



REPUBLIC OF KENYA



KENYA LAW
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**Musavi v Vajas Manufacturing Limited (Cause 1417 of 2018)
[2023] KEELRC 2840 (KLR) (9 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2840 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1417 OF 2018
JK GAKERI, J
NOVEMBER 9, 2023**

BETWEEN

FRANCIS MUTUA MUSAVI CLAIMANT

AND

VAJAS MANUFACTURING LIMITED RESPONDENT

JUDGMENT

1. The Claimant initiated this claim by a Statement of Claim filed on 2nd October, 2018 alleging unfair termination of employment by the Respondent.

The Claimant's case is pleaded as follows;

2. The Claimant avers that he was employed by the Respondent in 1994 as trainee mechanist, rose to the position of Maintenance Supervisor with a specific job description and served under various bosses he did not name.
3. It is the Claimant's case that between 11th and 14th July, 2016, an issue relating to the repair and recovery of a Doming Machine arose after having been attended to by one Mr. Eric, a Mechanist but the problem persisted.
4. According to the Claimant, the maintenance Section had established procedures which he explained to his seniors when asked about the issue but the Supervisor, Mr. Kelvin did not want to follow the procedure and sought to shield Eric from blame and a notice to show cause was issued on 14th July, 2016 on charges of gross misconduct, insubordination and dereliction of duty and the Claimant responded.
5. The Claimant avers that his employment was terminated on 25th July, 2016 by which time his gross pay had risen to Kshs.157,500/=.



6. The Claimant alleges that there was a Collective Bargaining Agreement between the Respondent and the Tailors and Textiles Workers Union and it applied to him though he was not a member.
7. The Claimant prays for;
 - a. A declaration that termination of his employment by the Respondent was unfair and unlawful.
 - b. Kshs.4,515,000/= as follows;
 - i. 12 months compensation Kshs.1,890,000.00
 - ii. Pay in lieu of notice Kshs.315,000.00
 - iii. Gratuity payment Kshs.2,310,000.00
 - iv. Costs of the cause
 - c. Interest on Kshs.4,515,000.00 from date of termination till payment in full.
 - d. Costs of the cause and interest thereon.

Respondent's case

8. In its response filed on 23rd June, 2019, the Respondent admits that it engaged the Claimant as a trainee mechanic on 1st October, 1994 and rose to become a Machine Maintenance Supervisor whose main duty was to maintain production and ensure quality.
9. It is the Respondent's case that on 11th July, 2016, the Doming Machine had broken down and was being repaired by a junior employee under the Claimant's supervision, but the Claimant kept on writing emails and blaming his junior staff and refused to repair the Machine which fell within his job description.
10. The Respondent avers that when the matter was escalated to the Financial Controller, he instructed the Claimant to work on the repairs but he declined.
11. It is the Respondent's case that the Claimant's response to the notice to show cause was unsatisfactory and he was invited for a disciplinary hearing on 22nd July, 2016 and he attended but again his explanation was found wanting and he was found culpable for insubordination and dereliction of duty which led to his dismissal on 25th July, 2016.
12. According to the Respondent, the Collective Agreement did not apply to the Claimant as he was not a member of the union.
13. It is the Respondent's case that the Claimant's dismissal was lawful and justifiable and the suit ought to be dismissed with costs.

Claimant's Evidence

14. On cross-examination, the Claimant confirmed that as Maintenance Supervisor, his duties entailed keeping all machines in the factory in a sound condition as his duties affirm.
15. The Claimant confirmed having received instructions from the Operations Manager to repair the Doming Machine but could not do so because he required certain information. He confirmed that he was in charge of the Maintenance team.



16. The witness further confirmed that he was taken through a disciplinary hearing and was only paid half the salary of July 2016 but terminal dues were not paid.
17. On re-examination, the witness testified that the Doming Machine was not repaired because there were procedures to be complied with and all were aware.
18. That he did a letter to the Operations Manager but no email was sent to the manufacturers.

Respondent's evidence

19. RWI confirmed on cross-examination that he joined the Respondent after the Claimant had been dismissed and was thus relying on records.
20. It was his testimony that the Claimant was asked to repair the machine but he refused stating that a junior officer was supposed to do so.
21. That by the Claimant's email to Kelvin on 11th July, 2016, he was seeking information and no response was filed.
22. That Mr. Eric was answerable to the Claimant as his supervisor.
23. The witness testified that the Claimant was requested to clear and collect his dues but did not.
24. The witness admitted that the repairs had a Manual or Standard Operating Procedures.
25. The witness confirmed that the Claimant was taken through a disciplinary process and had the opportunity to defend himself.
26. The witness confirmed that Mr. Eric was not invited as a witness.

Claimant's submissions

27. As to whether the summary dismissal of the Claimant was fair, counsel relied on the provisions of Section 44(4) of the *Employment Act* to urge that the Claimant was not guilty of gross misconduct.
28. According to counsel, the suspension signified condemnation before being heard.
29. On procedure, counsel submitted that the Claimant's evidence was ignored as his explanation that the machine could not be started without ascertaining its status was not taken into consideration.
30. The sentiments of the court in *Pius Machafu Isindu v Lavington Security Guards Ltd* (2017) eKLR and *David Gichana Omuya v Mombasa Maize Millers Ltd* (2014) eKLR were relied upon to underscore the essence of Sections 41 and 43 of the *Employment Act* in termination of employment.
31. Reliance was also made on the decision in *Anthony Mkalla Chitavi v Malindi Water & Sewerage Co. Ltd* (2013) eKLR was also cited to buttress the submission that the termination of the Claimant's employment was procedurally flawed.
32. As regards the reliefs sought, counsel submitted that since the dismissal of the Claimant was malicious and without justifiable cause, he was entitled to the reliefs prayed for as provided by Section 49 of the *Employment Act*, 2007 in the case of compensation.
33. On pay in lieu of notice and gratuity, counsel relied on Section 7 of the Collective Agreement between the Respondent and the Union dated 11th May, 2015 as well as the sentiments of the court in *Bamburi Cement Ltd v William Kilonzi* (2016) eKLR to underscore the fact that gratuity was payable at the discretion of the employer for the long service of 22 years.



Respondent's submissions

34. Counsel for the Respondent isolated three issues for determination on the summary dismissal, the Claimant's entitlement to damages and costs.
35. On the 1st issue, counsel cited the provisions of the [Employment Act](#), 2007 and various cases to underscore the elements of an unfair termination of employment.
36. The Court of Appeal decision in [Kenfreight \(EA\) Ltd v Benson K. Nguti](#) (2016) eKLR and the decision in [Co-operative Bank of Kenya Ltd v Banking, Insurance and Finance Union](#) (2017) eKLR were relied upon to urge that employer must demonstrate that it had a valid reason for the termination of employment and procedural fairness.
37. Counsel submitted that as the Claimant wilfully refused and/or neglected to work on the repair of the Doming Machine, which was his duty and the Respondent had justifiable grounds to summarily dismiss him as his conduct amounted to insubordination and dereliction of duty.
38. On procedure, reliance was made on the sentiments of the court in [Janet Nyandiko v Kenya Commercial Bank Ltd](#) (2017) eKLR, [National Bank of Kenya v Anthony Njue John](#) (2019) eKLR and others to urge that the requirements of Section 41 of the [Employment Act](#), 2007 were complied with.
39. Reliance was also made on the sentiments of the Court of Appeal in [Judicial Service Commission v Gladys Boss Shollei & another](#) (2014) eKLR and [Stanbic Bank Ltd v Danson Mwashako Mwakuwona](#) (2015) eKLR to submit that the Respondent had sufficient grounds to dismiss the Claimant from employment under the reasonableness test.
40. On entitlement to damages, counsel submitted that the Claimant was not entitled to 12 months compensation as the termination of employment was fair.
41. Sentiments of the Court of Appeal in [Kiambaa Dairy Farmers Co-operative Society Ltd v Rhoda Njeri & 3 others](#) (2018) eKLR were cited to urge that 12 months compensation was only reserved for the most egregious cases or contumelious disregard of the rights and dignity of the employee being dismissed.
42. Counsel submitted that awarding the Claimant 12 months compensation was tantamount to unjust enrichment of the Claimant as held in [Abraham Gumba v Kenya Medical Supplies Authority](#).
43. Counsel submitted that the Claimant was not entitled to pay in lieu of notice as all his dues had been paid.
44. On gratuity, counsel urged that it was not due as the Claimant was not a member of the union and stated as much in his witness statement.
45. Counsel relied on the sentiments of the Court of Appeal in [Bamburi Cement Ltd v William Kilonzi](#) (2016) eKLR on gratuity.
46. On interest, counsel submitted that the same runs from the date of judgement as opposed to the date of termination and cited the court's sentiments in [Shariif Salim & another v Malundu Kikava](#) (1989) eKLR and [Joseph Kiarie Njoroge v Njue Kiarie](#) (2007) eKLR among others to urge that the Claimant was not entitled to interest as claimed.

Determination

47. 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.
48. As to whether termination of the Claimant's employment was unfair and as typical, parties have adopted contrasting positions with the Claimant maintaining that it was substantively and procedurally unfair.
49. It requires no belabouring that the provisions of Section 41, 43, 44, 45 and 47(5) of the Employment Act prescribe the architecture on fair termination of employment contracts. Section 45 is the bedrock of fair termination as it prescribes the essentials of a fair termination of employment, namely; valid and fair reason and fair procedure. The reason may relate to the employee's conduct, capacity or compatibility or the operational requirements of the employer.
50. Courts have characterised the two requirements as substantive justification and procedural fairness. (See Naima Khamis v Oxford University Press (EA) Ltd (2017) eKLR and Walter Ogal Anuro v Teachers Service Commission (2013) eKLR among others).
51. I will now proceed to determine whether the Respondent had a valid and fair reason to terminate the Claimant's employment.

Reason for termination

52. It is common ground that the Claimant was employed as a trainee Mechanist and rose to become the Respondent's Maintenance Supervisor and his duties included ensuring that all the machines were in a sound condition.
53. It is also not in dispute that the Claimant had a team of mechanists in his docket including one Mr. Eric.
54. Finally, it is not in dispute that on 11th July, 2016, the Respondent's Doming Machine broke down and Mr. Eric Juma worked on it but appears to have been unsuccessful and several emails were exchanged between the Claimant and one Vajas-Kelvin, the Operations Managers, Eric and Kelvin, Claimant and one Saurabh Jain, the Chief Executive Officer and Eric and the Claimant.
55. From the email communication, it is discernible that the Claimant, Eric Juma and the Operations Manager do not appear to have had a cosy working relationship.
56. In an email dated 11th July, 2016 from the Claimant to Vajas-Kelvin, the Operations Manager, the Claimant is faulting the Operations Manager for covering up for Eric Juma (his supervisee) for mistakes on machines and states that all of them would come down.
57. He informs the Operations Manager what Eric (his supervisee) should do.
58. Based on this email alone, it is unclear what role the Claimant had in allocating duties and supervising tasks by those under him.
59. For unknown reasons, the Claimant is writing to his supervisee through his own supervisor.
60. From the email, it is clear that the Claimant had no clue on how Mr. Eric had repaired or attempted to repair the Doming Machine yet he had 22 years of experience with the machines.
61. By an email dated July 12th 2016 at 8.15 am from Eric to Kelvin, Eric explains the challenges the Doming Machine had and what he had done to rectify the defects but without success.
62. The last line of the email states that the Claimant had been informed of the new challenge relating to a clogged pipe and Mr. Eric was awaiting advice from the Claimant on the way forward.



63. The Claimant did not deny that he had been notified of the new challenge.
64. By an email dated 12th July, 2016 at 11.27 am to the Chief Executive Officer, the Claimant was still awaiting an email, presumably from Eric Juma so as to decide how to proceed on the machine.
65. At 12.39 pm on 12th July, 2016, the Claimant did another email to Kelvin and Eric copied to the CEO, one Puneet and Mr. Isaac explaining what Eric should do as he had done the day before.
66. The Claimant requests his supervisee to write an email to Kelvin who would forward it to him.
67. Unknown to the Claimant, Mr. Eric had already done an email to Kelvin on the issue.
68. The penultimate paragraph of the email is directed at Eric who is told to desist from blaming the Claimant as he had worked on the machine in his own initiative and had not been forced to do so.
69. The Claimant is emphatic that he did not trust Eric's information about the machine but still requests him to do an email to Kelvin on the issue.
70. Mr. Eric responded on the morning of 14th July, 2016 and the email was copied to Puneet, Kelvin, Isaac, Christopher and the CEO. Eric explains what he did to the machine and the challenges the machine had.
71. From the contents of the email, it is clear that the Claimant had challenges working with Eric and saw him as a threat or a "competitor" as Eric puts it in his email.
72. The last email from the Claimant to Kelvin and Eric is dated 14th July, 2016 at 6.04 pm. The Claimant is accusing Mr. Kelvin for not "bringing" Mr. Eric to work to clear any doubt on the machine.
73. For unexplained reasons, the Claimant portrays himself as hapless and helpless seeking information from his supervisee who did so through the Claimant's supervisor, yet the Claimant had worked in the department for 22 years and risen to be the position of supervisor and Eric was working under him.
74. The notice to show cause dated 14th July, 2016 accused the Claimant of gross misconduct, insubordination and dereliction of duty.
75. In his response dated 21st July, 2016, the Claimant stated that he did not implement the instructions of the Operations Manager because he did not know the status of the machine and acknowledges that Mr. Eric was his junior and was working on the machine.
76. That the Financial Controller was also notified of the Claimant's refusal to repair the machine.
77. The witness confirmed on cross-examination that he could not repair the machine without the information required.
78. This would suggest that the Claimant had no worksheets or other record keeping mechanism for repairs of the Doming Machine which implicated his supervisory skills.
79. The letter of termination dated 25th July, 2016 states that the Claimant's employment was terminated for his failure to take initiative to investigate the repairs leading to insubordination and dereliction of duty.
80. The foregoing analysis reveals that the Respondent's Doming Machine broke down on an undisclosed date and attempts by Eric to repair the same appear to have fallen through.
81. The Claimant as the supervisor had no clue on what was done by Mr. Eric and who was unavailable which precipitated email communication from 11th July, 2016 to 14th July, 2016.



82. In the meantime, the Claimant did nothing other than write emails and took no initiative in an endeavour to resolve the issue if the information he was looking for was unavailable.
83. In the courts view, the fact that the Claimant had no idea on what Eric, his supervisee had done to the machine and had no information from any other source other than from Eric himself, did nothing for 4 days with a view to remedy the situation the Respondent's requests notwithstanding, cannot be analogous to anything other than dereliction of duty by a supervisor which justified the termination of employment on 25th July, 2016.
84. The foregoing is consistent with the provisions of Section 43(2) of the Employment Act, 2007 that;
- “The reasons or reasons for termination of a contract are matters that 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.”

Procedure

85. Section 41 of the Employment Act, 2007 prescribes the procedural precepts to be complied with by the employer for a termination of employment to pass the fairness test.
86. In Pius Machafu Isindu v Lavington Security Guards Ltd (2017) eKLR, the Court of Appeal underscored the essence of the procedural precepts as follows;
- “A mandatory and elaborate process is then set up under Section 41 requiring notification and hearing before termination.”
87. Clearly, the provisions of Section 41 of the Employment Act, 2007 must be complied with for a termination of employment to pass muster.
88. The court is also guided by the sentiments of the court in Anthony Mkala Chitavi v Malindi Water & Sewerage Co. Ltd (*supra*) cited by the Claimant's counsel as follows;
- “The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.
- Secondly, it would follow naturally that if an employee has a right to be informed of the charges, he has a right to a proper opportunity to prepare and to be heard and to present a defense/state his case in person, writing or through a representative or shop floor union representative if possible.”
89. It is common ground that the Respondent invited the Claimant for a disciplinary hearing on 22nd July, 2016 vide letter dated 21st July, 2016, a fact the Claimant confirmed on cross-examination.
90. Although the letter indicated the charges the Claimant was facing, cited the provisions of Section 44(4)(c) and (e) of the Employment Act, 2007 and notified the Claimant that he was entitled to a representative during the hearing, the Respondent accorded him the less than a day notice to appear for the hearing.
91. The minutes availed by the Respondent reveal that the disciplinary committee comprised one Puneet Walia, Isaac Nzioki and Christopher Nambuki as Secretary.



92. Although the meeting commenced at 11.45 am and ended at 12.30 pm, it had no agenda items, but addressed the charges the Claimant was facing, there is no evidence to show that the Chairperson or anyone read out the charges to the Claimant in the presence of the representative, Mr. Wellington Kombi nor were the representation of Mr. Wellington Kombi, if any, were captured by the Secretary.
93. In the court's view, the procedure adopted by the Respondent fell short of the threshold of Section 41 of the *Employment Act*, 2007 in that the charges were not explained to the Claimant at the commencement of the meeting.
94. This reasoning finds support in the sentiments of the Court of Appeal in *Postal Corporation of Kenya v Adnrew K. Tanui* (2019) eKLR as follows;

“ . . . The retort that an employer has no obligation to ask the employee to be accompanied does not avail the appellant because the law requires that such other person be present to hear the grounds of termination and if so inclined, make representations thereon. A hearing not so conducted is irregular . . . ”
95. Second, the Respondent did not conduct any inquiry or investigation to unearth the true state of affairs in the Claimant's department and as a consequence no evidence was adduced at the hearing.
96. The Claimant maintained that Eric was not invited to adduce evidence and be cross-examined yet he was at the centre of the Claimant's disciplinary hearing. (See *Munir Sbeikh Ahmed v National Bank of Kenya* (2020) eKLR).
97. From the minutes, it is evident that the Claimant was questioned by the officers present and responded to the questions.
98. Finally, the Claimant was accorded less than a day's notice to attend the hearing and the court is not persuaded that the notice given was reasonable time in the circumstances.
99. Although the Claimant endeavoured and had a representative, his presence could not remedy the short notice given which implicates the right to fair hearing.
100. For the above-mentioned reasons, it is the finding of the court that the Respondent has failed to demonstrate that termination of the Claimant's employment on 25th June, 2016 was procedurally fair.

Reliefs

a. Declaration

101. Having found that termination of the Claimant's employment by the Respondent was procedurally flawed, a declaration that the termination was unfair is hereby made.

b. Pay in lieu of notice Kshs.315,000.00

102. The Claimant prays for 2 months' salary in lieu of notice but has not cited the relevant contractual clause entitling him to the prayer.
103. According to the Claimant's counsel, Section 7 of the CBA between the Respondent and the union justified the claim since the Claimant had served the Respondent for more than 5 years.
104. Worthy of note however, the Claimant testified that he was not a member of the union and adduced no evidence to show that he was unionisable and was paying Agency Fees or that he had benefited from the CBA in anyway.



105. Clause 24 of the CBA was unambiguous that only unionisable employees benefited from the 10% salary increment spread over 2 years effective 1st August, 2014 and 1st August, 2015.
106. A review of Part IV of the CBA reveals that the Claimant's position as Maintenance Supervisor was not covered by the CBA.
107. Similarly, the payslip availed by the Claimant for June 2016 has no entry for union dues.
108. Finally, having found that the Claimant's summary dismissal was substantively justifiable, the prayer for 2 months' salary in lieu of notice is unsustainable and it is declined.

c. Gratuity Kshs.2,310,000.00

109. Analogous to claim for 2 months' salary in lieu of notice, the Claimant grounded the prayer for gratuity on the CBA exclusively.
110. It is trite that gratuity is a gratuitous payment made by the employer in appreciation of the services rendered by an employee and is solely contractual under the letter of employment or the CBA.
111. The court is in agreement with the sentiments of Makau J. in *Bamburi Cement Ltd v William Kilonzi* (*supra*) cited by the Claimant's counsel to urge that gratuity is payable at the discretion of the employer.
112. Having found that the Claimant was neither a member of the union nor covered by the CBA dated 11th May, 2015, the prayer for gratuity grounded on the CBA must fail.

d. 12 months compensation

113. Having found that termination of the Claimant's employment was unfair for want of procedural propriety, the Claimant is entitled to the relief under Section 49(1)(c) of the *Employment Act*, 2007.
114. In determining the quantum of compensation, the court has taken into consideration the following;
 - i. The Claimant was an employee of the Respondent from October 1994 to 25th July, 2015, a period of about 20 years, 9 months, which is long.
 - ii. The Claimant had no previous record of misconduct and had served the Respondent diligently.
 - iii. The Claimant substantially contributed to the termination of employment.
 - iv. The Claimant neither appealed the Respondent's decision nor indicate his wishes to continue serving as an employee of the Respondent.
115. In the circumstances, the court is satisfied that the equivalent of 2 months gross salary is fair.
116. In conclusion, judgment is entered in favour of the Claimant against the Respondent in the following terms;
 - a. A declaration that termination of the Claimant's employment by the Respondent was unfair.
 - b. Equivalent of 2 months gross salary compensation.
 - c. Costs of this suit.
 - d. Interest at court rates from the date of judgement till payment in full.



DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 9TH 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

