



**Kimanyi v Kim Fay East Africa Limited (Cause 2178 of 2016)  
[2023] KEELRC 3206 (KLR) (9 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3206 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 2178 OF 2016  
K OCHARO, J  
NOVEMBER 9, 2023**

**BETWEEN**

**ALEXANDER JOHN KIMANYI ..... CLAIMANT**

**AND**

**KIM FAY EAST AFRICA LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction.**

1. Through a Statement of Claim dated May 17, 2016 and further amended on the 16<sup>th</sup> August 2021, the Claimant instituted a Claim against the Respondent, seeking the following reliefs:
  - a. Payment of terminal dues amounting to Ksh. 603,914.00 as particularized in paragraph 11 thereof.
  - b. Any other relief that the Court may deem fit to grant.
  - c. Cost of the Claim and interest.
2. The Statement of Claim was filed together with the Claimant's Witness Statement and documents that he intended to place reliance on as documentary evidence in support of the claim.
3. Upon being served with the summons to enter the appearance, the Respondent entered the appearance and filed its Memorandum of reply on 17<sup>th</sup> November 2021, denying the Claimant's claim and entitlement to the reliefs sought, in toto.
4. After the close of the pleadings, the matter was heard inter-partes on merit. The Claimant's case was heard on 4<sup>th</sup> November 2021 while the Respondent's case was heard on 7<sup>th</sup> March 2023.



5. When the matter came up for the hearing of the parties' respective cases, the witness statements that they had filed were adopted as part of their evidence in chief and the documents admitted as their documentary evidence.

### **The Claimant's case**

6. The Claimant stated that he first came into the employment of the Respondent on the 1<sup>st</sup> of July 2000 as a Machine Operator. He served the Respondent diligently and with maximum dedication until 13<sup>th</sup> October 2013, when it terminated his employment without any justifiable reason. At the time of his termination, he was earning a gross salary of KShs. 31, 237.
7. The Claimant testified that on the material day, they had a Sacco Welfare meeting Boardroom. At the meeting, he was responsible for serving the attendants with sodas and snacks. Serviettes too. At the end of the meeting, he remained with ten pieces of serviettes which he placed in his pocket and retained for use in the place of a handkerchief. At the gate, the pieces were found on him. He was told to see the Human Resource Manager the following day. On the 14<sup>th</sup> of October 2013, the Human Resource Manager issued him with a termination letter.
8. The Claimant contended that he was not given a chance to defend himself before his employment was terminated. At the termination, the Respondent paid him only KShs. 16000 as terminal dues.
9. Cross-examined by Counsel for the Respondent, he testified that he was given a termination letter but refused to take the same as he had not heard. The Respondent finally sent it to the Ministry of Labour where he picked it from them.
10. The Claimant further testified under cross-examination that the Respondent company was in the business of making tissue papers and serviettes. He knew that employees were prohibited from being found in possession of those items. However, those that he was found with were pieces that remained unused at the meeting, not from the factory. The ten pieces of serviettes were not taken away from him.
11. It was further testified that the dismissal was retaliatory for his championing of the workers' rights.
12. As regards the accident at the company, the Company took him to the hospital. They availed the ambulance and also paid the medical bills. The Company does not give safety gear like gloves.
13. On re-exam, he clarified by stating that he took the serviettes after work. The accident issue contributed to the termination.
14. He was a member of NSSF, and the Respondent made remittances for his account to the fund.

### **The Respondent's case**

15. The Respondent's case was presented by Alice Mworira, its Human Resource Manager. The witness confirmed that the Claimant was at all material times an employee of the Respondent in the position of a Machine Operator. At the time of separation, his salary was Ksh. 24, 889 inclusive of house allowance.
16. The Respondent contended that on the 6<sup>th</sup> of May 2011, while the Claimant was working, he sustained an injury to his left thumb. He was taken to the Avenue Hospital treated and discharged the same day. Furthermore, he was given paid sick-off. The injury he sustained was classified by the Hospital as soft tissue.
17. The Respondent contended that the Claimant immediately resumed duties and continued with his duties up until 16<sup>th</sup> October 2013, when he was discharged from employment.



18. It was stated that the Claimant was dismissed from employment on account that he breached the Respondent's policy. He stole and attempted to sneak out serviette papers. This led to a disciplinary process against him which culminated in the termination of his employment. Before the termination, he was accorded an opportunity to defend himself.
19. It was the Respondent's case that the incident that spurred the disciplinary process occurred on the 12<sup>th</sup> of October 2013 while the termination was on the 16<sup>th</sup> of October 2013. The Claimant admitted in writing that he was on the stated date found with serviettes as he was exiting the Respondent's premises.
20. The Respondent further contended that the Claimant was paid his terminal dues less statutory deductions. His dues included basic pay, house allowance, overtime worked up to that point, bus fare allowance for the days he worked and one-month salary in lieu of notice all amounting to Ksh. 16, 862.
21. The Respondent contended further that the termination of his employment did not have a connection with the workplace injury that he sustained almost two and half years prior to the termination.
22. When cross-examined, she told the Court that the Claimant was provided with safety gears and it was a Standard Practice for the same to be provided.
23. It was her testimony that the incident of stealing was not reported to the police station. The Claimant was asked to give a written explanation on the incident, he did oblige. On the 15<sup>th</sup> October 2013, he was summoned to the office of the Human Resource Manager for a disciplinary hearing. He admitted the accusations that were levelled against him. At this point, he was not in the company of a colleague of his own choice.
24. The witness admitted that on the 12<sup>th</sup> October 2013, the Claimant attended the welfare committee meeting. If food was served in the meeting, then definitely serviettes were used. The serviettes were loose pieces, not packed.

### **The Claimant's Submissions.**

25. The Claimant filed his submissions on 23<sup>rd</sup> March 2023 distilling three issues for determination thus:
  - i. Whether the Claimant was unfairly and unlawfully terminated.
  - ii. Whether the Claimant is entitled to terminal dues.
  - iii. Whether the cost of this suit should be awarded to the Claimant.
26. For the first issue the Claimant's counsel submitted that the dismissal of the Claimant was both procedurally and substantively unfair. He was not taken through any disciplinary proceedings. He was not formally informed of the charges against him nor given a chance to make representation regarding any accusations levelled against him in the presence of a colleague. By reason of these circumstances, it is clear that the provisions of section 41 of the *Employment Act*, were not adhered to.
27. The Claimant further submitted that the Respondent had failed to prove that the termination was on a valid reason in satisfaction of the requirement under section 45 [2] of the Act. The Claimant was summarily dismissed. However, the Respondent failed to demonstrate that the Claimant acted in a manner that could fall under those acts contemplated under section 44 of the Act, to justify a summary dismissal.
28. The Claimant lastly submitted that he was entitled to the reliefs sought together with the cost of the suit.



### **The Respondent's Submissions.**

29. The Respondent's counsel filed the written submissions on the 17<sup>th</sup> of April 2023 ventilating three issues for determination thus;
- i. Whether the Claimant's dismissal was unfair.
  - ii. Whether the Claimant is entitled to the reliefs claimed.
  - iii. Whether the Claimant was dismissed unlawfully.
30. According to the Respondent the Claimant's assertion that he was dismissed from employment because he was vocal in the representation of employee issues was a bald assertion without any evidence in fortification of the same. He who alleges must prove. In support of these submissions, reliance was placed on the case of *Evans Otieno Nyakwana vs Cleophas Bwana Ongaro* [2015] eKLR.
- “As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107(1) of the *Evidence Act* (Chapter 80 of the Laws of Kenya).”
31. Further, the Claimant didn't establish by calling a witness that indeed there was a SACCO meeting where the serviettes papers he was found with were given out. Therefore, it remained an unsubstantiated allegation.
32. The Respondent's Counsel submitted further that the Claimant breached his Contract of Employment as he was aware that all employees were strictly prohibited from carrying way products from the factory that were yet to meet the quality assurance. The Respondent's witness stressed the importance of the rule. It was meant to ensure that substandard goods do not get to the public, for the public's safety and the Respondent's business reputation maintenance. The summary dismissal was therefore justified under section 44[4][g].
33. Lastly, having failed to demonstrate that his employment was terminated unfairly, the Claimant cannot be availed of any of those reliefs he has sought. Further, he was duly paid his terminal dues.

### **Analysis and determination.**

34. From the pleadings, evidence on record and the submissions by the respective parties, the following issues present themselves for the determination:
- a. Whether the dismissal of the Claimant was substantively and procedurally fair.
  - b. Whether the Claimant is entitled to the reliefs sought.
  - c. Who should shoulder the cost of the suit?

### **Whether the dismissal was substantively and procedurally fair.**

35. Section 41 of the *Employment Act* 2007, provides for the procedure to be followed by an employer before terminating an employee's employment or summarily dismissing an employee from employment. The procedure is mandatory, it embodies three components, the information/notification component-the employer must notify the employee of his or her intention to take action against him or her, and the grounds attracting the intention. Second, the hearing component-the employer must accord the employee an adequate opportunity to prepare and make a representation on the grounds. This Component also avails the employee the right to accompaniment, either by a



colleague, where he or she is not a member of a trade union or a union representative, where he or she is a member. Lastly the consideration component, the employer must consider the representations made by the employee and or the colleague or union representative as the case may be before taking a decision.

36. In *Hema Hospital v Wilson Makango Marwa* [2015] eKLR, the Court of Appeal stated;

“20. As Radido, J observed in *Mary Mutundwa v Ayuda* [2013] eKLR:

“The *Employment Act*, in a radical departure from the position which obtains under the common law and in Kenya prior to 2<sup>nd</sup> June 2008 has made it mandatory by virtue of section 41 for an employer to notify and hear any representations an employee may wish to make whenever his/her termination is under contemplation by the employer if the ground for the termination relates to the employee’s misconduct, poor performance or physical incapacity. The employee is by law even entitled to have a representative present”.

21. This Court in *CMC Aviation Limited vs. Mobammed Noor* [2015] eKLR also reaffirmed that the dismissal of an employee in that case without according him an opportunity to be heard amounted to unfair termination.

37. Similarly, in the case of *Walter Ogal Anuro vs Teachers Service Commission* (2013) eKLR the court held:

“For a termination of employment to pass the fairness test there must be both substantive justification and procedural fairness. Substantive justification has to do with the establishment of a valid reason for termination while procedural fairness addresses the procedure adopted by the employer to effect the termination”

38. There is no doubt that the Claimant was employed by the Respondent on the 1<sup>st</sup> of July 2000 as a Machine Operator where he served until October 2013 when his services were terminated on alleged theft of serviettes contrary to the Respondent’s policies. The Claimant contended that he was summarily dismissed and the dismissal lacked procedural fairness as contemplated by the *Employment Act* 2007.

39. I have keenly considered the material placed before this Court, and there is none from whence it can be concluded; that the Claimant was notified that the Respondent was contemplating dismissing him from employment on the ground that he was found with the serviettes; that he was heard in company of a colleague or trade union representative in defence of the grounds; and that Respondent did consider the representations made by the Claimant on the grounds before it decided to dismiss him from employment. It has not lost sight of this Court that the Respondent’s witness did testify under cross-examination that the Claimant’s right to accompaniment was not expressed to him and that his trade union was only informed of the dismissal.

40. The Respondent has failed to demonstrate that leading to the dismissal of the Claimant, it undertook a process full of the three components mentioned hereinabove. It had a legal duty to do so, but it didn’t. It is not difficult to conclude and I hereby do that the dismissal was procedurally unfair.

41. Section 43 of the Act requires an employer in a dispute like the instant one, to prove the reason[s] for the termination, otherwise the termination will be deemed unfair by dint of the provisions of section 45. Important to add that it is not enough for the employer to prove the reason[s] but must further demonstrate that the reason[s] was fair and valid as required by the provision of section 45 (2) of the *Employment Act*.



42. The requirement that the reason[s] be proved. Therefore, it won't be enough for the employer to just state that the employee was dismissed for this or that reason. The employer must establish by satisfactory and truthful evidence that indeed the reason[s] genuinely existed.
43. The Respondent throughout its pleadings as well as during the hearing, firmly maintained that the Claimant was summarily dismissed from his employment for an alleged theft of serviette tissue papers. The termination letter sent to the Labour Office reads in part:
- “ Re: Termination of Employment for Alex Kimanyi
- His employment was terminated due to an act of theft of serviette tissue papers which he has admitted to in a written letter, the copy of which is enclosed herein.”
44. The termination letter mentions, and indeed RW1 testified that the Claimant admitted stealing pieces of serviettes in writing. The alleged written admission was not placed before this Court for consideration for a reason not explained to the Court. In my considered view, production of the document, if at all it existed, was vital, considering the Claimant's evidence surrounding the around 10 pieces of serviettes that he had after the meeting. So, one could be interested to know whether the alleged admission followed an accusation of theft or the fact that he was found with the pieces on him, pieces which he picked in the course of serving the attendants of the SACCO meeting.
45. The Respondent's witness went into detail to explain why the Respondent Company has a policy prohibiting staff from getting out of its factory with produced products. One of the reasons being the worry that products that might not have gone through quality checks shall end up in the market exposing it to reputational and legal liability risks should harm arise out of the use of the product[s]. Makes sense. However, the Respondent's witness was unable to discount the Claimant's version that those pieces he had were not from the factory. They were from the Board room, in my view meaning that they were already, certified for use, and in the market. She was honest enough to testify that she was not able to tell whether or not the serviettes were from the Board room as alleged by the Claimant.
46. The Respondent's witness didn't state how many pieces were found on the Claimant. The termination letter is coached in very general terms as regards the number of serviette pieces and whether or not they were packed or lose. In my view, this only helps to demonstrate that the decision to dismiss the Claimant was a rushed one preceded by no proper investigations.
47. Would it be reasonable for an employer to dismiss an employee who has picked a few pieces of serviette not from the factory but from a Board room to use in the place of a handkerchief in a situation where the employee has none on him, or for instance where has suddenly flu visited on him? I think not.
48. There is no doubt that though the termination letter doesn't mention it, a summary dismissal occurred here by the definition given under section 44 of the *Employment Act*. I take cognizance of the fact that subsection 4 thereof provides a catalogue on acts of omission or commission on the part of the Respondent that will amount a gross misconduct to justify the sanction of summary dismissal by the employer. I have agonized over the conduct of the Claimant and its circumstances and come to an inescapable conclusion that the conduct fits not in any of the categories set out in the provision. Further, in my view, it cannot be said to be of the gravity like those listed in the section.
49. By reason of the premises, the Respondent didn't discharge the legal burden under sections section 43 and 45 of the *Employment Act*, 2007. It failed to demonstrate on a balance of probabilities that the Claimant was guilty of an act of theft, further that the conduct of picking the pieces of serviette in the manner he did, was a gross misconduct contemplated under section 44[4] of the Act.



50. Consequently, the Court finds that the dismissal of the Claimant from employment was substantively unjustified. Too, that the same was procedurally unfair.

### **Whether the Claimant is entitled to the reliefs sought or any of the reliefs.**

#### **i. 12 months compensation for the unfair termination.**

51. The Claimant sought compensation for the unfair termination. The authority to make this award flows from section 49 of the Act and the same is influenced by the circumstances of each case. I have considered the fact that the dismissal of the Claimant was both procedurally and substantively unfair, that there was no equity and justice in the same when one considers the alleged transgression and the sanction [summary dismissal], and the length of the period of engagement at the Respondent's place of work, and conclude that the compensatory award and to an extent of 8 (eight) months' gross salary as compensation for the unfair termination, thus Ksh. 200,000 pursuant to section 49(1)(c) of the [Employment Act](#).

#### **ii. Service pay Gratuity.**

52. The Claimant urged this Court to award him service pay gratuity for the completed years amounting to Ksh.203, 040.50. In [Bamburi Cement Limited v William Kilonzi](#) [2016] eKLR Makau J. stated;

“The first thing that we must emphasize is that gratuity, as the name implies is a gratuitous payment for services rendered. It is paid to an employee or his estate by an employer either at the end of a contract or upon resignation or retirement or upon death of the employee, as a lump sum amount at the “discretion of the employer”

53. Sections 35 as read with section 36 of the [Employment Act](#), 2007, expressly provide for the instances where employees are not entitled to service pay. The Claimant was a registered member of the National Social Security Fund to which monthly contributions of Kenya Shillings Two hundred (Kshs.200) were made towards the Social Security Fund for the Claimant. The Claimant falls under the category that is expressly excluded by the aforesaid sections.
54. Further, there is no benefit in law known as service pay gratuity. It is either service pay or gratuity.

#### **iii. Unutilized leave days**

55. The claimant's compensation for the unutilized leave days for the year 2013 amounting to Ksh. 26,030. Section 28 of the Act enjoins the employer to allow the employees to proceed on leave or compensate the employee for leave days earned but not taken. The Respondent did not produce documentary evidence demonstrating that the Claimant was paid for the unutilized leave days or that he fully utilized his earned leave days. By this premise, the Claimant is hereby awarded unutilized leave days, Kshs.16,667.00.

### **Who should bear the cost of the suit?**

56. The cost of the suit is to be borne by the Respondent herein.
57. The upshot, judgment is hereby entered for the Claimant against the Respondent in the following terms:
- i. A declaration that the dismissal of the Claimant was both procedurally and substantively unfair.



- ii. 8 [eight] month's compensation for unfair termination pursuant to section 49 [1] [c] of the Employment Act.....Ksh. 200,000.00.
- iii. Compensation for earned but unutilized leave days.....Ksh. 16,667.00.
- iv. Cost of the suit
- v. Interest on the awarded sums at court rates from the date of this judgment till full payment.

**READ, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 9<sup>TH</sup> DAY OF NOVEMBER, 2023.**

.....

**OCHARO KEBIRA**

**JUDGE.**

In the presence of:

Mr. Sigoma for Claimant

Mr. Kegonde for Respondent

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 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 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.

A signed copy will be availed to each party upon payment of Court fees.

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**OCHARO KEBIRA**

**JUDGE.**

