Anaya v Agility Logistics Limited (Cause 1774 of 2017)
[2022] KEELRC 1119 (KLR) (28 April 2022) (Judgment)

Neutral citation: [2022] KEELRC 1119 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1774 OF 2017

SC RUTTO, J

APRIL 28, 2022

BETWEEN

MOSES ONZERE ANAYA ..... CLAIMANT

AND

AGILITY LOGISTICS LIMITED ..... RESPONDENT

JUDGMENT

1. The claimant has averred through his memorandum of claim that he was employed by the respondent as an Export Supervisor with effect from 1st December 2010 until 22nd May 2017, when the employment relationship was terminated at the behest of the respondent. It is the said termination that has triggered the instant suit through which the claimant seeks compensatory damages in the sum of Kshs 1,746,360/=, together with interest at court rates and costs of the suit.

2. The respondent, in opposing the claim, admitted the employment relationship but averred that there were reasons to justify the termination of the claimant and that in so doing, it followed due process as stimulated under the law. It asked the court to dismiss the suit with costs for disclosing no cause of action against it.

3. The matter proceeded for trial on 14th December, 2021 when each side called oral evidence.

Claimant's Case

4. The claimant testified in support of his case and at the commencement of the hearing, sought to rely on his witness statement and bundle of documents, which he adopted to constitute part of his evidence in chief. The claimant further produced the documents as exhibits before court.

5. It was the claimant's testimony that he transported the respondent's client's goods as requested together with all the documentation. He thus denied any negligence on his part. It was his case that on 24th April 2017, while off duty, two (2) containers belonging to the respondent's client (Alpharama)

were loaded. That it was his colleague by the name Mr. Richard, who was coordinating the shipment to Alpharama and his boss Ms. Catherine was aware of the same and had sent out an email to his work team members as much.

6. The claimant further avers that on 3rd May, 2017, Alpharama called him while he was still off duty and he advised the client to reach out to his boss Ms. Catherine, and colleague, Mr. Richard since they were the ones in the office at the time. That subsequently, Alpharama wrote an email on 5th May, 2017 complaining that it had issues with the shipment. That based on the email from Alpharama, he was issued with a show cause letter on 12th May, 2017. That he responded to the show cause letter vide a letter dated 17th May, 2017, whereafter he was invited for a disciplinary hearing on 22nd May, 2017. He contended that he received the letter inviting him for the disciplinary hearing at 1:00pm, while the said hearing was scheduled for 2:00pm. That following the disciplinary hearing which he attended in the company of his colleague Mr. Richard, his employment was terminated.

7. In cross examination, the claimant testified that he was required to write an apology by the transport manager in regards to the issue, but he did not do so as he believed that he had done what was expected of him.

Respondent's case

8. The respondent tendered oral evidence through Ms. Joyce Mwangi Kanuri, who testified as RW1. Ms. Kanuri identified herself as the respondent's Human Resource Management Consultant. She also adopted her witness statement and the bundle of documents filed on behalf of the respondent, to constitute part of her evidence in chief. The documents were also produced as exhibits before court.

9. The respondent through Ms. Kanuri averred that the claimant being the Export Supervisor, was tasked with attending to all air and sea export issues and ensuring operational efficiency where the respondent's clients are concerned. That there had been delays and complaints arising from the claimant's department which in turn, had prompted the Business Development Manager to raise an issue of concern vide an email dated 31st January, 2017.

10. That the complaints were raised by the respondent's clients regarding the claimant's communication duties which he was neglecting. That one such case was raised by the respondent's top client, Alpharama who complained that the claimant had not been keen on following up on the matters which in turn led to shut outs, tension, client dissatisfaction, penalties and cancellation of orders by their clientele. That the emails by Alpharama had gone unanswered hence had affected the day to day activities of its operations. That as such, Alpharama had raised the issue through its emails of 5th May, 2017 and 8th May, 2017.

11. Ms. Kanuri further averred that as a result of the claimant's inefficiency and lack of seriousness in handling the client's concerns, the client had fined the respondent a penalty of USD 3000 as a result of losses and had also withdrawn business from it.

12. That as a result, the claimant had been issued with a show-cause letter through which he was required to answer to allegations levelled against him. That being unsatisfied with the claimant's response, he was invited for a disciplinary hearing on 22nd May, 2017. That the disciplinary committee considered his submissions and all evidence before making the decision to terminate his employment.

13. It was Ms. Kanuri's further testimony that the claimant's dues were calculated by the respondent and a cheque issued to him. As such, she averred that the respondent did not owe the claimant any unpaid dues.

Submissions

14. Both parties filed written submissions upon close of the hearing, with the claimant submitting that his termination was wrongful as the respondent had failed to prove any ground for terminating him. The claimant further urged that the respondent had failed to discharge the burden of proving grounds for his termination. In addition, he submitted that there was no criteria for measuring his performance and as such, any allegation stating that his performance was poor is farfetched and ought not to be entertained by the court. He buttressed this line of argument on the case of *Jane Samba Mukala v Ol Tukai Lodge Limited* (2013) eKLR.

15. In further submission, the claimant stated that the respondent violated the mandatory procedure set out under section 41 of the *Employment Act*. On this score, it placed reliance on the case of *Standard Group Limited v Jenny Luesby* (2018) eKLR and *CMC Aviation Limited v Mohammed Noor* (2015) eKLR.

16. On the other hand, the respondent maintained that it was entitled to summarily dismiss the claimant for negligence as per the provisions of Section 44 (4) of the *Employment Act* but it chose to do a normal termination by paying full notice. It further submitted that it had accorded the claimant all rights and opportunities to explain himself and to be heard orally with a representative of his choice.

Analysis and determination

17. Flowing from the pleadings, the evidence on record as well as the submissions before me, the issues falling for the Court's determination are:

    i. Whether the respondent had justifiable cause to terminate the claimant's employment?

    ii. Whether the respondent subjected the claimant to a fair process prior to his termination?

    iii. Is the claimant entitled to the reliefs sought?

Justifiable cause for termination?

18. Pursuant to the provisions of Section 43 of the *Employment Act* (hereinafter the Act), an employer is required to prove the reason or reasons for the termination, and failure to do so, such termination is deemed to be unfair within the meaning of section 45. In this regard, Section 45 (2) (a) and (b) of *the Act* goes ahead to provide that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and is related to the employee's conduct, capacity or compatibility; or based on the operational requirements of the employer.

19. In the instant case, the claimant was terminated on grounds of negligence and loss of business. The particulars of the allegations were in regards to the shipment by Alpharama who had lodged a complaint that he was not following up keenly on all the matters until the container is loaded. Specifically, the respondent singled out the manner in which the claimant had handled MSC Evergreen containers which had led to a penalty being imposed on it and thus resulting in the loss of its esteemed customer.

20. In order to put the issue into context, it is imperative to understand the claimant's role at the respondent company. His overall responsibility entailed attending to all air and sea export issues, quotes airport coordinator and ensuring operational efficiency where clients are concerned. Part of his key result areas included booking of cargo on airlines; supervising the export department; updating clients on uplifts of cargo; replying and sorting out any complaint raised in regards to exports.

21. On record is an email of 31st January, 2017 from the respondent's Business Development Manager to the claimant and his colleagues. It reads as follows;

> " Dear all,
>
> Pls (*sic*) note that I had met the client yesterday and they were complained (*sic*) about two issues as below:
>
> 1. Why booking always roll over the next vessel
> 2. Why bl always delay, when client used their own freight, they can get original bl from shipping line next day after vessel sailed from Agility, it always take over 2 weeks for bl release
>
> We all knew the internal issue for export, and to avoid lose (*sic*) such big account, I prepare attached form and kindly send to me daily for all shipments, so we can improve our service, you can also amend form which suitable (*sic*) the job, your usual support will be highly appreciated...".

22. It is discernable from the email reproduced above that the issue raised flowed from the claimant's duties and responsibilities to wit; booking of cargo.

23. Further in an email of 5th May, 2017, from Alpharama to the claimant and his colleagues, the client notes:

> " Again new story. Please see below email from Export dept till now to us. Kindly confirm the status immediately."

24. The email being cited by Alpharama had emanated from Ahmed Aly and reads as follows:

> " Dear Kavitha,
>
> This container EMCU6036820 has been stopped by Kenya Forest Service."

25. In a further email of 5th May, 2017, Mr. Justus Mbuvi remarks to the claimant and a Mr. Richard as follows;

> " Moses/ Richard,
>
> We have been following in DRAFT BL MORE THAN A WEEK without a reply. Please advise us if containers was shipped or not. Give us the reasons as we loaded the container in time."

26. In a further email of 8th May, 2017, Mr. Justus Mbuvi addressed the claimant and his colleague Mr. Richard as follows;

> " Moses/Richard
>
> Kindly note that we have been chasing for the Draft B/L for the whole last week without bearing fruits. Please urgently advise us the status of the shipment. Please check trailing mail from our customer."

27. In yet another email of 9th May, 2017, which appeared to have been a follow up of the emails of 5th and 8th May, 2017, Mr. Justus Mbuvi addressed the respondent as follows:

> " Dear Agility Team,
>
> Kindly note that we loaded the containers on Friday 28th April, 2017. The last date of acceptance of containers in the port was on Sunday 30th April, 2017. However you handed over the containers on 2nd May 2017 of which they were late for loading. Please note that any demurrages that will incur from the said containers you will be responsible. We understand that the next vessel line is on 19th May, 2017."

28. It is notable that the claimant's duties and responsibilities namely; supervising the export department; updating clients on uplifts of cargo; replying and sorting out any complaint raised in regards to exports was at the heart of the emails of 5th, 8th and 9th May, 2017.

29. In a nutshell, it was apparent that the respondent's client, Alpharama's cargo had delayed and there was no communication from the respondent's end. It would also seem that Alpharama was under pressure from its client hence the trail of emails.

30. This sequence of events eventually triggered the email communication from Mr. Justus Mbuvi which reads in part:-

> " We are very sorry to inform you that day by day the services of Agility has come down and we are very much worried about loading our containers in planned vessels:
>
> MSC CONTAINER
>
> ....with regard to this container, the client has imposed a penalty of US $ 3000/- for no loading in planned vessel. We are debiting this to you and you can claim from customs or whoever delays this container.
>
> EVERGREEN CONTAINER
>
> ....we Alpharama have a strong feeling that your export dept team is not following up keenly all the matters until the container is loaded in the vessel. Due to this, we are facing a lot of shut outs, tension, client's dissatisfaction, penalties, cancellation or orders etc etc which will not help us to develop our business. Please note that if the container is shut out from the planned vessel, US $3,000/- will be charged to you, as the clients started penalizing us for not loading in planned vessels. If Mr. Mustak is not in the country, next in charge-Mr. Moses is not responding to our calls/replying mails in time to find solutions immediately. We need to have a meeting on this subject and until then, we will not be in a position to give business to you. You have disappointed our customers for inefficiency in your systems."

31. This email was an indictment on the claimant as the respondent's Export Supervisor. It is also notable that the tone of the emails emanating from Alpharama through Mr. Justus Mbuvi was not that of a satisfied client. On the converse, he seemed frustrated as he was not getting a resolution from the respondent's side. In the end, it is apparent that the respondent lost money as well as business and that was the straw that broke the camel's back. As such, it opted to terminate the claimant's employment.

32. The claimant has defended himself by stating that he was away on leave at the material time. This assertion is however not backed by evidence on record. What's evident from the email of 2nd May, 2017, is that he was away on 3rd May, 2017, morning hours. Further, there is no evidence the claimant

responded to the emails of 5th, 8th and 9th May, 2017 from Alpharama hence the ensuing frustration. As Mr. Mbuvi noted, the claimant was not responding to calls and/or emails. There is no evidence that he was away from work on those days hence there is no sufficient reason why he was non responsive to the client's queries.

33. As stated herein, the claimant's job entailed updating clients on uplift of cargo, replying and sorting out any complaints raised in regards to exports. Ultimately, the buck stopped with him and it was evident that he had fallen short of what was required of him in the performance of his duty.

34. The actions of the claimant availed the respondent justifiable reason to terminate his employment. The respondent acted as any reasonable employer would, faced with similar circumstances. My finding is reinforced by the determination in the case of *CFC Stanbic Bank Limited vs Danson Mwashako Mwakuwona* [2015] eKLR where the Court of Appeal in assessing the reasonableness of a decision taken by an employer, considered the following passage from the *Halsbury's Laws of England*, 4th Edition, Vol. 16(1B) para 642: -

> " ...In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if the dismissal falls outside the band, it is unfair."

35. It is therefore my finding that the respondent had a justifiable reason to terminate the claimant's employment.

36. I now turn to determine whether the respondent subjected the claimant to a fair process prior to terminating his employment.

Fair procedure?

37. The aspect of fair procedure is addressed under Sections 45 (2) (c) and 41 of *the Act*. While Section 45 (2) (c) is a general requirement for adherence to fair procedure, the specific requirements are set out under section 41. The said requirements entail notifying the employee of the allegations he or she is required to respond to, and thereafter granting him the opportunity to make representations in response to the said allegations in the presence of a colleague or shop floor steward.

38. In the instant case, the claimant was issued with a show cause letter setting out the allegations against him. He responded to the show cause letter in detail. He was invited for a disciplinary hearing on 22nd May, 2017 and was advised to bring along a colleague. The hearing notice is dated 22nd May, 2017 and was scheduled for 2 pm, the same day. It is evident from the record that he received the said hearing notice at 1 pm, hence the notice period for the disciplinary hearing was one hour. This was about the only time he had to prepare his defence.

39. The claimant was at a risk of loosing his job and source of livelihood. He needed to be psychologically prepared. By all means, one hour cannot be said to be sufficient to prepare for sch a hearing, which meant keeping or loosing a job. The time given was unreasonably short hence tainted the fairness of the

process commenced against the claimant. To that extent, the claimant's termination was procedurally unfair.

40. To buttress this finding, I reiterate the holding in the case of *Patrick Abuya v Institute of Certified Public Accountants of Kenya (ICPAK) & another* [2015] eKLR where the court found that;

> " 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."

41. Having determined as above, what reliefs then avail the claimant?

Reliefs

42. Having found that the claimant's termination was procedurally unfair, the court awards nominal damages equivalent to two (2) month's gross salary as compensatory damages. This award has taken into account the claimant's contribution to his termination.

Orders

43. Accordingly, I enter Judgment in favour of the claimant against the respondent in the sum of Kshs 291,060.00.

44. The amount shall attract interest at court rates from the date of Judgement until payment in full.

45. The claimant shall have the costs of the suit.

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

.....

STELLA RUTTO

JUDGE

Appearance:

For the Claimant Ms. Abong'o

For the Respondent Mr. Njiru

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