



**Kariuki v Tile and Carpet Centre Limited (Cause 910 of 2017)  
[2023] KEELRC 3249 (KLR) (7 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3249 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 910 OF 2017  
L NDOLO, J  
DECEMBER 7, 2023**

**BETWEEN**

**JOHN MWAURA KARIUKI ..... CLAIMANT**

**AND**

**TILE AND CARPET CENTRE LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. By a Statement of Claim dated 12<sup>th</sup> May 2017, the Claimant sued the Respondent for wrongful and unfair dismissal. The Respondent filed a Memorandum of Response dated 29<sup>th</sup> June 2017.
2. The matter went to full trial where the Claimant testified on his own behalf. The Respondent called its Chief Legal and Compliance Officer, Leonard Mvilauni. Both parties also filed written submissions.

**The Claimant's Case**

3. The Claimant states that he was employed by the Respondents on 1<sup>st</sup> August 2009, in the position of Administrative Clerk at an entry monthly salary of Kshs. 11,2000. He rose through the ranks to the position of Senior Logistics Supervisor at the time of separation.
4. The Claimant claims to have had a clean employment record until 10<sup>th</sup> April 2017, when the Respondent's Human Resource Leader, Bagesh; Sales Manager, Jitesh Kanade; Head of Manufacturing, Hitedra; and Furnishing Manager, Nimish went the Claimant's work station at Athi River to inquire about removal of tanks without documentation. The Claimant informed the officers that he was aware of two such incidents which had been addressed by the Senior Dispatch Supervisor.
5. Regarding the procedure for removal of tanks, the Claimant explained that after receiving the picking list from the Sales Department, he would check the quality of the items to be delivered on various



- routes and assign delivery trucks after which he would hand over the picking list to the Senior Dispatch Supervisor for loading.
6. The Claimant further explained that after loading, the Senior Dispatch Supervisor would hand over the picking list to the Dispatch Supervisor, who would print delivery notes to be given to the respective truck drivers. The Security Guards at the gate would check every truck load against the delivery note.
  7. Regarding an incident on 31<sup>st</sup> March 2017, the Claimant states that as he was leaving work, one of the trucks was exiting and he asked for a lift. He adds that upon reaching the gate, he met with the Senior Dispatch Supervisor, the Dispatch Supervisor and the Security Guard who interrogated the driver about an extra tank that had been loaded.
  8. According to the Claimant, the Senior Dispatch Supervisor and the Dispatch Supervisor directed that the extra tank be offloaded.
  9. The Claimant was suspended from duty from 10<sup>th</sup> April 2017 until 12<sup>th</sup> April 2017, on allegations of defrauding the Company. The suspension letter also required the Claimant to show cause why disciplinary action should not be taken against him and to attend a disciplinary hearing on 12<sup>th</sup> April 2017.
  10. The Claimant attended the disciplinary hearing on 12<sup>th</sup> April 2017, where he was interrogated by the Human Resource Leader, Bagesh and on 18<sup>th</sup> April 2017, he was issued with a summary dismissal letter.
  11. The Claimant contends that his dismissal was wrongful and unfair. He accuses the Respondent of targeting him and now claims the following:
    - a. Notice pay.....Kshs. 41,400.00
    - b. Unpaid overtime.....492,166.21
    - c. Salary underpayment.....353,400.00
    - d. Gratuity.....251,584.98
    - e. 12 months' salary in compensation.....496,800.00
    - f. Costs plus interest

### **The Respondent's Case**

12. In its Memorandum of Response dated 29<sup>th</sup> June 2017, the Respondent denies the Claimant's entire claim and maintains that the dismissal was lawful and fair.
13. Regarding the incident of 31<sup>st</sup> March 2017, the Respondent accuses the Claimant and three of his colleagues of attempting to leave the work premises with a 5000-litre water tank aboard motor vehicle registration number KCC 340Q, which was not accounted for.
14. The Respondent adds that a similar incident occurred on 8<sup>th</sup> April 2017 aboard motor vehicle registration number KBH 936Q.
15. The Respondent avers that after the two incidents, the Claimant was interrogated and issued with a suspension letter dated 10<sup>th</sup> April 2017 which also served as a show cause letter.
16. The Claimant responded on 12<sup>th</sup> April 2017 and attended a disciplinary hearing on the same day, after which he was issued with a summary dismissal letter dated 18<sup>th</sup> April 2017.



## Findings and Determination

17. There are two (2) issues for determination in this case:
  - a. Whether the Claimant's dismissal was lawful and fair;
  - b. Whether the Claimant is entitled to the remedies sought.

## The Dismissal

18. The Claimant's dismissal was communicated by letter dated 18<sup>th</sup> April 2017 stating as follows:

“Dear John,

SEP05 -RE: Summary Dismissal

After thorough investigation during your suspension period, and hearing meeting held on 12<sup>th</sup> April, 2017, this letter serves to indicate that you are being summarily dismissed in accordance with Clause 44 Subsections 4(c) and 4(g) of the *Employment Act 2007*.

It came to the attention of the management that extra tanks were loaded for delivery under your supervision. Despite this being brought to your attention by the security personnel, you did not report the issue nor did you take any action. This is clear contravention of Clause 44 Subsections 4(c) and 4(g) of the *Employment Act 2007* which identify respectively “an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly” and “an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property” as lawful cause for summary dismissal.

Considering the seriousness of your employment offence we have summarily dismissed you with effect from 18<sup>th</sup> April, 2017.

Please come and meet the Personnel Team Leader on 02<sup>nd</sup> May, 2017 to collect your final dues, pay-slip and Certificate of Service.

Yours Sincerely,

(signed)

Mandeep Degon

Human Resources Manager”

19. This letter accuses the Claimant of complicity in loading of undocumented tanks and failure to escalate the incidents.
20. The Claimant denied the charges levelled against him and accused the Respondent of victimising him, while leaving the real culprits to go scot-free.
21. The Respondent's witness, Leonard Mvilauni told the Court that it was the Claimant's duty to oversee the loading of tanks. This was contrary to the Claimant's averment that the loading and dispatch of tanks was not part of his job. Significantly, the Respondent did not produce any job description to back its position.



22. Mvilauni confirmed that he was not an eye witness to any of the incidents leading to the Claimant’s dismissal. Further, none of the persons who were alleged to have reported the incidents to the Claimant were called to testify.
23. In the submissions filed on behalf of the Claimant, reference was made to the decision in Michael Odhiambo Opiyo v Bidco Africa Limited [2021] eKLR where it was held:
- “Courts do not take away the right to terminate an employee who is found guilty of misconduct. However, the employer has to exercise a lot of caution during the steps that lead up to the said termination so that the process does not appear cosmetic.”
24. The Claimant further relied on Samuel Muchiri Gikonyo v Henkel Chemicals (EA) Ltd [2014] eKLR where the Court restated the purpose of disciplinary hearing in the following terms:
- “The purpose of a disciplinary hearing...is to objectively enquire whether an employee is guilty of misconduct, poor work performance or has some incapacity that lessens his ability to perform the job functions to the employer’s standard, and for which a sanction such as a warning, suspension or dismissal may be given.”
25. On its part, the Respondent relied on the decision in Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR where the Court of Appeal stated as follows:
- “There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”
26. The Claimant was issued with a suspension letter on 10<sup>th</sup> April 2017, which also served as a show cause letter and an invitation to a disciplinary hearing, which was held two days later. A keen observation of the Respondent’s actions leads to the conclusion that a decision had already been made that the Claimant was culpable of the allegations levelled against him. I must therefore agree with the Claimant that he was being taken through the motions in a cosmetic disciplinary process that could not yield a just outcome.
27. Even more shocking, the Respondent’s Human Resources Team Leader, Bagesh served as a single disciplinary panellist. Ordinarily, the Human Resource Department plays an advisory and stabilising role to management. It was therefore strange that Bagesh who, according to the Claimant, was part of the team that interrogated him on 10<sup>th</sup> April 2017. The Court agrees with the Claimant that Bagesh could not serve as an objective and impartial arbiter.
28. In the result, I find and hold that the Respondent not only failed to establish a valid reason for the Claimant’s dismissal as required under Section 43 of the Employment Act but also breached the procedural fairness dictates set by Section 41 of the Act. The Claimant’s dismissal was therefore substantively and procedurally unfair and he is entitled to compensation.



## Remedies

29. Consequently, I award the Claimant ten (10) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service and the Respondent's unlawful conduct in bringing the employment to an end.
30. I further award the Claimant one (1) month's salary in lieu of notice.
31. No basis was established for the claim for gratuity which therefore fails and is disallowed.
32. The claims for overtime and underpayment were abandoned in the course of trial.
33. Finally, I enter judgment in favour of the Claimant as follows:
  - a. 10 months' salary in compensation.....Kshs. 414,000
  - b. 1 month's salary in lieu of notice.....41,400
  - Total.....455,400
34. This amount will attract interest at court rates from the date of judgment until payment in full.
35. The Claimant will have the costs of the case.
36. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 7<sup>TH</sup> DAY OF DECEMBER 2023**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Muli for the Claimant

Ms. Yala h/b Mr. Kivuva for the Respondent

