



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1435 OF 2016

GRIFFINS WEKESA.....CLAIMANT

VERSUS

RENTOKIL INITIAL (K) LTD.....RESPONDENT

JUDGEMENT

1. The genesis of the claim herein can be traced to the events of 22nd October, 2015, when the claimant was alleged to have accompanied the respondent's competitor, to solicit for business from its client, Solphia Kenya Limited. This culminated in the dismissal of the claimant from employment thus triggering the instant claim.
2. The claimant avers that his dismissal from employment was unlawful hence has sought various reliefs including a declaration that his termination from employment was unfair, notice pay, unpaid salary and compensatory damages.
3. The respondent disputed the claim vide its response filed on 17th October, 2016 and through which it averred that the claimant was dishonest, reckless and disloyal in the discharge of his duties.
4. The matter proceeded for hearing on 18th November, 2021 and each side called one witness.

Claimant's case

5. At the outset, the claimant adopted his witness statement as part of his evidence in chief. He also sought to rely on his bundle of documents which he produced as exhibits before court. It was his testimony that he was employed by the respondent as a Quality Assurance Technician with effect from 3rd December, 2014. He told court that on 22nd October, 2015, he was assigned duty at Eka hotel. That at around 1 pm, he went to meet a friend by the name Peter Mutinda, for lunch. That on their way back from lunch, they made a stopover at Solphia Kenya Limited, but he did not leave Mr. Mutinda's car. That while inside the car, Mr. Mutinda returned with another gentleman, who upon noting that he was in respondent's branded uniform, locked the gate to the premises and called the respondent's offices.
6. That after a while, the respondent's Pest Control Manager, by the name Mr. John Nthama arrived at the Solphia premises and they left with the claimant. Upon arriving at the respondent's premises, he was instructed by Mr. Nthama to report to the Human Resource Manager. That the Human Resource Manager directed him to return the tools and equipment in his possession and go home to await the hearing of his case, the following day.
7. The claimant further told court that he returned to work on 23rd October, 2015, as directed and he was summoned to the Human Resource Manager's office who informed him verbally that his employment had been terminated. He was thereafter asked to surrender all the respondent's property in his possession.
8. It was also the claimant's testimony that on 26th October, 2015, he went back to the respondent's company for purposes of clearing with various departments. That while there, he was locked up in the chemical store upon instructions of the respondent's Managing Director, Mr. Nyaga. That he remained locked up at the chemical store for 2 hours whereafter he was handed over to the police who handcuffed him and remanded him at the Industrial Area Police Station where he was detained and released the following day without any charges being preferred against him.
9. He summed up his testimony by stating that he was not issued with any notice prior to his termination and neither was he accorded any hearing. He also disputed the disciplinary minutes appearing in the bundle of the respondent's documents and maintained that the same were a fabrication. He averred that his only mistake was associating with Mr. Mutinda.
10. During cross examination, the claimant acknowledged receiving Kshs 28,021/= as part of his terminal dues. He also denied abandoning work at Eka hotel and stated that he was at Solphia during his lunch hour break and he intended to resume duty thereafter.

Respondent's case

11. The respondent called its Human Resource Manager, Mr. Geoffrey Nyoro to testify on its behalf. Mr. Nyoro also adopted his witness statement to constitute part of his evidence in chief. He also sought to rely on the bundle of documents and supplementary documents filed on behalf of the respondent. He produced the same as exhibits before court.

12. On his part, Mr. Nyoro informed court that the claimant's employment was terminated following breach of his employment contract as well as the respondent's policies in respect of Conflict of Interest and Business protection.

13. That specifically, on 22nd October, 2015, the claimant was found at the premises of the respondent's client, Solphia Kenya Limited, in the company of an alleged competitor, Mr. Peter Mutinda. That the claimant was in his work uniform hence was easily spotted by Solphia's Manager and who in turn, alerted the respondent's Pest Control Manager, Mr. John Nthama. That Mr. Nthama immediately went to Solphia and returned with the claimant in tow. That at that juncture, the claimant was given an opportunity to explain his presence at Solphia's premises. That he gave a written explanation and was asked to appear the following day for the hearing of his case. That at hearing, the claimant admitted being at Solphia in the company of a former employee, Mr. Mutinda, who was allegedly, a competitor to the respondent's business.

14. Mr. Nyoro told court that the claimant was at Solphia to solicit business for the competitor, Mr. Mutinda. That consequently, the claimant was in breach of the respondent's policy in respect of conflict of interest and business protection hence there was cause to terminate his employment. He further stated that the claimant was granted a hearing and thereafter he was issued with a letter of termination which he acknowledged and that he was paid his terminal dues hence had no claim against the respondent.

15. During cross examination, Mr. Nyoro stated that the claimant was invited to appear for a disciplinary hearing on 23rd October, 2015 at 8:30 am. He also denied that the disciplinary minutes were a fabrication and maintained that indeed, there was a hearing. He further disputed the assertion that the claimant was locked up in the chemical store but admitted the arrest by the police and the fact that no charges were preferred against him.

Submissions

16. Upon close of the hearing on 18th November, 2021, the court directed both parties to file written submissions. In this regard, the claimant was given 14 days to file and serve its submission, whereupon the respondent would respond with its written submissions within 14 days after service. The matter was scheduled for mention on 16th December, 2021 for purposes of confirming compliance and taking a judgement date. On the said date, the claimant was absent from court and respondent's counsel Ms. Nekesa informed court that she was yet to be served with the claimant's submissions, hence she had not complied on her part. Accordingly, the court granted both parties more time to file their written submissions and reserved its Judgment for 28th January, 2022. The respondent filed its submissions on or about 23rd December, 2021 but the claimant only filed its submissions on 26th January, 2022, 2 days to the delivery of Judgement. By then the court had already written its Judgement, hence did not have the opportunity to consider the claimant's submissions.

17. The respondent submitted that there were valid and fair grounds to terminate the claimant's employment in that he had taken a competitor to the respondent's client to solicit for business. That further, it followed due process in effecting the claimant's termination as he was accorded a hearing on 23rd October, 2015. On this score, it placed reliance on the case of **Kenya power & Lighting Company Limited vs Aggrey Lukorito Wasike (2017)**.

Analysis and determination

18. Upon considering the pleadings by both parties, the evidence on record including the oral evidence tendered as well as the submissions on record, to my mind, the court is being called to determine the following issues;

- i. Whether the claimant's termination was unfair and unlawful?**
- ii. What reliefs if any, avail to the claimant?**

Whether the claimant's termination was unfair and unlawful?

19. The claimant has alleged that his termination by the respondent from employment was unfair. On the other hand, the respondent maintains that the claimant breached his employment contract as well as the policies on conflict of interest and business protection, thus the termination was justified.

20. Pursuant to the Employment Act, a termination will be deemed unfair if an employer fails to prove that there was substantive justification to warrant termination of an employee's employment and that it did not accord the employee procedural fairness. To this end, the court at this instance is being called upon to examine the circumstances under which the claimant's employment was terminated and determine whether there was justification to do so and whether he was accorded procedural fairness.

(i) Substantive justification

21. Substantive justification is addressed under sections 43 (1) and 45(2) of the Employment Act (Act).

22. **Section 43(1)** of the Employment Act requires an employer to prove reasons for termination and failure to do so, such termination is

deemed to be unfair, while **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 employee's conduct, capacity or compatibility; or

ii. based on the operational requirements of the employer;

23. It is therefore necessary to establish, whether the reasons leading to the claimant's termination were fair and valid. It is logical that validity and fairness of the reason for termination can only be determined upon the court considering the evidence presented by the respondent vis a vis that of the claimant.

24. The reasons advanced for the claimant's termination from employment are well captured in his letter of dismissal which reads in part as follows;

"...In line with this Act, and by your conduct, you have knowingly fundamentally breached your obligations arising from your contract of service. On the said date, whereupon you had been assigned duty at Eka hotel and at a time you were expected to be have been dutifully carrying out scheduled service there, you absconded duty and left the said assignment and proceeded to another of our customers, Solphia Kenya Ltd in the company of a contact of yours who works for a company in direct competition with Rentokil Initial. You proceeded there to introduce your contact to the customer with the intention that the said contact would procure pest control service business from there. This was without permission and/or knowledge by the office. You are well aware that we offer the said pest control services but still took a competitor there in an attempt to earn the competitor the same business to the detriment of the company. As there was no scheduled visit to Solphia Kenya Ltd on the said day, our client was suspicious of the intention of your visit and on realizing you had a competitor in your company, whom had engaged him as indicated herein, he raised an alarm with our office. You were at a loss to explain your presence at Solphia Kenya Ltd and in your statement, you confirm having taken the employee of the competitor to the said premises. Your actions are contrary to company rules and regulations, and particularly against company policies on business protection, conflict of interest, and anti-bribery and corruption policies. It is further contrary to the Company Code of Conduct, all of which you are aware of and have signed acknowledgement of. Your actions also put the company in disrepute, tarnished its image and created mistrust on the part of the customer with the integrity of our staff, and the company as a whole. You have thus committed an offence against and to the substantial detriment of the company which amounts to gross misconduct in line with the Employment Act, 2007..."

25. As can be discerned from the letter of dismissal, the central issue leading to the claimant's termination was in respect of breach of trust. It would appear that once the respondent received information that the claimant had accompanied a competitor to its client's premise, its trust in him as an employee wavered.

26. As a matter of fact, the claimant does not deny being at the premises of the respondent's client (Solphia). Further, he does not dispute that he was in the company of Mr. Mutinda. It is also noteworthy that he did not refute the respondent's assertions that the said Mr. Mutinda was engaged in a business that was in direct competition with the respondent's business.

27. From the circumstances, it would thus appear that the trust in the employment relationship had been greatly shaken. As the court noted in the case of **Lawrence Onyango Oduori v Kenya Commercial Bank Limited [2014] eKLR**, **"The employment relationship is dynamic and based on mutual trust and confidence."**

28. Essentially, both parties ought to operate on some level of trust, and once lost, it is almost impossible to engage as before. Hence in this case, the pertinent question is whether the conduct of the claimant resulted in a breakdown of the employment relationship and whether the claimant thus breached an essential term of his employment contract.

29. Clause 11 of the claimant's contract of employment, prohibits in an elaborate fashion conflict of interest and any dealings whatsoever with a competitor. It provides as follows; *"It is against company policy to engage in activities outside the company that compete with the business..As a colleague of Rentokil Initial, you are obliged to conduct yourself and company business with a clear conscience, and in a manner void of conflict of interest."*

30. In view of the foregoing contractual provisions of conflict of interest, the claimant ought to have engaged at an arm's length with a person who it knew or ought to have known is a competitor to the respondent. That is not say that he could not engage at all with a competitor. Nonetheless, the same had to be devoid of any business engagement.

31. The circumstances herein do not infer a mere social interaction. The claimant knew or ought to have known that his acquaintance (Mr. Mutinda) was not at Solphia for a social visit but rather it was for business. Otherwise, the Manager at Solphia would not have had a reason to contact the respondent's offices. As it is, the claimant put himself in a situation which would make his conduct vis a vis the loyalty to his employer, rather questionable. This is a classic example of being at the wrong place, at the wrong time, with the wrong person. His presence at the Solphia premises with Mr. Mutinda placed him in a precarious position thus rendering himself liable to suspicion from his employer, thus the trust it had in him dwindled.

32. Section 43(2) of the Act provides that the reason or reasons for termination of an employee are matters that the employer at the time of termination **genuinely believed to exist**, and which caused the employer to terminate the services of the employee. This was well espoused in the case of **Kenya Revenue Authority vs Reuvel Waithaka Gitahi & 2 Others [2019] eKLR**. In this respect, the standard of proof is on a balance of probability as opposed to, beyond reasonable doubt.

33. In the case of **Bamburi Cement Limited vs William Kilonzi [2016] eKLR** the Court of Appeal expressed itself on the nature of proof required as follows:

“The question that must be answered is whether the appellant’s suspicion was based on reasonable and sufficient grounds. According to section 47(5) the burden of proving that the dismissal was wrongful rests on the employee, while the burden of justifying the grounds of wrongful dismissal rests on the employer. It is a shared burden, which strictly speaking amounts to the same thing...”

34. From the facts presented in the instant case, the respondent genuinely believed that the claimant had taken a competitor to solicit for business from its client. That was a reason it genuinely believed to exist at the time. As stated herein, the fact that the claimant was with Mr. Mutinda at the respondent’s client’s premises was not in contest.

35. In the circumstances, it can be said that the respondent had a genuine reason for terminating the claimant’s employment.

36. Be that as it may, the respondent was obliged under the law to afford the claimant procedural fairness. This requirement was amplified in the case of **Walter Ogal Anuro vs Teachers Service Commission [2013] eKLR**, where the court held as follows; **“However, for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness.”**

37. Accordingly, it is imperative to consider the process the claimant was subjected to prior to termination of his employment, taking into account the requirements stipulated under the law.

(ii) Procedural fairness

38. The second limb in determining the fairness of a termination of employment is in regards to notification and hearing. The requirement for fair procedure is generally provided for under **section 45 (2) (c) of the Act. Section 41 (1)** makes specific requirements in regards to the process to be complied with by an employer. It entails 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.

39. In the instant case, the respondent has averred that it complied with the procedure in regards to procedural fairness. There is a charge sheet/show cause on record dated 22nd October, 2015 and is presumably the document that the claimant was notified of the allegations against him.

40. As per the evidence tendered before court, the claimant was found at the Solphia premises on 22nd October, 2015 between 12 to 1 o’clock. The charge sheet indicates that the claimant’s response was to be received by 4 p.m, the same date. It is not indicated what time the charge sheet was issued to the claimant. Though the distances between the two offices is not indicated, it must have taken some bit of time for the claimant to arrive at the respondent’s offices from Solphia premises. In essence, the claimant had about less than 3 hours within which to compile and tender his response to the allegations.

41. To this end, it is evident that the time given to the claimant was not adequate and reasonable in the circumstances hence it is probable that it affected the quality of his defence. It is also not clear why the claimant was given such a short notice within which to tender his response. I do not see any prejudice the respondent would have suffered by according him sufficient time to respond.

42. It is also not in dispute that the claimant was asked to appear for a hearing the following day on 23rd October, 2015. According to Mr. Nyoro, the claimant was to appear at 8:00 am in the morning. This was barely 24 hours after the fact. The hearing therefore appears to have been rushed.

43. The respondent produced minutes dated 23rd October, 2015 and which it averred, arose from a disciplinary hearing undertaken against the claimant. The claimant has disputed attending any hearing and indeed, has termed the said minutes as a fabrication. He denies appearing before the respondent for any hearing or meeting to discuss his case. It is therefore a credibility contest.

44. I have noted that the said minutes are very sketchy and do not bring out the details of the hearing quite well. The same do not indicate whether the claimant was afforded an opportunity to present his case and if he did, his response/defence is not clearly articulated in the minutes. As a result, I find that the minutes do not clearly demonstrate whether the respondent was given a fair hearing or not.

45. I must state that it is not enough to grant an employee an opportunity to be heard, the same ought 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 issue;

“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.”

46. In following with the above decision, I find that the claimant was not accorded procedural fairness on account of the short timelines granted to him, hence to that extent, his termination was unfair.

47. Therefore, in as much as the respondent may have had a genuine reason to terminate the employment of the claimant, it was duty bound to observe the requirements of fair procedure.

48. The upshot of the foregoing is that the claimant's termination was procedurally unfair as it fell short of the legal parameters. To this end, I find that the same was not fair and lawful.

Available Reliefs

49. The claimant is awarded one month's salary in lieu of notice having found that his termination was unfair.

50. The claimant has prayed for compensatory damages in the sum of Kshs 216,000/= which is equivalent to 12 months of his gross salary. I have noted that the claimant had worked for the respondent for barely a year hence I will award him compensatory damages equivalent to three (3) months' gross salary.

51. The claimant admitted receiving his salary for the period worked hence his claim to that extent is declined.

52. The claimant also prayed for service pay in the sum of Kshs 8,250/=. I will decline to award the same as I note from his pay slips that he was contributing towards the National Social Security Fund (NSSF). In light thereof, he falls within the ambit of exclusions stipulated under section 35 (6) (d) of the Act hence his claim in that regard falls.

53. The employment relationship having been admitted, the claimant is entitled to a Certificate of Service pursuant to section 51(1) of the Employment Act.

Orders

54. In the final analysis, I enter Judgment in favour of the claimant against the respondent in the following terms;

One month's salary in lieu of notice	18,000.00
Compensation equivalent to 3 months' gross salary	54,000.00
Total	<u>72,000.00</u>

55. The award, shall be subject to interest at court rates from the date of Judgment until payment in full.

56. Ordinarily, since the claimant's case has succeeded, I would have awarded costs in his favour but I note that he failed to comply with the court's directions issued on 18th November, 2021 as regards filing of submissions. Indeed, at the time this Judgment was being written, he was yet to comply. As such, he loses on the order in respect of costs and in which case, each party shall bear its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JANUARY 2022.

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STELLA RUTTO

JUDGE

APPEARANCE:

FOR THE CLAIMANT MR. MUGO

FOR THE RESPONDENT MS. NEKESA

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