



**Olumbe v Standard Global East Africa Limited (Cause 578 of 2017)
[2022] KEELRC 54 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KEELRC 54 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 578 OF 2017**

**K OCHARO, J
APRIL 28, 2022**

BETWEEN

JOHN OKUKU OLUMBE CLAIMANT

AND

STANDARD GLOBAL EAST AFRICA LIMITED RESPONDENT

JUDGMENT

1. Through a memorandum of claim herein dated 24th February 2017 and filed on 27th March 2017, the Claimant impleaded the Respondents alleging that the latter as his employer unfairly and unlawfully terminated his employment. He consequently therein sought for the f reliefs and orders: –
 - a. A declaration that the said termination of the Claimant by the Respondent on January 2017 was unfair, uncouth and unlawful
 - b. An Order compelling the Respondent to pay the Claimant his terminal dues including maximum compensation amounting to Kshs 608,800
 - c. Costs and interests pursuant to this claim.
2. Upon being served with summons to enter appearance, the Respondent did, enter appearance and file a statement of response dated 8th May 2017, wherein it denied the Claimant’s case and entitlement to the reliefs sought.
3. At the close of pleadings, this matter got destined for hearing interpartes on merit. The Claimant’s case was taken on the 4th October 2021, while the Respondent’s was on the 28th October 2021. At the close of the parties’ respective cases, this court gave directions for filing of written submissions, the parties obliged the directions.



The Claimant's case

4. The Claimant testified that he was employed by the Respondent as a cook at their Finix Casino on 17th April 2013 with a starting monthly salary of Kshs 17,000 which with time rose up to Kshs 30,000.
5. The Claimant stated that on 16th January 2017 he fell sick, and as a result thereof had to go to hospital, Provide International Health Services. Consequently, he was not able to report work. However, tried calling the head chef, Mr. Mohammed to inform him that he was unwell and unable to attend work but he did not pick the call. He resorted to send him a short message and also called another head cook and explained his predicament.
6. He stated that when he failed to get Mr. Mohammed, he got constrained to call, another head cook Alex, who advised him to do Mr. Mohammed the short message. In the short message he also indicated that he wouldn't be able to report to work. Mr Mohammed, didn't reply to the message.
7. The Claimant stated that after treatment at the medical facility, the doctor gave him a 5 sick off days.
8. When the he reported back to work on 22nd January 2017 he was told to see the Human Resource personnel at the head office, he proceeded there, only to find the office closed. On the 23rd January 2017, when he got back to the office he was asked to write a statement explaining his whereabouts from the 16th January 2017 which he did and on 24th January 2017 he was issued with a termination letter on allegations of gross misconduct.
9. He stated that as directed, he handed over to the Human Resource Director/Chief Financial Officer, his Job Identity Card, A jacket, coat, trousers and swiping card. He was paid Kshs. 4,600 being 15 days worked and pending leave of 30 days. He was also given a certificate of service.
10. The Claimant avers that he worked for the Respondent for 4 years dutifully and honestly but was dismissed without due regard of the law relating to fair procedure in matters termination therefore. The termination was unfair and unlawful.
11. The Claimant further states that he was not paid his rightful terminal dues
 - i. Notice pay (1 Month Salary) Kshs 30,000
 - ii. Unpaid Transport Allowance Kshs 176,800
 - iii. Public Holidays Kshs 25,000
 - iv. Unauthorized Deductions Kshs 17,000
 - v. Full Compensation (1 year salary) Kshs 360,000Total Kshs 608,800
12. In his evidence under Cross examination, the Claimant reiterated that he called his supervisor severally, but the latter did not pick any of his calls. This prompted him to do a short message to him. He acknowledged that it was a term of his contract of service, that in such a situation he was required to provide the Respondent with a medical certificate. He asserted that he gave the same out to the Respondent, but it was refused.
13. The Claimant stated that to his letter that he addressed to the Managing Director, he did not attach treatment notes. However, he produced the same.



14. The Claimant acknowledged that he had two warnings prior to the incident at hand. However, the warnings were not related to absenteeism. The amount that is stated to be and claimed under the head, transport allowance was overtime allowance, erroneously so claimed.
15. He acknowledged that in his Claim for compensation for public holidays worked with no compensation, he did not give specifics of the holidays. As regards his claim for a refund of deducted amounts from his salary, he asserted that the pay slips that he tendered before Court, were testament that on various months, various amounts were deducted from his salary. He was not told why the deductions.
16. That he was being frustrated at the place of work, he reported the same to the Human Resource Manager verbally. His letter dated 23rd January 2017, is reflective of this.

Respondent's Case

17. The Respondent presented one witness, Emmanuel Okumu Namanya, its Administrative director to present its case. The witness, just like the Claimant did, urged this Court to adopt his witness statement as his evidence Chief, and the documents that the Respondent filed herein as its documentary evidence. The same was so adopted.
18. The witness stated that the Claimant was employed by the Respondent through a letter of employment dated 17th April 2013. That under the letter it was stipulated that the Claimant was subject to summary dismissal for gross misconduct, if he absented himself from his workplace without leave or lawful cause. Further that he was subject to a summary dismissal if he carelessly or improperly performed his work.
19. The Respondent asserted that the Claimant was dismissed from employment on account of absenteeism, and poor performance. That between 16th December 2016 to 20th January 2017, he absented himself from duty without any permission. That the Respondent asked him to explain in writing the absenteeism. The Claimant did but without attaching the sick sheet.
20. The Claimant was therefor given a hearing when he was asked to explain his absence in writing. That though he informed the management that he had fallen ill. He failed to explain why he did not notify the company as required under section 30[2] of the *Employment Act*.
21. The Claimant didn't produce any medical document at the time he was witting the explanation, consequently, the one which he has tendered in court is an afterthought.
22. As regards poor performance, the witness stated that the Claimant warning issued against him, the last warning was that which was issued on the 18th February 2014. He was warned on preparing food that was not fresh, thereby causing the Respondent's customers to suffer from food poisoning.
23. The Respondent asserted that the Claimant's employment was terminated through a letter dated 24th January 2017, on the ground of gross misconduct. The termination was fair.
24. The witness stated that it was the Respondent's policy that for every public holiday worked, its employees got a day added to their annual leave as per the requirements of section 7[1][2] of the Regulation of Wages and Conditions of *Employment Act*. That the 30 days annual leave that were provided for in the letter of appointment include the public holidays, as the minimum requirement for annual leave is 21 days.
25. Transport allowance was not an entitlement under the Claimant's letter of appointment. The Claimant was summarily dismissed, therefore notice to pay is not applicable.



26. Cross examined by Counsel for the Claimant, the witness reiterated that the reason for the termination of the Claimant's employment was absenteeism. The witness acknowledged that Mr. Mohammed and Alex were head chefs. The Respondent didn't call any of them to testify in its defence.
27. He asserted that the Claimant was given a notice to show cause verbally. Further that the Claimant's explanation was verbal.
28. The witness testified that the Respondent did have a requirement for application for sick leave. The employee would proceed for treatment then get treatment notes or medical documents to the Respondent upon resuming duty. The medical document exhibited by the Claimant had never been brought to his attention.
29. The salary increment for the Claimant was as a result of his good performance and Govt. guidelines.
30. He acknowledged the fact that, a demand letter was issued to the Respondent, which demand letter raised the issue of the medical notes. The letter was responded to.

Claimant's Submissions

31. The Claimant identified only one issue for determination, namely whether the Claimant was terminated fairly. It was submitted by his Counsel that the termination letter was express on the reason[s] for termination. That same was in accordance with Clause 10[a] and 10[g] of the contract of employment. The Claimant was asked orally to explain his absence. It was argued that the Respondent's witness admitted that the Claimant was not given any notice to show cause, therefore the charges that were being levelled against him were not clearly spelled to him, to enable him respond. Had a notice been issued to him, and required the medical report to be attached to the response, he would have attached the same.
32. It was submitted that Clause 7 of the Claimant's letter of appointment only required production of a medical document, and in discharge of this obligation, he carried the report to work on the 16th January 2017, but the Respondent didn't accept to take it. If the Respondent had any doubt about the medical notes, nothing would have been easier for it to seek authentication from the hospital that issued it.
33. It was argued that the Claimant's evidence that he informed his supervisors of his health condition at the material time was not controverted.
34. The Claimant relies in the holding in [Rodha Angwenyi Vs Narok County Republic Services Board & 2 others](#) 2020

“..... where the Claimant is sick and or ill and was admitted in hospital, Section 30 and 34 of the *Employment Act* ,2007 requires that the employee who is sick should inform the employer within a reasonable time and even where the employee is not able to communicate a third party is allowed to undertake the role
35. [Kimani vs Kenya Agricultural Livestock Reseach Organization \(KALRO\)](#) (2017) where the court held;

“Further to the above, Section 34 of the *Employment Act*, 2007 requires that where an employee is unable to attend work due to illness, Sickness or any other medical condition, such should be brought to the attention of the employer within a reasonable time. The law also gives the condition to the employee should also submit a medical certificate from the medical practitioner”



Respondent's Submissions

36. The Respondent submits that the Claimants claim is lacking merit and should be dismissed with costs.
37. The Respondent submits that the Claimant failed to demonstrate to the court that he was sick between the period 16th December 2016, to 20th January 2017. The letter dated 23rd January 2017 addressing the alleged sickness did not mention any medical certificate as provided in the contract.
38. The Respondent submits that the Claimant has failed to establish the basis of his claim as he has only made vague and falsified allegations and has therefore failed to discharge the onus of prima facie proof to warrant the grant of the orders sought in the claim. The letter was fabricated for purposes of the instant matter.
39. The Respondent submits that the burden of proof in civil cases is on a balance of probability as held by Denning J in *Miller vs Minister of Pensions* (1947) ALL ER Page 372, thus;
- “That degree is well settled. It must carry a reasonable degree of probability, but not so high as required in a criminal case. If the evidence is such that the tribunal can say: “We think it is more probable than not,” the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win however narrow.”
40. The Respondent further submits that the Claimant was served with several warnings in misconduct and breach of employment contract, on several occasions, warnings that were related to his poor performance.
41. It was submitted that The Claimant didn't prove that he ever reported his reason for being absent to, Mr. Mohammed and Alex.
42. The Respondent submits the Claimant was lawfully summarily dismissed as provided in the employment contract and [Employment Act 2007](#). And relied in the holding in [National Bank of Kenya Ltd vs Pipe plastics Samkolit \(k\) LTD and another](#) Civil Appeal No. 95 of 1999 which held that parties are bound by the terms of their contract.
43. Counsel submitted that the Claimant in his submissions submitted and sought for reliefs that were not sought in his pleadings. Parties are bound by their pleadings.

Analysis and determination

44. The following issues present themselves for determination, thus;
- [i]. whether the dismissal of the Claimant from employment was fair
 - [ii]. Whether the reliefs sought by the Claimant or any of them can be availed to him.
 - [iii]. Who should be condemned to shoulder the costs of this suit.

Whether the dismissal of the Claimant was fair.

45. In investigating whether or not there was fairness in the termination of an employee's employment or dismissal of an employee, the court is enjoined to consider two aspects, presence or absence of adherence to fair procedure, and substantive justification. There is now firm jurisprudence that absence of the two or any of them will render the termination or dismissal unfair.



46. Section 41 of the *Employment Act* supplies the structure for procedural fairness. The mandatory procedure set up under this section requires notification, a hearing and consideration of the employee's representations and his co-workers before termination. Therefore, the process has three components, and absence of any one of them definitely obviates the fairness of the process leading to the decision to terminate an employee's contract of service or summarily dismissing the employee.
47. The Claimant took a position that the dismissal was procedurally unfair. He contended that he was not given a notice to show cause why disciplinary action would not be taken against him, notice setting forth the Respondent's intention to dismiss him and, adequately the grounds upon which the Respondent was seeking to dismiss him. That this was imperative to enable him defend himself adequately against the intention and the grounds. The Respondent on the other hand contended that the Claimant was given an opportunity to explain himself. That the Claimant explained his absence, stating that it had been caused by the fact that he was unwell on those days he was absent from duty.
48. The Respondent's witness cross examined as to whether or not the Claimant was given a notice to show cause, gave a response that struck the mind of this Court, the notice to show cause was given verbally.
49. Looking at the totality of the evidence that has been placed before me, I am persuaded that the Claimant was asked to explain his absence from duty during the material time. I hold that that is not what section 41 of the *employment Act*, which is entitled, "Notification, and hearing before termination" requires of an employer. In my reading of the provision, the employer is not just required to call for an explanation as was here, he or she is supposed to be clear that he or she intends to terminate the concerned employee's employment or summarily dismiss him on particular grounds, this to enable the employee defend himself against the grounds/ accusations. I am inclined to conclude that keeping view of these premises, the notification aspect of the procedure contemplated in the provision was not adhered to.
50. A hearing under section 41, flows from the notification contemplated thereunder. Having found that there was no notification, that would consequently call for a hearing, I find that there was not hearing. What the provision contemplates is a defence to the grounds that the employer intends to base his action. I am unable to conclude that the explanation that the Claimant gave was a defence, to any accusation but a mere explanation as to why he didn't report to work, for that is what he was asked to.
51. I cannot be off mark by stating that where an individual is asked to give a defence in regard to a particular situation, otherwise an adverse action shall be taken against him, such person will definitely tend to give a detailed and careful representation, than in a situation where he is just asked to give an explanation, without any warning concerning the possibility of an adverse outcome in the default of giving an inadequate explanation.
52. In the upshot, I come to an inescapable conclusion that the dismissal was procedurally unfair.
53. Section 44 of *Employment Act*, 2007 stipulates when summary dismissal can occur, thus;

"Summary dismissal shall take place when an employer terminates the employment of an employee without notice or less notice than that which the employee is entitled by any statutory provision or contractual term.

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3. Subject to provisions of this Act, an employer may dismiss an employee summarily where the employer has by his conduct indicated that he has fundamentally breached his obligation arising under the contract of service."



54. It is common cause that the Claimant’s employment was brought to an end summarily. Whether or not there was a conduct which fundamentally breached his obligations under the contract, the Court shall delve into shortly.
55. Section 43 of the Employment Act places an obligation upon the employer to prove the reason or reasons for the termination, and where the employer fails to do so the termination shall be deemed to have been unfair within the meaning of section 45.
56. Section 44[4] of the Act, provides for actions and inactions of an employee that may amount to gross misconduct so as to justify a summary dismissal against him or her. However, it is imperative to state that the list is not an exhaustive list. An employer can summarily dismiss an employee on an account outside the catalogue for as long as the account has the characteristics that evinces the employee’s intention not to continue to be bound by the fundamental terms of the contract.
57. I have carefully studied the termination letter dated 24th January, 2017, the letter reads in part;
- “The company no longer require your services effective 16th January, 2017 and your service has been terminated as of that date for gross misconduct
- The Company in terminating your services is exercising its powers under the Clause 10 [a] and [g] under Contract of Service. Please handover all the company property at your earliest to finalize and collect your entitlements.
-”
58. It is not difficult to state that the particular misconduct that the Claimant had been found culpable of was not specifically brought forth in the letter. It should be known to employers that it is not enough for an employer to just generally state that the termination has been occasioned by a gross misconduct. Specificity of the conduct is imperative for the employee to know what exactly hit him, for gross misconduct can come in many forms and shades. The term gross misconduct is too global to be termed a reason for dismissal of an employee’s contract. If one were to stop at the termination letter, there cannot be any challenge to find that it doesn’t aid the Respondent to discharge its legal obligation under section 43.
59. The Respondent’s witness in his oral testimony in court stated that the dismissal of the Claimant was on two counts. First that he would prepare meals for the Respondent’s customers of poor quality, to food poisoning on the customers. In essence he was asserting that the performance of the Claimant was less than satisfactory. The court notes that the Respondent didn’t state that the Claimant was called upon to defend himself on this, before the termination. There was no evidence led to establish this. It cannot be available for an employer to just decide to terminate an employee on a ground that he has not been asked to make a representation on. That deprives of the reason, the validity and fairness, that an employer is enjoined to establish before a termination can be considered in terms of section 45 of the Act.
60. It should be noted that the Respondent’s witness’s testimony was that the Claimant had been warned severally on the issue of poor-quality food preparation of food, and that he was on a last warning. In the world of work, a warning is a sanction. Where a warning is stated to be a last warning on a particular misconduct, it can only be relevant and basis for a graver disciplinary action against an employee, if the employee commits same misconduct thereafter. In this matter it was not asserted by the Respondent that after the final warning the Claimant misconducted himself by preparing bad quality meals. I am considerably challenged to understand how then, the performance in that regard would be made a reason for dismissal. I hold that the reason was not valid and fair therefore, pursuant to the provisions



of section 45[2] of the Act. The Respondent didn't act according to justice and equity, I further so find pursuant to the provisions of section 45[7] of the Act.

61. Secondly, the Respondent contended that the dismissal was anchored on the reason that the Claimant absented himself from work throughout the material period, without authority. The Claimant on his part asserted that his absence from work was as a result of his sickness, and that he informed his immediate supervisors. I note that the Respondent opted to contest the Claimant's position that through the supervisors, the Respondent was therefore informed of his sickness. The Respondent didn't call the supervisors to testify in fortification of the contestation. I cannot help but draw an adverse inference that had they been called, they would have given evidence prejudicial to the Respondent's case.
62. However, under cross examination, the Respondent's witness acknowledged that the Respondent had the information. That however, he didn't furnish the Respondent with any medical document to prove his sickness. He asserted that, and its counsel submitted so, that if indeed the medical documents existed at that time, the Claimant would have attached them to the explanation letter of 23rd January, 2017.
63. The Claimant contended that he reported back to work with the documents, but the management of the Respondent refused to accept them. Therefore, they were not received by the Respondent. That had he been specifically asked he would have attached the document to the latter.
64. I have considered the stipulations of Clause 7 of the employment contract of the Claimant, it doesn't provide a specific manner of handing of over the medical document pursuant thereto. I see no sense in the Respondent's insistence that the Claimant ought to have attached the document to the letter. In fact, implicitly, the clause suggests just handing in the same at the earliest opportune moment. The Respondent's witness acknowledged that much in his evidence under cross examination.
65. From the onset of this matter, the Respondent was made aware, that the Claimant was going to put reliance on the medical document, if it had any concerns on it, nothing could have been easier that oppose the production of the same by the Claimant and seek that the maker comes to testify so that its authenticity is tested through cross examination, or out of its own motion write to the hospital to authenticate the same.
66. In the premises, I conclude that the Respondent did discharge its burdens under, section 43-prove of the reason[s] for the dismissal, section 45[2]- that the reasons was valid and fair, and section 45[7]- that it acted with justice and equity. The Claimant was absent from duty on a genuine reason.

Whether the Claimant is entitled to the Reliefs sought or any of them.

67. The Claimant Claimed for one month's salary in lieu of notice. The Respondent asserted that the separation was as a result of a summary dismissal and therefore the Claimant cannot be heard to make the claim. In a situation where a summary dismissal is found to have been justified, the employee gets disentitled of notice pay. However, where the summary dismissal is found to be unfair as is here, it shall amount to allow the employee benefit from his infraction[s] if the employee were to go unrewarded with the notice pay. I award the Claimant one month's salary in lieu of notice.
68. The Claim for transport allowance is not supported by any evidence, it was not a term of the contract employment that the Claimant was entitled to it, I am unable to see the justification for it therefore. I decline to award the same.
69. Before, I have stated categorically that Claimants should cease throwing claims for compensation for public holidays worked but not paid for without specifying which public holidays and for which year[s], To just claim without adducing evidence in the nature that can assist the Respondent know



for purposes of its defence, and or court discern the public holidays had in mind by the Claimant, is equal to not proving the claim. The relief sought under the head is therefore for declining.

70. The Claimant averred that there were unjustified and unexplained deductions that were made on his salary as can be discerned from his pay slips. There was no evidence from the Respondent denying the deductions or legally justifying the same. I find that the claim for Kshs. 17000 was proved.
71. Having found that the termination was both procedurally and substantively unfair, I now turn to consider whether the Claimant is entitled to the compensatory relief provided for under section 49[1] [c] of the *Employment Act*. The relief is normally granted at the discretion of the court, depending on the circumstances of each case. I take cognizance of the fact that the provision sets a ceiling beyond which an award thereunder cannot be granted, 12 months' gross salary. The extent of the award too, depends on the circumstances of each case.
72. I have considered the circumstances under which the termination occurred, the substantial deviation by the Respondent of what the law expected of them, and the length of service of the Claimant, and get convinced that the Claimant is entitled to the compensatory relief and to the extent of 5 month's gross salary.
73. In the upshot, judgment is hereby entered in favour of the Claimant in the following terms.
 - [a]. One month's salary in lieu of notice. Kshs. 30,000
 - [b]. Refund of un authorized deductions. Kshs. 17,000
 - (c) Compensation Pursuant to section 49[1][c] of the *Employment Act*, Kshs. 150,000
 - [d]. Interest on the awarded sums from the date of filing this suit till full payment.
 - [e]. Costs of the suit.

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

OCHARO KEBIRA

JUDGE

Delivered in presence of:

Mr. Rakoro for the Claimant.

No appearance for the Respondent.

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 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 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.

A signed copy will be availed to each party upon payment of Court fees.



OCHARO KEBIRA
JUDGE

