



**Mungai v Del Monte Kenya Limited (Cause 1779 of 2016)  
[2022] KEELRC 1483 (KLR) (26 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1483 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1779 OF 2016**

**K OCHARO, J  
MAY 26, 2022**

**BETWEEN**

**EPHANTUS NGUGI MUNGAI ..... CLAIMANT**

**AND**

**DEL MONTE KENYA LIMITED ..... RESPONDENT**

**JUDGMENT**

1. At all material times, the Claimant herein was an employee of the Respondent as a driver, whose employment came to termination on the 5<sup>th</sup> day of November 2013. Contending that the determination was unfair, he through his statement of claim dated 26<sup>th</sup> August 2016, sued the Respondent seeking for the following reliefs:
  - a. Payment for Kshs. 607,053.18 in terms of paragraph 10 of the Statement of Claim with interest from the date of filing the suit until payment in full.
  - b. Costs.
2. The Respondent filed a Statement of Response to the Claim, dated 17<sup>th</sup> October 2016, denying the Claimant's Claim and his entitlement to the reliefs sought.

**The Claimant's case**

3. At the hearing hereof, the Claimant urged this Court to adopt his Witness Statement dated 26<sup>th</sup> August 2016, and admit the documents that he had contemporaneously filed therewith, under the list of documents dated 26<sup>th</sup> August 2014 as his documentary evidence. The Court so adopted and admitted.
4. The Claimant stated that he came into the employment of the Respondent on the 25<sup>th</sup> July, 1995 as a motor vehicle driver attached to its Agricultural Department.



5. He stated that on the 24<sup>th</sup> October, 2013, he reported on duty and was assigned the company motor vehicle registration number KBN 086N and instructed to proceed to the Field 79 to load pineapples. He proceeded to the field and when he alighted from the motor vehicle he discovered that the lorry's two batteries were missing.
6. He stated that he informed the supervisor, the farm manager and askaris about the loss and requested them to allow him get back and look for the batteries.
7. He alleged that while searching for the batteries, he met two men whom he knew very well and requested them to assist him in the search. He allowed these men to board the motor vehicle. While at the weigh bridge, they found one of the batteries but would not find the other.
8. The Claimant stated that on the 30<sup>th</sup> October 2013, the Respondent wrote a letter to him seeking for an explanation as to why he ferried two [2] unauthorized passengers in the company motor vehicle and why disciplinary action would not be taken against him.
9. On the 5<sup>th</sup> of November 2013, he was summarily dismissed for ferrying two [2] unauthorized passengers in the company motor vehicle and abetting theft of company property.
10. Through his letter dated 13<sup>th</sup> November, 2013 he wrote to the Respondent, appealing for reinstatement. However, by its letter dated 22<sup>nd</sup> November, 2013 the Respondent declined the appeal.
11. The Claimant contended that the dismissal was unfair, as he apologized for the incident, and undertook not to repeat the same mistake. It was his 1<sup>st</sup> time to be involved in such an incident for the 18 years he had worked with the Respondent. Summary dismissal was harsh in the circumstances.
12. He consequently prayed for Judgment against the Respondent for:
  - a. 12 [twelve months' salary compensation for unfair dismissal, Kshs. 560,357.
  - b. One month's salary in lieu of notice, Kshs. 46,696.48.
13. Cross examined by counsel for the Respondent, the Claimant stated that prior to the dismissal he had not been given any warning. That it wasn't true that on the 2<sup>nd</sup> September 1999 and 21<sup>st</sup> August 2008, he had been issued with warnings.
14. He stated that according to the pay slip tendered as evidence, he was earning Kshs. 28,640.5 as at October 2013. The Kshs. 46,696.18 came about after factoring in overtime pay.
15. The Claimant further stated through the employee discipline discharge form, [Claimant's exhibit 5] he was informed of the accusations against him, ferrying unauthorised passengers, he admitted the accusation and apologised.
16. The Claimant stated that he was served with a notice to show cause, he responded thereto, got invited to a disciplinary hearing, where he was heard and witnesses testified.
17. The unauthorized passengers boarded the motor vehicle with his authority.
18. The Claimant stated that those two men that he allowed to board on the company motor vehicle were never charged with any criminal offence. He asserted that he was not aware of the criminal matter and the verdict therein, as was being alleged by the Respondent.
19. While admitting that he knew that ferrying unauthorized passengers was a misconduct, he asserted that he allowed the two passengers on board with the authority of the supervisor. He picked the passengers at the Ndura shopping Centre, however, the supervisor wasn't thereat.



20. The Claimant stated that they found the battery at 11:00 p.m. Him and the two were at gate number 79 at around 4.30 a.m. and that is where the two were arrested. He alleged that they took all that time because they had to wait for a replacement of one battery.
21. The Claimant asserted that out of the four who were charged in the Criminal Court, only two of them had been arrested at the gate 79. However, he did not know their names.
22. The Claimant urged that the summary dismissal be commuted to a normal termination so that he can get his terminal benefits.
23. In his evidence in chief, the Claimant contended that out of the who were charged, he only knew one.
24. The Claimant asserted that none of those who were charged incriminated him in any manner. He was not charged with any criminal offence.
25. The Claimant further asserted that he had the permission of one Mutua to carry the four. At disciplinary hearing he admitted having ferried the four. but explained that it was with permission.
26. He contended that even in his response to the notice to show cause, he did indicate that he allowed the passengers on board with permission. That to his surprise those people he mentioned as having given him the permission were never called to testify during the disciplinary hearing.

#### **The Respondent's case**

27. Mr. Gerald Matoke, the Respondent's Head of Human Capital, testified on behalf of the Respondent. he adopted the contents of his Witness Statement dated 17<sup>th</sup> October 2016, as part of his evidence in chief and had the documents that were filed under the list of documents dated the even date admitted as the Respondent's documentary evidence.
28. The witness stated that the Claimant was an employee of the Respondent between 25<sup>th</sup> July 1995 to 5<sup>th</sup> November, 2013.
29. Further that on the 24<sup>th</sup> October 2013, the Claimant was assigned the company motor vehicle Registration KBN 085 N and instructed to proceed to the Field No. 79 to load pineapples on the said motor vehicle. That on arrival at Field 79 at about 0740 hrs, he realised that two batteries were missing from the motor vehicle. He went back to search for the same and on the way, he picked two men who were well known to him and requested them to aid in the search.
30. The witness testified that the Claimant stated to the Respondent that he found one of the batteries in Field 33, and that after missing the second battery he went back to the weighbridge and reported the matter to the Head guard Mr. Karita and while getting to the cannery he left the two men at Ndura Gate four [4].
31. The witness stated that at about 1.40 a.m. he left the cannery and picked the two men he had left at Gate 4 and drove to Kakuzi road to Field 79 and arrived at 0200 hours. After he parked the motor vehicle to be loaded two men carrying sacks were found inside the crate of the lorry.
32. That when the Claimant was asked about the four strangers, he said that he only knew the two who were in the cabin of the lorry but he didn't know the other two who were found in the crate. He suspected that they might have jumped over into the crate at BAT Makongeni.
33. The witness stated that the four strangers were escorted to Kituamba Police Station and after interrogation they acknowledged knowing the Claimant very well and stated that they boarded the



- lorry at Makongeni with the knowledge of the Claimant and that they had a plan with the Claimant to steal pineapples.
34. The witness stated that the suspects were subsequently arraigned and charged in Thika Law Court vide Criminal Case Number 5614 of 2014. They pleaded guilty to the offence of preparation to commit a felony and got fined Kshs. 5000 each, in default serve two months imprisonment.
  35. The witness stated that in consequence thereof, the Claimant was issued with a Notice to Show Cause on the 30<sup>th</sup> October, 2013. He was required to show cause why disciplinary action wouldn't be taken against him for the misconduct of ferrying four unauthorized passengers into company property without proper authorization and abetting to steal the company's property, contrary to company policy.
  36. The witness stated that on the 31<sup>st</sup> October, 2013, the Claimant was served with an employee discipline or Discharge form on which he accepted the charges. Subsequently, a disciplinary hearing was conducted on the 1<sup>st</sup> November 2013. Considering that the explanations that were given were found to be insufficient a decision was made to dismiss the Claimant. He was issued with a dismissal letter on 5<sup>th</sup> November 2013.
  37. He stated that the Claimant appealed against the dismissal through a letter dated 13<sup>th</sup> November, 2013 on grounds that the dismissal was unfair taking into account the length of time he had been in the service of the Respondent. In the appeal he sought for reinstatement. The Respondent declined the appeal and communicated its decision through a letter dated 22<sup>nd</sup> November 2013.
  38. The witness maintained that the Respondent had a right to summarily dismiss the Claimant, and that the process leading to the summary dismissal was fair.
  39. Cross examined by the Claimant's counsel, the witness stated that the reason for the dismissal was that he neglected to do his work as he was supposed to and that he also abetted theft.
  40. The witness stated that he could not confirm whether indeed the batteries got lost as there was nothing to prove that the incident was reported.
  41. In its decision the Respondent relied on the statements that were made by the strangers to the Respondent and also on the Judgment in the criminal matter.
  42. Giving an explanation on the charge sheet, the witness stated that three people were charged in the matter and one in another.
  43. The witness stated that the Claimant admitted the misconduct of ferrying strangers in the company vehicle with an intention to steal.
  44. In his evidence in re-examination the witness stated that the dismissal letter was specific that the determination was a summary dismissal not a termination. The misconduct, basis of the summary dismissal was clearly brought out in the letter.

### **The Claimant's submissions**

45. The Claimant submitted that section 43 of the *Employment Act* placed a duty on the Respondent to prove the reasons for the dismissal. That though the Respondent cited two reasons for the dismissal, the same were not justified.
46. It was argued that the Respondent did not place before the Court any material in form of the Respondent's policy, rules or otherwise to establish that it was a misconduct on the part of the



Claimant to ferry passengers to its property especially where there was a valid reason. That the Claimant gave an explanation as to why he allowed the two passengers on board and that it is clear from the Respondent's exhibit 8 that one of the persons, Henry Nyamu indicated to the Respondent that he had been picked to assist the Claimant search for the batteries.

47. On abetting commission of a criminal act, it was argued that the Respondent heavily relied on an alleged confession from the four suspects and their statements with the police, however the four were not called to testify and that the statements and confessions were not placed before this Court.
48. It was further submitted that the Claimant had worked for almost twenty [20] years without any warning. Summary dismissal was too harsh in the circumstances of the matter. The Court was urged to be persuaded by the decision in *Albert Mutekele Maunda -vs- Postal corporation of Kenya* [2019] eKLR and commute the summary dismissal into a normal termination with full terminal benefits.

### **The Respondent's submissions**

49. The Respondent identified two issues for determination in this matter:
  - i. Whether the Claimant's termination was fair.
  - ii. Whether the Claimant is entitled to the reliefs prayed for.
50. On the first issue, it was submitted that in order for a termination to be deemed fair it must be substantively and procedurally fair – *Walter Ogal Anuro -vs- Teachers Service Commission* [2013] eKLR.
51. Placing reliance on section 43 [2] of the *Employment Act*, the Respondent submitted that the reasons for the termination of the Claimant's service were facts which the Respondent genuinely believed to exist. The summary dismissal was therefore on valid and fair reasons. The Respondent therefore discharged its burden as an employer, under section 45 of the Act.
52. It was argued that looking at the material before Court, there is no doubt that there was procedural fairness in the summary dismissal of the Claimant.
53. The Respondent submitted that having not proved that the dismissal was unfair, the Claimant is not entitled to any of the reliefs sought. That however, should the Court find that the dismissal was unfair for any reason, then a compensatory relief to an extent of 4 [Four] months shall suffice at a basic pay of Kshs.28 640.25 not Kshs. 46,696.48.
54. Further that since the Claimant was summarily dismissed, he cannot be entitled to salary in lieu of notice as sought.

### **Determination**

55. Considering the material placed before me by the parties, the following issues emerge for determination thus:
  - i. Whether the summary dismissal of the Claimant from employment was fair.
  - ii. Whether the Claimant is entitled to the reliefs sought.
  - iii. Who should bear the costs of this suit?



## Of fairness

56. Where a Court has been charged with the duty to determine whether or not there was present fairness in an employer's decision to terminate an employee's employment of service or summarily dismiss an employee in a matter, the Court must consider two aspects namely fairness in the process leading to the employer's decision and action – procedural fairness and substantive fairness.
57. This Court has before expressed that procedural fairness encompasses three components. The first component being notification /information, the employer must inform the employee that he or she contemplates to terminate his employment, and the reason[s] forming basis for the contemplation, second the hearing component – the employee should be given an opportunity to make a representation on the contemplated action and grounds/reasons. Lastly, the consideration component – the employer has to consider the representation by the employee before making a decision.
58. In this matter, there is no dispute the Respondent through a show cause letter dated 30<sup>th</sup> October 2013 intimated to the Claimant that he was contemplating taking action against him on a reason that he ferried 4 [four] unauthorized passengers into the Respondent's property [Field 79] without proper authorization. That on 30<sup>th</sup> October 2015 the Claimant responded to the show cause letter. That too on the employee discipline form, the charges were put forth. The Claimant appeared before a disciplinary committee whereat he and a witness made representations.
59. There is no doubt too that the Claimant appealed against the decision of summarily dismissal. The Respondent considered the appeal and declined the same.
60. By reason of the premises foregoing, I have no doubt that there was procedural fairness as contemplated in section 41 of the *employment Act*.
61. Section 44 of the *employment act*, 2007 stipulates when summary dismissal can occur, thus:
- “ 1. Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that which the employee is entitled to by any statutory provision or contractual term. ....
  3. Subject to the 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.”
62. It is common cause that the Claimant's employment was brought to an end summarily. Whether or not his conduct was one which fundamentally breached his obligation arising under the contract, I shall delve into, shortly hereinafter.
63. 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.
64. It was the Respondent's position that the Claimant's conduct, the subject matter of the summary dismissal was in the nature one that justified a summary dismissal under the law.
65. Whether an employee's misconduct warrants dismissal requires an assessment of the degree and the surrounding circumstances, the contextual approach.



66. I have carefully considered the circumstances of the misconduct the subject matter of the dismissal, including the admission by the Claimant that he was aware that ferrying unauthorized passengers not only on board the Respondent's motor vehicle but also into its harvesting field was improper, that the people he ferried were arrested while carrying sacks and that they were eventually charged of intending to commit a felony, a charge which they admitted, my view that all through the Claimant failed to delink himself from the four who were convicted, he admitted on the employee discipline form that he ferried them into the field at 2:45 a.m., and the nature of the Respondent's industry, and find that the misconduct was one that breached the Respondent's faith in the Claimant, and one that fundamentally breached the contract of employment. The employment relationship could no longer be viable. Consequently, I find that the dismissal was valid, fair and justified.

#### **On the reliefs**

67. The reliefs sought by the Claimant were all upon premise of the Claimant's position that his dismissal was unfair. None of them was independent of the "unfair termination" claim. Having found that the dismissal was fair, I am unable to grant any of the reliefs therefore.

68. In the upshot, I find the Claimant's claim lacking in merit, and it is hereby dismissed.

**READ AND DELIVERED VIRTUALLY AT NAIROBI THIS 26<sup>TH</sup> DAY OF MAY, 2022.**

**OCHARO KEBIRA**

**JUDGE**

In presence of

Mr. Wayua holding brief for Uvyu the Respondent.

Ms. Otieno for the Claimant.

#### **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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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.

