comply with the requirements of section 41 of the *Employment Act, 2007*.
58. It requires no belabouring that under the provisions of the *Employment Act, 2007*, for a termination of employment to pass the fairness test, the employer is required to demonstrate that it had a valid and fair reason for the termination (substantive justification) and it conducted the termination in accordance with a fair procedure (procedural fairness), as exquisitely captured by Ndolo J. in *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR as follows;

“ . . . For a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”
59. The Court of Appeal expressed similar sentiments in *Naima Khamis v Oxford University Press (EA) Ltd* (2017) eKLR.

Reason for termination

60. In its notice to show cause dated January 12, 2021, the respondent accuses the claimant of having changed the prescribed route plan without approval or communicating the same to her supervisor contrary to the respondent's procedure. That her route and verification of the vehicle tracking were at variance, allowing unauthorised persons drive the motor vehicle and having drinks during working



hours. Being a Sales Manager entrusted with company assets including a motor vehicle, the claimant was expected to be honest with the respondent and her supervisor.

61. In her evidence, the claimant admitted that she was neither permitted to use the office vehicle for personal errands or give it to another person and had changed the itinerary without notifying the supervisors and gave no explanation. She also admitted that she was at Jifiche Grill having lunch in the company of other persons and that there were beer bottles on the table. Equally, the claimant admitted that she was the one appearing on the photographs allegedly taken by RWII, Mr Thomas Mutua Mutiso.
62. The claimant's admission leave no doubt that she and Mr Thomas Mutua Mutiso were at the restaurant at one point on January 6, 2021.
63. Relatedly, RWII testified that she followed the vehicle owing to a bottle thrown out of the vehicle on Mirema drive and the vehicle was branded. That the two ladies in the motor vehicle ordered alcoholic drinks even before they were joined by three men and the entertainment continued.
64. Significantly, the claimant also admitted that the vehicle she was driving had a tracking device to show its movement which lends credence to the respondent's tracking report on record which shows that the vehicle was within the vicinity of Thika Road Mall (TRM) from around 13.54 until 15.32, a duration of more than 1¹/₂ hours.
65. Contrary to the claimant's counsel's submission that the claimant did not report to work while intoxicated and the claimant's evidence that there was no evidence of drunkenness, the evidence of RWII to the effect that he saw the claimant take alcohol in the company of a female companion and were later joined by three men remain uncontroverted. She admitted that there were beer bottles on the table and did not allege that she was taking any other drink.
66. Based on the evidence on record, the court is satisfied that claimant was taking alcohol during working hours and had altered the itinerary without informing the supervisor or obtaining authority for the change.
67. The court is left wondering why the claimant could not call the supervisor having testified that the process required a mere phone call to the supervisor.
68. The claimant blatantly ignored the respondent's procedures, the fact that she visited other customers and collected a cheque notwithstanding.
69. Finally, the charge that the claimant authorised another person to drive the respondent's motor vehicle lacked supportive evidence and was unproven.
70. Contrary to the claimant's counsel's submission that RWII's testimony had no probative value, the court found it helpful. Human beings are curious animals and are typically inclined to pursue things that excite their curiosity. Bottles do not typically fly from car windows during the day and such an occurrence would arouse curiosity to find out more about it. The witness could remember the make of the vehicle, which implies that it was not just happenstance. The witness had sufficient time to observe the vehicle and its occupants, evidence the claimant did not controvert.
71. The testimony of RWII demonstrate critical elements of the jigsaw puzzle and partially explains the claimant's silence that afternoon. The claimant admitted that she was in that locality and at the club referred to by the witness.



72. Finally, the minutes of the disciplinary hearing dated January 13, 2021, which the claimant signed, lay it bare that she took alcohol with her sister and did not proceed to Quickmart but ended up at Leestar supermarket, Ruiru and acknowledged having given an incorrect report.
73. Finally, the claimant only worked for 1 hour 15 minutes for the entire day.
74. Section 43(2) of the [Employment Act, 2007](#) provides that;
- “The reason or reasons for termination of a contract are the matters that the employer at the time of the termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee.”
75. Case law is unambiguous that all that the employer is required to establish is that it had reasonable grounds for the genuine belief which comports with the ‘band of reasonableness test’ explained by Lord Denning in *British Leyland UK Ltd v Swift* (1981) IRLR 91.
76. No doubt the provisions of section 43(2) of the [Employment Act, 2007](#) introduce an element of subjectivity in the termination of employment matrix as held in [Kenya Revenue Authority v Reuwel Waitihaka Gitahi & 2 others](#) (2019) eKLR.
77. For the foregoing reasons, is it the finding of the court that the Respondent has established on a preponderance of probabilities that it had a valid and fair reason to terminate the Claimant’s employment.
78. The claimant’s conduct on January 6, 2021 was sufficient justification.

Procedure for termination

79. As regards the procedure adopted by the respondent, it is common ground that the respondent issued a notice to show cause on January 12, 2021 setting out the specific charges against the claimant who was accorded less than 24 hours to respond by 12 noon on the following day, which she did. RWI confirmed that the notice to show cause was served on the afternoon of January 12, 2021 and a response was needed by 12.00 noon.
80. Strangely, the notice to show cause additionally invited the claimant to attend a disciplinary hearing thereafter on January 13, 2021 and was notified that she could be accompanied by another employee of her choice.
81. The claimant attended alone. The claimant confirmed that this was because the notice given was too short to secure another employee to accompany her as her colleagues were out.
82. As correctly submitted by the claimant’s Counsel, the requirements of section 41 of the [Employment Act, 2007](#) are mandatory as held by the Court of Appeal in [Pius Machafu Isindu v Lavington Security Guards Ltd](#) (2017) eKLR.
83. Similarly, the court is in agreement with the sentiments of the courts in [Nicholus Otinyu Muruka v Equity Bank Ltd](#) (supra), [David Gichana Omuya v Mombasa Maize Millers Ltd](#) (supra) and [Anthony Mkala Chitavi v Malindi Water & Sewerage Co Ltd](#) (supra) cited by the claimant’s counsel on the provisions of section 41 of the [Employment Act, 2007](#).



84. Equally, the sentiments of the court in *John Rioba Maungo v Riley Falcon Security Services Ltd* (supra) on the speed with which the process was commenced and concluded are instructive where the court stated as follows;

“The speed with which the disciplinary process for the claimant was carried out could not have permitted him to prepare or adequately defend himself. He was issued with a show cause letter on April 23, 2014, and was expected to respond to it on the same day. The letter inviting him for a disciplinary hearing was issued to him on the very same day and the disciplinary hearing was held the same day.

. . . It would appear that the respondent merely wanted to pay lip service to the provisions of section 41 by cosmetic compliance.”

85. These sentiments apply on all fours to the facts of the instant case in that the entire process took less than 24 hours.

86. Relatedly, RWI confirmed that the claimant was not given a copy of the tracking report which the Respondent relied upon during the hearing.

87. The fact that the claimant was denied this important piece of evidence, coupled with the speed with which the process was executed denied the claimant the right to a fair hearing which is the centre piece of section 41 of the *Employment Act, 2007*. (See *Postal Corporation of Kenya v Andrew K. Tanui* (2019) eKLR.)

88. The respondent cannot camouflage the fact that it had already made the decision to terminate the claimant’s employment after it received the pictures taken by RWII irrespective of the claimant’s response to the notice to show cause.

89. For the above-stated reasons, it is the finding of the court that the respondent has failed to establish that it complied with the provisions of section 41 of the *Employment Act, 2007*.

90. The termination of the claimant’s employment was thus procedurally flawed.

91. In sum, it is the holding of this court that termination of the claimant’s employment was procedurally unfair.

Appropriate reliefs

92. As regards the reliefs sought, the court proceeds as follows;

a. One month’s salary in lieu of notice

93. As the claimant was neither accorded the one (1) month notice nor paid in lieu of notice, the one month’s salary prayed for is merited and is accordingly awarded Kshs 203,156.25.

b. January salary

94. By a partial settlement dated April 1, 2022, the parties agreed and the claimant was paid the salary for January 2021 among other payments.

The prayer is dismissed.

c. Cash Sales Commission (December and January)



95. Neither the claimant's Written Statement dated February 4, 2020 nor the oral testimony make reference to the particulars of the claim for commission or the circumstances in which it was payable and the same had not been paid.

The prayer is declined.

d. Sales Commission for 2020

96. The Claimant adduced no evidence to establish this claim and it is accordingly dismissed.

e. Accrued leave

97. The amount due under this head was paid by the respondent pursuant to the partial settlement recorded on April 1, 2022.

The prayer is dismissed.

f. Service pay for 4 years

98. The amount due to the claimant was paid under the partial settlement.

The prayer is accordingly dismissed.

g. General and aggravated damages including exemplary damages

99. Although the claimant alleged that the termination of employment was malicious and her reputation was injured, neither the particulars of the alleged malice nor the injury to her reputation were pleaded or proved.

100. In the absence of evidence of malice or defamation and having found that the respondent had a valid reason to terminate the claimant's employment, the prayer for general and aggravated damages is unsustainable and is accordingly dismissed.

h. 12 months compensation

101. Having found that termination of the claimant's employment by the respondent was procedurally flawed, the claimant is entitled to the relief of compensation under section 49(1)(c) of the [Employment Act, 2007](#).

102. In this regard, the court has considered the following;

i. The claimant had been an employee of the Respondent for a period of about 3 years 11 months which is not long.

ii. The claimant had no previous record of indiscipline or warning.

iii. The claimant did not appeal the decision of the Respondent or express her wish to continue in the Respondent's employment.

iv. The claimant substantially contributed to the termination of employment.

103. In the circumstances, the court is satisfied that the equivalent of two (2) months gross salary is fair, Kshs 406,312.5.

i. Certificate of service

104. The claimant is entitled to the certificate of service by dint of section 51 of the [Employment Act, 2007](#).

j. Public apology



105. The claimant adduced no evidence of entitlement to a public apology.

The prayer is dismissed.

106. In the upshot, judgment is entered in favour of the claimant against the respondent in the following terms;

- a. One month's salary in lieu of notice Kshs 203,156.25.
- b. Equivalent of two (2) months salary Kshs 406,312.5.
- c. Certificate of service.
- d. Costs of this suit.
- e. Interest at court rates from date hereof till payment in full.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 22ND DAY OF NOVEMBER 2023

DR. JACOB GAKERI

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 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 has 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.

DR. JACOB GAKERI

JUDGE

