



Mburu v Afro Industries Agencies Ltd (Employment and Labour Relations Cause 1104 of 2018) [2023] KEELRC 2731 (KLR) (2 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 2731 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1104 OF 2018**

**BOM MANANI, J
NOVEMBER 2, 2023**

BETWEEN

JAMES GITAU MBURU CLAIMANT

AND

AFRO INDUSTRIES AGENCIES LTD RESPONDENT

JUDGMENT

Background

1. This is an action for inter alia, compensation for alleged unlawful dismissal from employment. The Claimant accuses the Respondent of unfairly terminating his contract of service and hence the prayer for the relief aforesaid.
2. On the other hand, the Respondent denies that its decision to terminate the Claimant's contract was unlawful. The Respondent believes that it had valid reason to end the employment relation between the parties. Thus, it is the Respondent's prayer that the instant claim be dismissed with costs.

Claimant's Case

3. The Claimant avers that he was employed by the Respondent in the position of driver on 1st February 2012. He contends that he worked uneventfully until 16th September 2017 when the Respondent terminated his contract. He further avers that his exit salary was Ksh. 29,953.00.
4. The Claimant contends that the decision to sever the employment relation aforesaid was without lawful cause. He further avers that the decision was in violation of due process.
5. The Claimant states that on the material day, he reported to work as usual and proceeded to pick the vehicle keys in readiness for the day's work. As he made his way to the vehicle, the Respondent's manager stopped him and asked him why he had not picked sample material which he was supposed to have picked from the Respondent's client as he drove back to the Respondent's premises. The



- Claimant states that he was not aware of the request to pick the sample material from the Respondent's client as asserted by the Respondent's manager.
6. The Claimant indicates that when he expressed his lack of knowledge about the request aforesaid, the Respondent's management asked him to hand over the vehicle keys. He was thereafter relieved of his employment without the benefit of a hearing.
 7. The Claimant avers that the decision to terminate his employment violated his right to fair labour practice. He further avers that he was neither heard on the matter nor issued with a warning letter as was required under the law and the Collective Bargaining Agreement between the parties.
 8. The Claimant called a witness who corroborated his evidence. This witness who was a co-employee of the Claimant asserted that on the material date, the Respondent's manager summoned the Claimant and demanded to know why he had failed to heed instructions to collect sample material from the Respondent's client. It was this witnesses' evidence that the Claimant's explanation that he was unaware of these instructions fell on deaf ears. The witness stated that the Claimant was dismissed from employment without being accorded an opportunity to respond to the accusations against him.
 9. Both the Claimant and his witness asserted that the dispute was reported to the Ministry of Labour and Social Services. It was their case that a conciliator was appointed to resolve the matter but the Respondent rejected the conciliation recommendations thus necessitating this suit.
 10. On its part, the Respondent avers that the Claimant failed to heed lawful instructions when he refused to pick sample material from its client. This resulted in the decision to terminate his contract of service.
 11. The Respondent called two witnesses. The first witness was the delivery person who was with the Claimant on the date he was to collect the sample material. This witness stated that he received a phone call from the Respondent's management asking him to collect the aforesaid sample material. The witness stated that he asked the Claimant to drive to where they were to collect the material but the Claimant declined the request stating that it was too late in the day to do so.
 12. The witness confirmed that the instructions to pick the sample material were given to him and not the Claimant. According to the witness, the Claimant's role was only to drive him to where the material was to be collected, a duty that he (the Claimant) declined to implement.
 13. The witness stated that the Claimant was interrogated about the refusal to follow instructions before his contract was terminated. The witness said that he was present when the Claimant was questioned about the alleged misconduct. However, he left before the meeting came to an end.
 14. The witness stated that he was later told that the Claimant admitted his mistake and asked for forgiveness. He (the witness) however clarified that he was not present when the Claimant allegedly admitted his mistake and asked for forgiveness.
 15. The witness stated that the Respondent did not conduct a disciplinary session for the Claimant. The decision to terminate his contract was without the benefit of a disciplinary hearing.
 16. The Respondent's second witness largely reiterated the position that was expressed by the 1st witness. It was his case that the Claimant was dismissed from employment after he refused to follow lawful instructions.
 17. The witness indicated that he could not tell the exact exit salary of the Claimant. He also stated that he could not tell whether the Claimant had taken his annual leave before his contract was terminated.



18. On due process, the witness stated that he gave the Claimant an opportunity to express himself before the decision to terminate his contract was arrived at. However, he confirmed that the Claimant was not issued with a notice to show cause.
19. The witness stated that the Claimant was told that he was free to call a witness. He further averred that the disciplinary session was conducted in the presence of one Martin Owuor, a union official.
20. The witness confirmed that the dispute had been referred to the Ministry of Labour. He said that he could not remember with exactitude the recommendation that were made by the conciliator. However, he confirmed that the conciliator had found that the decision to terminate the Claimant's contract was irregular for want of a hearing.

Issues for Determination

21. The parties formulated issues for determination. These are set out in their joint list of issues dated 14th August 2020. From the aforesaid list, I consider the following two as sufficient to dispose of the dispute: -
 - a. Whether the Respondent terminated the Claimant's employment unfairly, irregularly and in contravention of the Employment Act of Kenya.
 - b. If the answer to the above is in the affirmative, whether the Claimant is entitled to the prayers that he seeks in the Memorandum of Claim.

Analysis

22. The ingredients of a fair termination of a contract of employment are enshrined under the Employment Act as read with articles 41 and 47 of the Constitution and the Fair Administrative Action Act. For a decision by an employer to terminate a contract of service to be deemed as lawful, he (the employer) must demonstrate that he had valid reason to support the decision. Further, he must demonstrate that the decision was taken in accordance with due process.
23. The Respondent's case is that the Claimant failed to heed instructions to collect sample materials from a client. The Respondent avers that it asked its delivery person who was with the Claimant in the delivery van to pick these samples.
24. To facilitate this process, the Claimant was required to take the delivery man to where the samples were. However, he is said to have refused to do so on account of time. The Respondent called the delivery man who stated that although he alerted the Claimant of the Respondent's request, the Claimant refused to pick the samples alleging that there was no time left for the exercise.
25. The Claimant denies this version of events. It is his case that the Respondent's management did not ask him to collect the alleged samples.
26. It is apparent from the evidence on record that the Claimant's work was to merely drive the Respondent's vehicle to delivery points. The work of physical hand over of delivered material lay with the delivery person who was on board the delivery vehicle with the Claimant.
27. On the material day, it appears that the Respondent's management called the delivery person to collect the samples in question. This fact is confirmed by the Respondent's witnesses. The delivery person who gave evidence confirmed the fact that he received a telephone call from the Respondent's management to collect the samples in question.



28. It is evident that the Claimant was not called by the Respondent's management about collection of the samples. He was only notified of the need to collect the samples by the delivery man. His work was to merely drive to where the samples were to be collected.
29. I believe the evidence by the Respondent's witnesses that there were samples to be collected by the crew comprising the Claimant and the delivery man. I do not think that the delivery person had any reason to lie that he had been instructed to collect the samples.
30. It is evident that the samples were not collected as instructed. The delivery person informed the Respondent's management that the reason why this happened was that the Claimant declined to drive to where the samples were to be picked because there was allegedly no time for this exercise.
31. Although the Claimant was not directly notified by the Respondent's management of the need to collect the samples, my view is that he got these instructions through the delivery man. Therefore, it was necessary for him to have driven to where the samples were to have been collected.
32. I believe the Respondent's case that the samples in question were not collected because the Claimant declined to drive his colleague to the place where they were to have been picked. In my view, the Claimant's conduct amounted outright defiance of lawful instructions. Thus, the Respondent was entitled to consider terminating his employment.
33. The foregoing notwithstanding, the Respondent was duty bound to ensure that the decision to terminate the Claimant's employment was processed in accordance with due procedure. The Respondent was obligated to notify the Claimant of the reasons for the proposed decision and allow him an opportunity to respond to the charges. The Respondent was obligated to provide the Claimant with a chance to call witnesses if he wished and cross examine his accusers.
34. The evidence on record does not convince me that this was done. It is evident that when the Claimant reported on duty the following day, he was immediately confronted by the Respondent's management about the issue. Before he could offer his explanation, the Respondent's management asked him to surrender the car keys. He was then told that his employment had been terminated due to insubordination.
35. Although the Respondent asserts that the Claimant was taken through a disciplinary hearing, it will be a mockery of justice to equate the events of the morning on which he (the Claimant) was sacked with a disciplinary hearing. Before the Claimant was confronted about the impugned incident and told that his employment had been terminated, it is clear that he was not notified that what he was about to face was a disciplinary session as required under section 41 of the [Employment Act](#). There is no evidence that he was informed of the right to call witnesses if at all.
36. The evidence on record demonstrates that the Trade Unionist who was called into the Respondent's premises at the time that the Claimant's issue was being addressed only came in after the fact. He did not attend the actual session in which the Claimant was allegedly questioned. He (the Unionist) was only notified of the decision to terminate the Claimant's employment.
37. The procedure under section 41 of the [Employment Act](#) as read with section 4 of the [Fair Administrative Action Act](#) must count for something. This procedure requires the employer to give an employee who is facing disciplinary action: adequate notice of the proposed disciplinary process; an opportunity to be heard and make representations; and a chance to call witnesses and cross examine his accuser among others.
38. I do not consider what happened on the morning of the Claimant's dismissal from employment to have met this threshold. He was clearly deprived of adequate notice of the charges against him. No sooner



had he been told of the alleged infraction than was he told to hand over the vehicle keys and consider his employment as terminated. There is no evidence that he was given a chance to call witnesses or cross examine his accuser. As a result, I reach the conclusion that the Claimant was not afforded procedural fairness in the process that resulted in the loss of his employment.

Determination

39. Having regard to the foregoing, I am convinced that the Respondent may have had valid reasons to consider terminating the Claimant's employment. However, the procedure that was followed in arriving at the decision was flawed. As a result, I declare the decision to terminate the Claimant's contract of service as procedurally unfair.
40. The Claimant has claimed for pay in lieu of notice to terminate his contract. This is premised on sections 35 and 36 of the *Employment Act*.
41. The evidence on record shows that the Claimant was terminated on 16th September 2017 without the benefit of notice. There is no evidence that he was paid salary in lieu of notice to terminate his employment. In the premises, I am convinced that he is entitled to an award of pay in lieu of notice to terminate. Accordingly, I enter judgment for the Claimant for Ksh. 29,935.00 being salary for one month in lieu of notice to terminate his contract of service.
42. The Claimant has also claimed for leave pay on pro-rata basis for nine (9) months. He admitted having taken his leave save for the period in question. From the report by the conciliator, the Respondent acknowledged this aspect of the Claimant's claim. Accordingly, I enter judgment for the Claimant for accrued leave days in the sum of Ksh.17,964.00 being on pro-rata basis.
43. The Claimant has also prayed for salary for the sixteen (16) days that he had worked in September 2017. There was no evidence that he was remunerated for these days. As a matter of fact, the Respondent concedes this claim in its final submissions. Accordingly, I enter judgment for the Claimant for salary for the aforesaid days, that is to say Ksh. 15,965.00.
44. I award the Claimant compensation for unfair termination of his contract of service that is equivalent to his gross monthly salary for four (4) months, that is to say Ksh. 119,740.00. In making this award, I have considered the guidelines under section 49 of the *Employment Act*. In particular, I have considered the length of service that the Claimant rendered to the Respondent.
45. I award the Claimant interest on the aforesaid award at court rates from the date of this decision.
46. The aforesaid award is subject to the applicable statutory deductions.
47. I award the Claimant costs of the case.

DATED, SIGNED AND DELIVERED ON THE 2ND DAY OF NOVEMBER, 2023.

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant

..... for the Respondent

ORDER



In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

