



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 1519 OF 2015

BAKERY CONFECTIONERY FOOD

MANUFACTURING & ALLIED WORKERS UNION.....CLAIMANT

VERSUS

WRIGLEY COMPANY (EA) LIMITED.....RESPONDENT

JUDGEMENT

1. The claimant union has brought the instant suit on behalf of the grievant, Mr. Alfred Keter, who it avers is one of its members. The memorandum of claim which was amended on 10th March 2018, seeks several reliefs against the respondent including; a declaration that the grievant's termination of was wrongful and illegal; payment of the grievant's termination benefits to the tune of Kshs. 2,284,043.08/= and Certificate of Service.
2. The claimant avers that there is a valid recognition agreement between itself and the respondent and subsequent Collective Bargaining Agreements that govern the terms of engagement for all its members within the respondent.
3. It is the claimant's case that the grievant was employed by the respondent as a Technical Operator and was earning a basic salary of Kshs. 47,706.56 together with a house allowance of Kshs. 9,634.80/=. It further avers that the grievant's services were terminated on 10th December 2013, which termination the claimant deems as unfair and illegal.
4. The respondent has opposed the claim through a Memorandum of Response dated 10th March 2016 and which was subsequently amended and filed on 19th July 2018. It further averred that in the course of the grievant's employment, it had become apparent that he had a problem with excessive consumption of alcohol and intoxication while at the work place. That the reason for his dismissal was that on 28th November, 2013, the respondent received a report from the grievant's supervisor that he was smelling of alcohol and appeared uncoordinated.
5. The matter proceeded for part hearing on 12th October 2021 and was thereafter adjourned to 4th November, 2021, when the trial was closed and parties directed to file written submissions.

Claimant's Case

6. The grievant testified as CW1 and at the outset, adopted his witness statement and bundle of documents, which he asked the court to admit as part of his evidence in chief. He also produced the bundle of documents filed together with the initial claim, as well as the further list of documents, as exhibits before court.
7. The grievant told court that he was employed as a Technical Operator by the respondent and was charged with operating, maintenance and repair of production machines. That he reported to work on 28th November 2013, and was screened by the respondent's security personnel, who did not notice any suspicious behavior from him. That he subsequently proceeded to the changing room and as he was proceeding to his work station, he had a brief encounter with the Production Supervisor, Mr. Hamilton Kazungu who greeted him as they passed each other. That they exchanged verbal greetings since his hands were occupied. That the moment of interaction was a split second. That about 15 minutes later, Mr. Kazungu called him and accused him of being intoxicated and uncoordinated. That shortly afterwards, he was summoned for a preliminary inquiry which was conducted by a team of the management staff.
8. It was his testimony that at the inquiry, he gave his explanation to the allegations leveled against him and it was agreed that he be examined by the respondent's nurse so that a test could be undertaken to establish if indeed, he was intoxicated. That however, the nurse was not able to ascertain the level of intoxication. As a result, Mr. Kazungu insisted that he proceeds with him to Mater Hospital for a serum

blood test, but which he declined to undertake as he was not psychologically prepared. That his refusal was coupled with the fact that he had undergone a physical examination at the company clinic which had indicated that he was not drunk. He further stated that he asked to be represented by an independent shop level union representative, but his request was denied and instead, the Human Resource Manager, by the name Edda Wambua, showed up.

9. That he later went back to work and about 5:00 pm, he was issued with a notice to show cause dated the same date and through which he was required to answer to the allegations of intoxication by 7:30 am, the following day. That he responded to the notice to show cause and denied the said allegations of intoxication.

10. It was also his evidence that despite the Show Cause letter stating that a hearing would be conducted on 29th November 2013, the same was not undertaken and instead, he was suspended from duty until 6th December, 2013 to pave way for investigations by the respondent. That the suspension was later extended to 10th December 2013 and on the said date, he was instructed to report to his supervisor who issued him with a letter of summary dismissal. That he was never informed of the outcome of the investigations.

11. The grievant further averred that the allegations by Mr. Kazungu were malicious and an act of witch hunt as he had reported him for being allegedly intoxicated, earlier in the year, but the said allegations were not proven.

12. He further stated that a trade dispute had been reported to the Ministry of Labour, and that despite attempts by the conciliator to convene several meetings, the respondent had failed to attend the same, thus a decision was issued in his favour.

13. During cross examination, the grievant maintained that the allegations of his intoxication emanated from Mr. Kazungu and that no one else he interacted with on that day, had noted the same.

Respondent's case

14. The respondent presented its oral evidence through its Production Supervisor, Mr. Hamilton Kazungu, who testified as RW1. He also adopted his witness statement and bundle of documents filed on behalf of the respondent as part of his evidence in chief. The said documents were also produced as exhibits before court.

15. RW1 testified that in the course of the grievant's employment, it was noted that he had a problem with excessive alcohol consumption and as such, he had been issued with a warning letter sometimes in September 2013.

16. As regards, the incident of 28th November 2013, RW1 testified that he had an encounter with the grievant, whereupon he noted that he reeked of alcohol and appeared uncoordinated. That as a result, he filed a report to that effect and the grievant was summoned to an enquiry, which was attended by Mr. Jessen Opiyo, a union representative. That at the meeting, Mr. Opiyo suggested that the grievant be examined by the company nurse or a qualified medical practitioner, in order to ascertain his level of the intoxication.

17. That the tests conducted by the company nurse were not conclusive as his level of intoxication could not be ascertained. As a result of this, it was decided with his approval, that he would be taken to Mater Hospital for further tests. That however, upon arrival at the hospital, the grievant declined to be tested hence the medical doctor who attended to him, noted as much in writing.

18. That subsequently, the grievant was issued with a notice to show cause based on the allegations of intoxication and he responded to the same. That he was subsequently suspended from work and thereafter his services were terminated. He added that the respondent was apprehensive in allowing the grievant to continue operating machine as it would have been risky since he was a habitual drunkard.

19. During cross examination, RW1 testified that he had no issues with the grievant as alleged. He stated that he had no recollection of him opposing the grievant's participation on a planned trip to Russia. He further stated that the union representative, Mr. Jessen refused to accompany them to the hospital.

Submissions

20. Upon close of the hearing, both parties filed written submissions, with the claimant submitting that an allegation of intoxication not only requires proof of intoxication but proof of the fact that an employee is incapable or unwilling to perform his/her duties. That in this regard, there was no evidence that the grievant was not capable or willing to perform his duties. On this issue, the claimant relied on the following authorities; **John Rioba Maungo vs Falcon Security Services Limited (2016) eKLR** and **Peter Wangai vs Egerton University (2019) eKLR**.

21. It was also the claimant's submission that the respondent was in violation of the provisions of Section 41 of the Employment Act as there is no evidence that the grievant was taken through an oral hearing hence the process was substantively flawed. It urged the court to consider the determination in the case of **Eliud Wachira vs General Motors (EA) Limited (2019)**.

22. On the other hand, the respondent submitted that it had reasons to terminate the grievant's employment as it genuinely believed that he was intoxicated while at work and as such, it acted as a reasonable employer would, in the circumstances. It fortified its submissions on the decision by the Court of Appeal in **Bamburi Cement Ltd. vs Farid Aboud Mohammed (2016) eKLR**. As regards the issue of fair procedure, the respondent submitted that it complied with the requirements of fair hearing prior to summarily dismissing the grievant. It further urged that the internal disciplinary procedure of a company, is not a court process and should not be treated as such. It buttressed its submissions on the case of **Joseph Onyango Asare vs Brookside Dairy Limited (2016) eKLR**. It further submitted that there was a disciplinary hearing as evidenced by the grievant's suspension letter. Further reliance was placed on the case of **Kenya Revenue Authority vs Menginya Salim Murgani (2010) eKLR** with the respondent arguing that exchange of correspondence, constituted fair process.

Analysis and Determination

23. From the record, the court is being called upon to determine the following issues;

i. Whether the respondent had justifiable cause to dismiss the grievant?

ii. Whether the grievant was subjected to a fair hearing?

iii. Is the grievant entitled to the prayers sought.

Whether the respondent had justifiable cause to dismiss the grievant?

24. The point of entry in determining this question, is **Sections 43(1)** and **45(2) (a)** and **(b)** of the Employment Act (Act). In respect to this, **Section 43(1)** of the Act requires an employer to prove reasons for termination and failure to do so, such termination is deemed to be unfair. In addition, **section 45 (2) (a)** and **(b)**, provides that a termination of employment is unfair if the employer fails to prove-

a) that the reason for the termination is valid;

b) that the reason for the termination is a fair reason-

i. related to the employees conduct, capacity or compatibility; or

ii. based on the operational requirements of the employer;....

25. It can therefore be construed from the foregoing legal provisions that a termination must pass the “fairness and “validity” test. Logically, the test applicable is quite subjective hence the same can only be determined depending on the circumstances of each case. The burden of proof also lies with the employer.

26. The reasons for the grievant’s dismissal can be deciphered from his letter of termination which reads in part;

“...It is noted from your response to the show cause letter that you deny having been intoxicated on the material day. Instead, you claim that you were suffering from tonsils infection. The company nurse Ms. Bertha Kimathi who observed you at the company clinic however, recorded a statement to the effect that even though you claimed to have had an infection, the wound inside your mouth appears to have been caused by physical injury as opposed to an infection. She has further corroborated the statement by your supervisor that at the time of her observation you were reeking of alcohol and appeared drunk both in your talk and composure. She could not however determine the level of alcohol in your body. It is for that reason that a decision was made to take you to Mater hospital where the alcohol level in your body was to be assessed, a move which was supported by your shop floor representative. Indeed, you cooperated in its execution until you reached the hospital and the examination was commenced and performed to a certain extent.

You now claim that you declined to be medically observed because you were not psychologically prepared for such observation. The management however considers your explanation to be a deliberate attempt to conceal the truth as such observation could have yielded overwhelming evidence that due to your being drunk it would have been risky to allow you work in a factory environment where the machine operation is involved.

It is noted that your drunk behaviour was also witnessed by the Production Manager Mr. Laban Kagori and that previously you had been involved in a similar incident for which you were warned and further that a repeat will not be tolerated. The company now considers your employment hereby terminated with effect from the date of this letter...”

27. In summary, what’s evident from the letter of termination, is that the grievant was dismissed on grounds of intoxication while at work. The grievant has vehemently denied this allegation.

28. Indeed, intoxication at the work place is one of the grounds for summary dismissal pursuant to the provisions of **section 44(4) (b)** of the Act, which provides as follows;

“(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause,.....(b) during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly;

29. The grievant has averred that the allegation of intoxication and lack of coordination as levelled against him was not true for the reason that;

i. Mr. Kazungu could not establish how he was intoxicated yet their encounter lasted for less than a minute;

ii. The production had not stated at the material time, hence Mr. Kazungu could not establish that he was unable to perform his functions;

iii. **The Occupational Health Nurse would have pointed out the issue of lack of coordination on his part, but did not do so in her observation;**

iv. **There had been no single indication of his intoxication from his actions as there was no medical exam or an alcohol serum test; and**

v. **During the brief session at the training room, none of the persons present that is Laban Kagori, Newton Omari, Hamilton Kazungu, Fred Gor and Jessen Opiyo, noted the alleged intoxication.**

30. The respondent has submitted that it genuinely had reasons to believe that the grievant was intoxicated in that;

i. **He has admitted that there was something odd with his behaviour on account of the explanation given in his response to the notice to show cause;**

ii. **From the minutes of the meeting of 28th November, 2013, all parties present observed the grievant's odd behaviour, for instance, Mr. Kazungu noted that the grievant had a strong alcohol breath while Mr. Jessen noted that he appeared uncoordinated, with minimal speech, which he attributed to shyness hence his recommendation that the grievant be examined by the company nurse or a qualified medical practitioner; and**

iii. **The company nurse examined the grievant and observed that he appeared drunk from his talk and composure but couldn't tell the level of intoxication.**

31. What is before me is therefore a credibility contest. I must state at the outset, that the role of the court is to determine whether the grounds proffered by the respondent were valid and fair. As such, it is not for the court to determine whether the grievant was indeed intoxicated or not. This issue must therefore be determined in the context of the provisions of **section 43 (2) of the Act**, which state that the reason or reasons for termination of 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.

32. This position was amplified by the Court of Appeal in the case of **Kenya Revenue Authority vs Reuel Waithaka Gitahi & 2 Others [2019] eKLR**. In the said case, the court further opined that the standard of proof in this instance was on a balance of probability as opposed to, beyond reasonable doubt.

33. In the circumstances, the respondent was required to prove that it had genuine reasons to believe that the grievant was intoxicated while at work, thus had cause to terminate his employment. In this case, the test is quite subjective hence it is for the court to assess whether the employer's decision was reasonable in the circumstances. This is also known as the "*range of reasonableness*" test.

34. This principle also ties closely with the wording of section 44(4) (b) of the Act which requires that *the intoxication should be such that the employee is unwilling or incapable to perform his work properly*. Again, this is very subjective as notably, there is no standard measure of assessing whether an employee is capable or willing to perform his work properly. As such, the standard ranges from case to case and moreso, is dependent on the nature of the work to be performed by the employee.

35. In the instant case, it is not in dispute that the grievant was employed as a Technical Operator and his work entailed operating, maintenance and repair of production machines. As such, his work revolved around machinery. It therefore follows that for his own safety and for the safety of his colleagues, he needed to be alert and vigilant at all times. Therefore, any alcohol in his system, had a possible impact in his performance of duty.

36. It is therefore presumable that upon the respondent suspecting that the grievant was intoxicated, found it prudent to subject him to the necessary test so as to establish whether indeed he was intoxicated hence capable or incapable of performing his duty. It is notable that upon examining him, the respondent's nurse by the name Ms. Bertha Kimathi had this observation to make;

"He appeared drunk from the talk and composure but one could not tell the levels of intoxication..."

37. It was therefore apparent that only a medical examination could determine whether the grievant was intoxicated or not. As it came to be, the grievant refused to be examined at the hospital, hence the medical practitioner who attended to him noted as follows;

"Patient brought from the Wiggles limited for test of serum alcohol levels which he declined. Test not done"

38. There was therefore no way of ascertaining whether the grievant was indeed intoxicated and if so, to what level. Ordinarily and legally so, it is only the grievant's conduct and his level of cooperation, that would have availed the respondent the opportunity to determine whether indeed he was intoxicated.

39. As rightly stated by the court in the case of **John Rioba Maugo vs Riley Falcon Security Services Limited [2016] eKLR**;

"I however do not agree with the Claimant's argument about scientific proof of drunkenness. It is inconceivable that the employer would be required to bundle an employee into a vehicle and transport him to a medical facility then make agree (sic) to extraction of his blood to be used in the test for the level of alcohol in his blood."

40. In this case, an employer cannot force an employee to take a blood test so as to determine his level of intoxication. Having been accused of intoxication, it was only reasonable for the grievant to cooperate and alleviate any doubts to that effect. His lack of cooperation and the observations made by his supervisor and the nurse, afforded the respondent more reason to believe that indeed, he may have been intoxicated.

41. It is no doubt that the grievant was within his right to refuse to take the blood test, but it was also within the right of the employer to believe that the reason the grievant had refused to take the test, was because he was indeed intoxicated. In my view, the hospital provided a more neutral ground for taking such a test, compared to the company clinic, hence the results therefrom, would have been more credible.

42. Further by the nature of his work, the respondent had reasons to believe that it would be risky to allow the grievant operate any machinery, when it was still doubtful as regards his intoxication. As observed by the court in the case of **John Rioba Maugo (supra)**, **“There is therefore no generic scientific measure of intoxication. For instance the level at which a pilot would be considered incapable of performing his duties is quite different from that at which say a teacher would be considered so.”**

43. In this case, the nature of work to be performed by the grievant was not the type of work that could be performed when one was intoxicated, regardless the level.

44. As stated herein, the test to be applied in assessing the respondent’s action is the reasonableness of the decision taken. In the case of **British Leyland UK Limited vs Swift [1981] IRLR 91**, the court had this to say in regards the assessment of the reasonableness of the action taken by an employer **“There is a band of reasonableness with which one employer may reasonably take one view; another quite reasonably take a different view. One would quite reasonably dismiss the man. The other would quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair: even though some other employers may not have dismissed him.”**

45. The circumstances presented in the instant case, indicate that the respondent made a decision which any reasonable employer faced with a similar situation would have arrived at. No reasonable employer would allow an employee suspected of intoxication, to resume work and operate machinery without clearly ascertaining whether he is intoxicated or not. If anything, that would have been very negligent on the respondent’s part.

46. The upshot of the foregoing, is that the grievant by his conduct, availed the respondent valid and fair grounds to terminate his employment, having genuinely believed that he was intoxicated while at work.

47. Having established as much, the next issue for determination is whether the respondent accorded the grievant fair hearing prior to his termination.

Whether the grievant was subjected to a fair hearing?

48. Pursuant to **section 45 (2) (c) of the Act** a termination of an employee is deemed unfair if the employer fails to prove that the termination was effected in accordance with fair procedure. **Section 41 (1)** addresses the manner in which the fair procedure is to be achieved. It makes specific requirements in regards to the process to be complied with by an employer and this entail notifying the employee of the allegations leveled against him or her and granting him or her the opportunity to make representations in response to the said allegations in the presence of a fellow employee or a shop floor union representative of own choice.

49. In the instant case, it is not contested that the grievant was issued with a notice to show cause through which he was notified of the allegations raised against him. It is also not in contest that the grievant responded to the said allegations through a written explanation. What is in contest is whether a disciplinary hearing was undertaken. In this case, the grievant states that he was not called in for a disciplinary hearing despite the respondent indicating as much in his suspension letter.

50. On the other hand, the respondent has maintained that the grievant was accorded a hearing on 28th November, 2013, where the decision to subject him to a medical examination was made. The respondent further contends that a hearing was conducted on 29th November, 2013, but there are no minutes to evidence the same.

51. The respondent has further argued that in any event, the grievant appeared for an observation on 28th November, 2013 and thereafter, he was given an opportunity to render a written explanation hence that’s proof that he was accorded fair hearing. The question thus is, was an oral hearing mandatory to satisfy the requirement for fair hearing?

52. The Court of Appeal in the case of **Kenya Ports Authority vs Fadhil Juma Kisuwa [2017] eKLR** had this to say on the issue;

“It must however be stressed that the necessity of oral hearing will depend on the subject and nature of the dispute, the whole circumstances of the particular case.”

53. Further in the case of **Postal Corporation of Kenya vs Andrew K. Tanui [2019] eKLR** the Court of Appeal stated thus;

“Admittedly, there has been considerable debate as to what amounts to a fair hearing or procedure in disciplinary proceedings. Indeed the appellant has cited the *Kenya Revenue Authority* case where this Court held that the fairness of a hearing is not determined solely by its oral nature, and that a hearing may be conducted through an exchange of letters as happened in that case. It also held that whether an oral hearing is necessary will depend on the subject matter and circumstances of the particular case and upon the nature of the decision to be made. We believe that is still good law, but not

in respect of a hearing before termination as envisaged under Section 41 of the Act. It is our further view that Section 41 provides the minimum standards of a fair procedure that an employer ought to comply with... The respondent faced serious indictments which could torpedo his entire career and destroy his future. In our view, this was a matter in which oral hearing was necessary, but none was held.”

54. In the instant case, the grievant had been accused of intoxication, which is a grave offence that amounts to gross misconduct under section 44(4) hence a ground for summary dismissal. As such, and given the likelihood that his livelihood was at stake, it was only prudent that the respondent grants the grievant an oral hearing within the terms of section 41.

55. Besides, the suspension letter dated 29th November, 2013, notified the grievant that further investigations would be undertaken. It would also appear that if indeed a hearing was undertaken on 29th November, 2013, the same was not conclusive. The suspension was extended till 10th December, 2013 when he was to report back for further directions. There was no evidence of what the investigations unearthed, if indeed the same were conducted. Ordinarily, and in fulfilment of the rules of natural justice, the findings of such an investigation, ought to have been shared with the grievant whereupon, he would have been given another opportunity to respond to the findings therein, if adverse to him. In this case, the process appears to have been left in abeyance.

56. Besides, it is notable that the grievant was given short timelines within which to respond to the show cause. The grievant states that he received show cause letter at 5:00 pm and his written explanation was expected by 7:30 am, the following morning. This claim was not refuted by the respondent.

57. The fairness of a disciplinary process cannot be over emphasized. A disciplinary process which has the likelihood of depriving the employee of his livelihood must by all means be seen to be fair. In the case of **Patrick Abuya vs Institute of Certified Public Accountants of Kenya (ICPAK) & another [2015] eKLR**, the court had this to say on the fairness of a disciplinary process;

“Procedural fairness requires not only an advance and reasonable notice of the steps to be taken but time to an employee to prepare psychologically as such employee is always under the threat of losing a livelihood. In my view, the Respondents action of writing an invitation letter on 3 March 2014 inviting the Claimant to hearing on the morning of 4 March 2014 when, according to it, he had absconded and therefore his whereabouts were not known was ill motivated and was not in consonance with the statutory requirements of procedural fairness. It was equally not in accord with justice and equity as envisaged by section 45(4)(b) of the Employment Act, 2007. The dismissal was therefore procedurally unfair.”

58. Against this background, I find that the dismissal of the grievant was procedurally unfair hence unlawful.

Reliefs

59. I would have awarded the grievant one month’s salary in lieu of notice pursuant section 35 (1) (c) of the Act and clause 5 of the parties’ Collective Bargaining Agreement, as he was in the respondent’s employment for less than a year. However, I note that the same was paid out to him as part of his terminal dues.

60. On behalf of the grievant, the claimant has prayed for compensatory damages in the sum of **Kshs 688,096.32** which is equivalent to 12 months of his gross earnings. In this regard, the court awards him compensatory damages equivalent to three (3) months’ gross salary. This award is informed by the grievant’s length of employment and his contribution to the termination.

61. The rest of the claims are dismissed as it is evident that the grievant was paid as evidenced by his pay slip for November, 2013. Besides, he did not adduce any evidence to refute that he had been paid hence prove that he was entitled to the same.

62. Since the employment relationship has been admitted, the grievant is entitled to a Certificate of Service pursuant to section 51(1) of the Employment Act.

Orders

63. In the final analysis, I enter Judgment in favour of the claimant against the respondent and award the grievant the sum of **Kshs 172,024.08**, being compensation equivalent to 3 months gross salary.

64. The award shall attract interest at court rates from the date of Judgment until payment in full.

65. Costs to be borne by the respondent.

DATED, SIGNED and DELIVERED at NAIROBI this 28th day of January 2022.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Amalemba

For the Respondent Mr. Weru

Court assistant Barille Sora

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 had 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.

STELLA RUTTO

JUDGE