



**Mungahu v Chandaria Industries Limited (Cause 2077 of 2017)  
[2023] KEELRC 3297 (KLR) (18 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3297 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 2077 OF 2017  
JK GAKERI, J  
DECEMBER 18, 2023**

**BETWEEN**

**BONIFACE MUNGAHU ..... CLAIMANT**

**AND**

**CHANDARIA INDUSTRIES LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant commenced this suit by a Memorandum of Claim filed on 16<sup>th</sup> October, 2017 alleging unfair termination.
2. The Claimant prays for;
  - i. A declaration that the dismissal of the Claimant from employment was unfair and unlawful and that the Respondent is liable to pay his terminal dues and compensatory damages.
  - ii. An order for the Respondent to pay the Claimant his due terminal benefits and compensatory damages totalling to Kshs.1,350,848/=.
  - iii. Interest on (b) above from date of filing till full payment.
  - iv. Cost of this suit plus interest thereon.
3. It is the Claimant's case that he was employed by the Respondent from October 2008 as a Machine Operator earning a salary of Kshs.12,000/= per month and he worked diligently to the satisfaction of the Respondent until his termination.
4. The Claimant states that for the duration he worked for the Respondent, he was provided with neither housing allowance nor proceed on leave.



5. He states that on 3<sup>rd</sup> of October, 2015 he reported to work as usual but was summoned by the Respondent's Personnel Manager who informed him that his services were no longer needed and ordered him to leave the premises.
6. It is the Claimant's case that the Respondent's action amounted to summary dismissal which was unlawful and against the provisions of the Constitution, Employment Act and the principles of natural justice as there was no plausible reason for the dismissal, no notice or warning was issued to him and due process was not followed.
7. The Claimant avers that the decision to dismiss him from employment was unwarranted and unjustified and claims from the Respondent his terminal benefits and compensatory damages as follows;
  - a. One month's salary in lieu of notice Kshs.12,000/=.
  - b. Payment for untaken/unpaid leave days for the entire duration of service being Kshs.12,000/= x 7 Kshs.84,000/=.
  - c. Unpaid overtime worked for the entire period of service being (75.42/per hour) x 4 hours x 30 days x 12 months x 7 years of service x 1.5 (Being overtime rate @ each hour worked) Kshs.1,140,040/=.
  - d. Unpaid/untaken public holidays for the entire duration of service being 11 x Kshs.12,000/= x 30 x 7 years Kshs.30,800/=.
  - e. Certificate of service.
8. The Claimant states that as a result of the of the illegal and unfair dismissal, he suffered abrupt loss of income and trauma and inability to meet his continuing obligations and seeks 12 months gross salary of Kshs.12,000/= x 12 months = Kshs.168,000/=

### **Respondent's case**

9. In its response dated on 26<sup>th</sup> January, 2018, the Respondent denies the allegations made by the Claimant against it.
10. The Respondent states that the Claimant was dismissed on the basis of CCTV footage where he was captured on camera sleeping instead of working during nightshift on 19<sup>th</sup> September, 2015.
11. The Respondent avers that when the Claimant was given a chance to explain and show cause why he should not be dismissed from employment he was unable to do so.
12. The Respondent further states that the Claimant performed his duties dismally and occasioned massive loss of revenue despite being warned.
13. The Respondent states that the Claimant's conduct warranted summary dismissal.
14. It is the Respondent's case that the termination of the Claimant's employment was valid and the allegations by the Claimant were null and void and urges the court to dismiss the claim.
15. The Respondent further states that the Claimant had filed two similar matters, being Cause No. 272 of 2017 and 1673 of 2017 with similar facts and between the same parties.

### **Claimant's evidence**

16. The Claimant adopted his witness statement dated 16<sup>th</sup> October, 2017 as his evidence in chief.



17. On cross-examination, the Claimant testified that the Respondent's allegation that he was sleeping instead of working on the 19<sup>th</sup> September, 2015 was not true as the true position was that the machine was spoilt.
18. The Claimant further testified that he was not supplied with the CCTV footage that the Respondent relied on and he was not given an opportunity to be heard.
19. The Claimant testified that he was not paid his terminal dues for the duration he worked for the Respondent and had not proceeded on leave.
20. The Claimant admitted that the payslip had an entry for overtime and that he was paid.
21. The Claimant testified that he was not given a notice to show cause nor invited for a hearing and urged the court to grant the reliefs sought.

### **Respondent's evidence**

22. RWI, Joash Mbulika, the Personnel Officer of the Respondent testified in defence of the Respondent. He adopted his witness statement dated 28<sup>th</sup> January, 2018 as his evidence in chief.
23. RWI testified that on the 19<sup>th</sup> September, 2015, the Claimant was captured on CCTV camera sleeping and when given a chance to explain and show cause why he should not be dismissed, but failed to do so and was relieved his duties on the 20<sup>th</sup> September, 2015.
24. On cross-examination, RW1 confirmed that the Claimant had worked for the respondent for 8 years, no notice to show cause was issued and the claimant was not invited for a hearing.
25. The witness further confirmed that the Claimant was not paid his terminal dues and testified that the Claimant used to proceed for his annual leave.
26. The witness stated that efforts to settle the matter out of court were not successful.

### **Claimant's submissions**

27. Counsel for the Claimant highlighted three issues for determination;
  - a. Whether the Claimant was subjected to due process prior to being dismissed from employment?
  - b. Is the claimant entitled to the reliefs sought?
  - c. Who bears the cost of this cause?
28. On the first issue, counsel submitted that the Claimant had not done anything to warrant summary dismissal from employment and no evidence was availed in support of the Respondent's allegation that the Claimant was caught on camera sleeping at the workplace.
29. Counsel further submitted that the Claimant was never issued with a warning letter on his performance as alleged by the Respondent.
30. It was submitted that due procedure in terminating the Claimant's employment was not followed as he was not issued with a notice to show cause why he should not be dismissed, nor invited to a disciplinary hearing to defend himself.



31. Counsel, further submitted that on the 19<sup>th</sup> September, 2015 he was accused of gross misconduct and was dismissed from employment on the following day, 20<sup>th</sup> September, 2015, thus denying him a chance to respond to the allegations levelled against him.
32. Counsel relied on the sentiments of Ndolo J. in Walter Ogal Anuro vs Teachers Service Commission (2013) eKLR where the court held;

“For termination to pass the fairness test, there must be both substantive justification and 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 termination”.
33. Counsel submitted that if the Claimant had been guilty of poor performance and sleeping at the workplace as alleged, the Respondent ought to have subjected him to a fair disciplinary hearing.
34. Counsel urged the court to find that the Claimant was unfairly and maliciously terminated without justification and was condemned unheard in contravention with the provisions of Article 41 and 47 of the Constitution of Kenya, 2010, Sections 41, 43 and 45 of the Employment Act, 2007 and good labour practices.
35. On the 2<sup>nd</sup> issue, counsel submitted that the Claimant was entitled to all the reliefs sought and urged the court to allow the claim as prayed together with costs and interest on the award.

### **Respondent’s submissions**

36. As at the time the court was retiring to write the judgment, the Respondent had not filed its submissions.

### **Findings and determination**

37. The issues that commend themselves for determination are;
  - i. Whether termination of the Claimant’s employment by the Respondent was unfair.
  - ii. Whether the Claimant is entitled to the reliefs sought.
38. It requires no belabouring that in law, for termination of employment to pass the fairness test, the employer must demonstrate that it had a substantive justification for the termination and conducted it in accordance with a fair procedure.
39. In determining this case, the court is guided by the sentiments of Ndolo J. in Walter Ogal Anuro V Teachers Service Commission (Supra) cited by the Claimant’s counsel as well as the provisions of Sections 43, 41, 45(2), 41 and 45 of the Employment Act, 2007.
40. It is not in dispute that the Claimant worked for the Respondent from 2008 to 2017 as a Machine Operator and had no documented warning or disciplinary cases.
41. According to the Claimant, when he reported to work on the 3<sup>rd</sup> October, 2015, he was summoned by the Respondent’s Personnel Manager who informed him that his services were no longer needed. The Respondent on the other hand stated that the claimant had on the 19<sup>th</sup> of September been captured on CCTV footage sleeping and he was relieved off his duties on the 20<sup>th</sup> September, 2015 after he failed to explain why his employment should not be terminated.



42. Strangely, the Respondent did not avail the alleged CCTV footage or still pictures of the incident as evidence or contradict the Claimant's evidence that the machine had broken down.
43. In determining whether the Respondent had a valid and fair reason to terminate the Claimant's employment, the court is guided by the provisions of Section 43(2) of the Employment Act, 2007 which 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.”
44. In Galgalo Jarso Jillo V Agricultural Finance Corporation (2021) eKLR, the court stated as follows;
- “In other words, it is not a requirement of the law that the substantive ground informing the decision to terminate must be in existence. All that is required is for the employer to have a reasonable basis for genuinely believing that the ground exists.”
45. The court is in agreement with these sentiments.
46. From the evidence on record, it is clear that the Respondent has not availed verifiable evidence to demonstrate that it had a substantive justification to terminate the Claimant's employment.
47. In light of the foregoing, it is the finding of the court that the Respondent has failed to prove that it had a valid and fair reason to terminate the Claimant's employment.

### Procedure

48. Section 41 of the Employment Act, 2007 prescribes the procedural precepts of a fair termination of employment.
49. The Court of Appeal underscored the mandatory nature of the provisions of Section 41 of the Act in Pius Machafu Isindu V Lavington Security Guards Ltd (2017) eKLR as follows;
- “... A mandatory and elaborate process is then set up under Section 41 requiring notification and hearing before termination.”
50. Further, in Postal Corporation of Kenya V Andrew K. Tanui (2019) eKLR, the Court of Appeal identified the key elements of procedural fairness as; reason(s) for which termination of employment was being considered, explanation of the grounds in a language understood by the employee in the presence of another employee of the employee's choice, and hearing and considering any representations made by the employee and/or the person chosen by the employee.
51. The Claimant's counsel submitted that the Claimant's termination from employment was flawed as the Claimant was not granted a hearing as contemplated in Section 41 of the Employment Act, 2007.
52. Similarly, the Claimant testified that he was neither invited nor taken through a disciplinary hearing, evidence the Respondent did not controvert.



53. In *David Wanjau Muboro V Ol Pejeta Ranching Ltd* (2014) eKLR, Rika J. was unambiguous that;

“The principle of fair hearing requires the employee has sufficient opportunity to prepare . . . The right to documentation. The employee must be given the documents the employer intends to rely on at the hearing as well as other documents the employee may request. . .”

54. The right to be heard is an essential ingredient in determining the fate of an employee who is facing charges. The Claimant was denied this basic right as the Respondent’s witness confirmed that he was caught sleeping at the workplace on 19<sup>th</sup> September, 2015 and dismissed from employment on the following day without being afforded the opportunity to defend himself.

55. The Respondent’s testimony that the Claimant failed to show cause why his employment should not be terminated had no supportive documentation and, in any case, one day is not sufficient for an employee to prepare his defence, if that was the case.

56. From the foregoing it is the court’s finding that the termination of the Claimant’s employment was procedurally flawed and thus unfair.

### **Reliefs**

57. Having found that termination of the Claimant’s employment was unfair, I will now delve into the reliefs sought.

### **One month’s salary in lieu of notice.**

58. Having found that the Respondent did not establish a valid and fair reason for terminating the Claimant’s employment and he was not paid in lieu of notice, the court is satisfied the Claimant is entitled to one month’s salary in lieu of notice and the same is awarded as prayed.

### **Unpaid Leave days, overtime and untaken Public Holidays**

59. The Claimant tendered no evidence as to when the leave days accrued. From the evidence on record, it is clear that the Claimant had no pending leave days and the prayer fails.

60. As regards untaken public holidays, the Claimant did not provide particulars of the public holidays when he worked.

### **The prayer is unsustainable and is declined.**

61. As regards overtime, the payslips on record show that the Respondent paid overtime on a monthly basis.

62. More significantly, the Claimant adduced no evidence of the days he worked overtime and was not paid. The prayer is dismissed.

### **Certificate of Service**

63. The Claimant is entitled to a certificate of service by dint of Section 51 of the *Employment Act*, 2007.

### **12 Months Compensation**

64. Having found that the termination of the Claimant’s employment was unfair, he is entitled to the relief provided for under Section 49(1)(c) of the *Employment Act*, 2007.



65. In determining the level of compensation, the court has taken into consideration the following;
- i. The Claimant worked for the Respondent for a period of 7 years during which period he had no warning letter or disciplinary cases.
  - ii. Further, the Respondent tendered no evidence to show that the Claimant contributed to the termination of employment.
  - iii. The Claimant did not express his wish to continue in the Respondent's employment.
  - iv. The Claimant did not appeal the Respondent's decision.
66. In the circumstance, the court is satisfied that the equivalent of 4 months gross salary is fair compensation.
67. In the upshot, judgment is entered in favour of the Claimant against the Respondent as follows;
- a. Declaration that termination of the Claimant's employment by the Respondent was unfair for want of substantive justification and procedural propriety.
  - b. One-month's salary in lieu of notice.
  - c. Equivalent of 4 months gross salary.
  - d. Certificate of service to be issued within 30 days.
  - e. Costs of this suit.
  - f. Interest at court rates from date of judgment till payment in full.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 18<sup>TH</sup> DAY OF DECEMBER 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 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 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**

