



**Peter & 2 others v Crown Industries Limited (Cause 887 of 2015)  
[2022] KEELRC 1465 (KLR) (18 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1465 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 887 OF 2015**

**K OCHARO, J  
MAY 18, 2022**

**BETWEEN**

**JOSEPH KILATYA PETER ..... 1<sup>ST</sup> CLAIMANT  
GIBSON KIMANI NDUNG’U ..... 2<sup>ND</sup> CLAIMANT  
JEOCLIFF MULINGE PETER ..... 3<sup>RD</sup> CLAIMANT**

**AND**

**CROWN INDUSTRIES LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claim herein was instituted vide a statement of claim dated 19<sup>th</sup> May 2015 wherein the claimants sought the following reliefs:
  - i. Terminal benefits
  - ii. Compensation for unlawful termination
  - iii. Costs of this suit
  - iv. Interest in (i), (ii) and (iii)
  - v. Any other relief as the court deem just.
2. The claimants aver that their employment services were terminated unlawfully despite serving the Respondent with loyalty and diligence.
3. The Respondent responded to the Statement of claim vide a Response to claim dated 11<sup>th</sup> February 2016. While it agrees that the claimants were in its employ, it avers that the claimants were summarily dismissed on account of gross misconduct.



4. On the 15<sup>th</sup> of November 2021 when this matter came up for hearing, the parties recorded a consent that this Court be able to render itself on the matter upon basis of the pleadings, the witness statements, and documents record.

### **Claimants' case**

#### **1st Claimant's case**

5. The 1<sup>st</sup> claimant avers that he was employed by the respondent in 2005 as a packer at a monthly salary of Kshs. 20,231/= and a house allowance of Kshs. 1,470/=. He states that his services were unlawfully terminated on 29<sup>th</sup> September 2013 and that he was not paid his full terminal benefits.
6. The 1<sup>st</sup> Claimant avows that on 29<sup>th</sup> September 2013, while on nightshift, he was assigned to punch picnic boxes. That the lid and the bottom were not matching and upon informing his supervisor, he was instructed to keep working.
7. On 30<sup>th</sup> September 2013, the 1<sup>st</sup> claimant states that upon reporting to work for his night shift, he was told that the containers he had worked on the previous night were not correct and that he was not allowed to get inside the Respondent's premises. He avers that he was given a suspension letter dated 9<sup>th</sup> October 2013 and was not given an audience to be heard.

#### **2nd Claimant's case**

8. The 2<sup>nd</sup> Claimant avers that he commenced his contract in 2010 as a machine attendant at a monthly salary of Kshs. 11,100/- and a house allowance of Kshs. 1,655/-. He states that he was terminated on 29<sup>th</sup> September 2013 without being paid his terminal dues.
9. He avers that on 29<sup>th</sup> September 2013, while on night shift, he was assigned to punch picnic boxes. He noted that the metallic frame had a problem and the top and bottom were not in alignment. He states that he informed his supervisor who told him to continue working until morning, which he did.
10. That the next day upon reporting to work, he was told that the containers he worked on the previous night were not correct. He was not allowed inside the company premises and was given a suspension letter and was told to go back after two weeks when he was given a dismissal letter.

#### **3rd Claimant's case**

11. The 3<sup>rd</sup> claimant avers that he was employed by the Respondent as a machine attendant at a machine attendant at a monthly salary of Kshs. 9,800/- and a house allowance of Kshs. 1,400/-. He avers that the Respondent terminated his employment unlawfully on 27<sup>th</sup> September 2013 and refused to pay him terminal benefits.
12. On the incidents leading to his termination, the 3<sup>rd</sup> Claimant avers that on 29<sup>th</sup> September 2013 while also on night shift, he was instructed to pack ultra-fresh jerricans into bundles. He states that the sacks could not fit 48 pieces as instructed by his supervisor but could only take 36 pieces per sack as the systems kept on changing.
13. He maintains that just like the 1<sup>st</sup> and 2<sup>nd</sup> Claimants, he reported to work the next day and was denied entry into the premises. He was then suspended for a week for investigations to be conducted and was subsequently dismissed without being given audience.
14. The claimants all maintain that they were orally employed and therefore the terms were implied. They also aver that the Respondent terminated them with no valid reason and failed to afford them audience



prior to the termination as required under the law. In addition, they maintain that they were not issued with warning letters or notices which meant that their termination was abrupt and traumatising.

15. The claimants therefore state that the Respondents actions were unlawful, unfair and wrongful and that the decision to not pay them their terminal dues further aggravated the termination. They also add that during their tenure, they were neither given weekly rest days, holidays nor paid overtime as stipulated under the law.

### **Respondent's Case**

16. In its defence the Respondent relied on the witness statements by James B. Mwangi, on the Claimants' respective cases. The Respondent acknowledges that the claimants were its employees.
17. The witness stated that the 1<sup>st</sup> Claimant was employed on 1<sup>st</sup> March 2008 as a packer at a monthly salary of Kshs 5,200/- and a house allowance of Kshs. 780/- and not a monthly salary of Kshs. 20,231/- and a house allowance of Kshs. 1,470/- as alleged by the Claimant.
18. The Respondent avers that the 1<sup>st</sup> Claimant during his tenure had a habit of absconding duty without permission. This led to issuance of a number of warning letters against him. He only apologized once for the misconduct through his letter dated 5<sup>th</sup> October 2011.
19. It was the Respondent's case that on the 28<sup>th</sup> September 2013, the 1<sup>st</sup> Claimant damaged the Respondent's property, 800 picnic boxes [40 bundles of 20 each]. The Claimant acknowledged this through his letter dated 30<sup>th</sup> September 2013. The Respondent was constrained to issue a show cause letter dated 30<sup>th</sup> September 2013 and invited him to attend a disciplinary meeting that was scheduled for 3<sup>rd</sup> October 2013.
20. The Claimant attended the disciplinary hearing, through the hearing it was confirmed that as a result of his actions, poor workmanship, the Respondent suffered a loss of over Kshs.300,000. Over and above this loss, the Respondent was left with a client who threatened to cancel an order and demand Kshs. 3.1 Million as a refund.
21. The witness stated that the 1<sup>st</sup> Claimant was issued with a dismissal letter dated 22<sup>nd</sup> October 2013.
22. On the 2<sup>nd</sup> Claimant, the witness stated that the former was employed on the 1<sup>st</sup> of April 2011 as a general worker at a basic salary of Kshs. 6750 and a house allowance of Kshs. 1053 less statutory deductions that included PAYE, NSSF and NIF. The employment was through a contract dated 1<sup>st</sup> April 2011.
23. The Respondent contended that on the 29<sup>th</sup> September 2013, the 2<sup>nd</sup> Claimant while on night shift, punched holes on the lid and bottom picnic boxes which were not matching thereby damaging them. Further, he produced 40 bundles of 20 boxes each with same problem, prompting a recheck and correction of the same. This led to a reputational prejudice on the Respondent in the eyes of its customers and loss. For these, he was issued with a notice to show cause to which he responded on the 30<sup>th</sup> September 2013.
24. The Respondent contended that investigations had to be carried out on the wrong punching of the picnic boxes, the Claimant was suspended pending the same.
25. On the 3<sup>rd</sup> October 2013, a disciplinary hearing was held with the attendance of the 2<sup>nd</sup> Claimant. Out of the hearing, it was confirmed that through his poor workmanship, the Respondent was costed a sum of over Kshs. 300,000. Its reputation was also jeopardised.
26. The 2<sup>nd</sup> Respondent was dismissed on the 22<sup>nd</sup> October 2013, through a letter of the even date.



27. In its evidence, the Respondent brought out several other incidents when the 2<sup>nd</sup> Respondent worked otherwise than he was expected to prompting warnings from it.
28. The Respondent maintained that the Claimant was paid all his dues at termination of his employment. Further, that the at all material times holiday and leave days were paid to him whenever he was entitled to.
29. On the 3<sup>rd</sup> Claimant's case, the Witness stated that the said Claimant was on or about the 1<sup>st</sup> off April 2011, employed as a lifter ad a basic salary of Kshs. 6750 and a house allowance of Kshs. 1013 per month. Further that the Claimant had a history of misconducting himself in the manner he undertook his duties. On the 2<sup>nd</sup> July of 2012, he gave a wrong report on production, 148 pieces of a product called supreme baskets were un accounted for consequently, the Respondent suffered a loss.
30. On 27<sup>th</sup> September 2013, while on night shift the Claimant packed 36 pieces of Ultra Fresh instead of the required 48 pieces in a bundle. This was not expected of him as a person with an experience of more than two years. A show cause letter was issued to the Claimant, and he responded to the same through his letter dated 30<sup>th</sup> September 2013. He alleged in the response that he did what he did under instructions.
31. The Respondent was not satisfied with the explanation and was constrained to suspended him from employment allow investigations to be conducted. On the 30<sup>th</sup> October 2014, a disciplinary hearing was conducted and a decision consequently made to dismiss him.
32. It concludes that the claimant's termination was lawful, fair and justified and in accordance with the law and urges the court to dismiss the claim. At the termination the Claimant was paid all his terminal dues. Further that whenever the Claimant was entitled to holiday pay or leave pay, he was duly paid.

### **Claimants' Submissions**

33. The claimants submitted that where an employer alleges that an employee's services were terminated for poor performance, the burden of proving the same whether by producing verbal and/or written admonishment falls on the employer. They also argued that an employer ought to prove that counselling intended to improve an employee's performance was done and that despite all attempts to have the employee improve his or her performance, the employee had failed.
34. In respect of the foregoing, the claimants argued that the Respondent did not fulfil the obligation of ensuring their performance improved before terminating their employment.
35. Further the 1<sup>st</sup> and 2<sup>nd</sup> Claimants submitted that the reason for termination was due to a faulty machine that punched the picnic baskets wrongly. They therefore concluded that the respondent should bear the loss.
36. The claimants concluded that they are entitled to the prayers sought.

### **Respondent's Submissions**

37. The Respondent submitted that pursuant to the provisions of Section 44(3) of the *Employment Act*, it was entitled to dismiss the claimants as their conduct had fundamentally breached their contracts of employment.
38. It also submitted that it had given the claimants reasons for their dismissal in their respective dismissal letters as required under Section 43 of the *Employment Act*. It placed reliance on the case of *Evans Misango vs Barclays Bank of Kenya Limited* (2015) eKLR.



39. The Respondent argued that it had adhered to the provisions of Section 41(1) of the *Employment Act*. It also highlighted the case of *Alponce Machanga Mwachanya vs Operation 680 Limited* (2013) eKLR and argued that it had complied with the principles of the procedural fairness required for termination of an employee's employment on grounds of misconduct, poor performance or physical incapacity.
40. The respondent further submitted that the statutory burden to prove unfair termination falls on the claimant pursuant to the provisions of Section 47(5) of the *Employment Act*. It relied on the Court of Appeal case of *Bamburi Cement Limited vs William Kilonzi* (2016) eKLR to bolster its position and argued that the claimants had not discharged the burden and as such, urged the court to dismiss the claim.
41. The Claimants' suit lacks merit, consequently it should be dismissed for want of merit

### **Analysis and Determination**

42. From the material placed before me, the following issues emerge for determination;
  - [i]. Why was the Claimants' employment terminated?
  - [ii]. Was the termination fair?
  - (iii) Are the Claimants' entitled to the reliefs sought or any of them?
  - [iii]. Who should bear the costs of this suit?
43. The Claimants asserted in their submissions that their employment was terminated on account of poor performance, and therefore the Respondent in this matter was enjoined to demonstrate to the Court that their alleged poor performance was brought to their attention, that after the notification they were put on a performance improvement plan and or assisted to improve their performance. The Respondent didn't do this.
44. The Respondent on the other hand asserted that the termination of the Claimants' employment was attracted by the misconduct arising from the manner they undertook their duties on the material days. The misconducts in the nature that placed them under the category of those brought out in Section 44 of the *Employment Act*, and therefore it was entitled to dismiss them summarily.
45. There are two rival positions here. This Court must determine whether the termination was occasioned by poor performance on the part of the Claimant's or a misconduct on their part which fell under the category of those identified under section 44 of the Act. Determining fairness or wrongfulness of either of the two requires considerations that aren't similar. Therefore, the need to determine why the termination.
46. The Claimants in their memorandum stated;

“The Claimants state that on diverse dates between 27<sup>th</sup> and 29<sup>th</sup> September 2013, the Respondent unlawfully terminated the Claimants' services for no particular reason and failed to pay them terminal dues.”

Parties are bound by their pleadings. They are never allowed to freely depart from them for that would negate the purpose for pleadings exist and their importance both to Courts and the parties themselves. Having pleaded that their termination was without any reason, the Claimant cannot be heard to attribute a reason, poor performance to their dismissal.



47. This court understands the Respondent's case to be that the Claimants carelessly and improperly performed work which in the nature of their duty they were expected to perform carefully and properly. The court has carefully considered the material placed forth by the parties and notes that the Claimants did not deny the actions that the Respondent accused them of, but tried to justify why. This leads to a conclusion that the termination of the Claimants' employment was on account of the Respondent's holding that they were guilty of gross misconduct.

#### **Was the termination fair.**

48. Having found that the termination of the Claimant's employment was on account of an alleged gross misconduct, I now turn to consider whether the termination was fair. Fairness in an employer's decision to terminate an employee's employment can only be gauged by a court of law by it considering two aspects, presence or otherwise of procedural fairness and substantive justification. Absence of all or any of these two components will automatically lead to a termination being considered unfair.

49. Section 41 of the *Employment Act* provides the statutory procedure that an employer must follow in determining an employee's employment. The procedure entails notification- the employer contemplating to terminate an employee's service of employment must with all clarity indicate that much, and the grounds forming basis for the contemplation, to the employee; hearing- the employer must allow the employee to present his or her defence on the contemplated action and the grounds; consideration- the employer must consider the representations by the employee, his witness[es] if any and or his or her accompanying colleague before rendering a decision.

50. In their memorandum of claim and their respective witness statements, the Claimants contended that they were dismissed without being heard. Contrary to this assertion, it emerges from the Respondent's evidence on record, and the evidence has not been challenged, that all the Claimants were issued with notices to show cause, they responded to the notices variously, they were all heard at a disciplinary hearing and considering their representations, the Respondent made a decision to dismiss them on an account of gross misconduct. I am persuaded to conclude that the termination was procedurally fair.

51. Section 47[5] of the *Employment Act* placed a statutory obligation on the Claimants to prove that the termination was unfair- *Bamburi Cement Limited v William Kilonzo* [2016] eKLR. The Claimants as brought out hereinabove had two versions of the circumstances of their termination. With that in mind I am not able to conclude that they discharged the burden.

52. Section 43 of the *Employment Act*, bestows upon an employer whenever there is a dispute regarding termination of an employee's employment to prove the reasons for the termination, otherwise the termination shall be considered unfair in terms of section 45. Section 45 imposes a further burden on the employer to prove that the reasons for the termination were fair and valid. The Respondent in the show cause letters was express on the reasons that were stirring its contemplation to terminate the Claimants, at the disciplinary hearing the Claimants answered to the reasons, and eventually the reasons were brought out the dismissal letters. The court considers the reason fair and valid. The reasons were not challenged.

53. The Claimants sought for a compensatory relief against the Respondent pursuant to section 49[1] [c] of the *Employment Act*. The relief is only awardable where the court has found a termination or summary dismissal to be unfair. In this matter the court has found otherwise. The relief cannot be granted therefore.

54. Section 44 of the *Employment Act* provides when summary dismissal shall take place, thus when an employer terminates the employment of an employee without notice or with less notice than that to



which the employee is entitled to by any statutory provision or contractual term. Having found that the dismissal of the Claimants was summary, I hold that they were not entitled to any notice and therefore to any notice pay too.

55. The Claimants made a claim for holidays for 3 years. This Claim suffers from destituteness in particularity. In a year there are many holidays, others as are granted by the Constitution and others as are declared from time to time by the minister. Looking at the Claimants' pleadings and witness statements one cannot say with certainty which public holidays they had in mind. The Claimants want this Court to venture into the realm of speculation, the Court is not ready to.
56. The Claimants have sought for gratuity, gratuity is only granted where is provided for in a contract between the parties. That is not the case here. The Court declines to grant the same.
57. In the upshot, I find the Claimant's claim wanting in merit and it is hereby dismissed.

**READ AND DELIVERED VIRTUALLY THIS 18<sup>TH</sup> DAY OF MAY 2022.**

**OCHARO KEBIRA**

**JUDGE**

In presence of

Ms. Kibaba holding brief for Wambua for the Respondent.

No Appearance 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.

**OCHARO KEBIRA**

**JUDGE**

