



**Kamande v Menengai Oil Refeneries Limited (Cause 140 of 2015)  
[2022] KEELRC 1564 (KLR) (2 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1564 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
CAUSE 140 OF 2015  
HS WASILWA, J  
JUNE 2, 2022**

**BETWEEN**

**ALIAS NGUGI KAMANDE ..... CLAIMANT**

**AND**

**MENENGAI OIL REFENERIES LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant filed his Memorandum of Claim dated 15<sup>th</sup> May, 2015 on the 18<sup>th</sup> May, 2015 claiming to have been unfairly terminated by the Respondent. The Claimant prays for the following remedies: -
  - a. Payment of Kshs 683,096.73 as particularized in the claim.
  - b. Costs of this Suit
  - c. Interest on (a) above.
  - d. Any other relief that this Court may deem just to grant.
2. The Claimant's case is that he was employed by the Respondent in December, 2004 as a loader earning a salary of Kshs.4,608/= per month till March, 2008 when he was promoted to the position of turn boy now earning a monthly salary of Kshs.12,000.
3. He averred that he served the Respondent diligently till January, 2014 when his services were cut short abruptly without any notice or hearing. He stated that during the 9 years he worked, he was never given leave, and no off during public holiday. He then stated that the Respondent paid all his statutory deduction such as NSSF or NHIF as required by law.
4. The Respondent was represented by the Federation of Kenya Employer and entered appearance on the 15<sup>th</sup> June, 2015. The Firm of Ogejo, Olendo and company Advocate took over the conduct on behalf of the Respondent and then filed a response to claim on the 1<sup>st</sup> February, 2016 in which it denied all



the contents of the Claimant and stated that if the Claimant was terminated then the same was done in accordance with the law after being served with several warning letters, show causes and hearings notices and that the Claimant if at all was terminated, was the author of his misfortune and never at any point gave reasonable excuse for his misdoing.

### **Hearing.**

5. During hearing, the Claimant testified as CW-1 and adopted his witness statement dated 2<sup>nd</sup> July, 2015 and produced the documents dated 2<sup>nd</sup> July, 2015 as his exhibits. He added that the reason for his termination was later communicate to him that he had allegedly stolen oil a fact which he avers he did not do and also that the Respondent did not give him an opportunity to explain himself. He then stated that he was not paid a single cent at the time of termination.
6. Upon cross examination by Orare Advocate, the witness testified that he worked for the Respondent from December, 2000 till January, 2014 and during this time he was only paid salary without any allowance when he used to work overtime. He confirmed that he was not invited to any disciplinary hearing.
7. The Respondent called its senior Human Resource manager, one Peter Kanenye Muchibi as RW-1. The witness testified that the Claimant was the Respondent's former employer. He avers that the Claimant was found by one of the manager siphoning fuel and before action could be taken he deserted work on 31<sup>st</sup> January, 2014 only to resurface in March, 2014 at the Labour office. He maintained that the Claimant was paid salary and overtime earned while at the Respondent's employ. The Witness continued with his testimony and stated that the Claimant could work one in a while during public holidays and was compensated for the same. He further states that the Claimant absconded duty and was not terminated as alleged.
8. Upon cross examination by Daye Advocate, the witness testified that he started working for the Respondent on 1<sup>st</sup> July, 2008. He stated that the Claimant was found stealing oil however that no report was made to the authorities. He confirmed that no disciplinary hearing was held because they could not reach out to the Claimant. He also confirmed that they received summons from the labour office that they did not respond, but attended the meeting. He avers that they did not comply with recommendations by the labour officer because the Claimant had absconded duty. He then insisted that the Claimant was paid house allowance.
9. On re-examination the witness testified that the matter was not reported to the police as they preferred to handle the matter internally. He then stated that no fuel was lost as the Claimant was found red-handed before taking the same.

### **Claimants Submissions.**

10. The Claimant submitted that the reason for the alleged termination being desertion was not ascertained by the Respondent as the Respondent failed to issue a notice of desertion or even demonstrate any steps taken to trace the Claimant as was held in the case of [\*Felistas Acheba Ikatwa V Charles Peter Orieno\*](#) [2018] eKLR where the Court held that;

“The law is therefore well settled that an employer claiming that an employee has deserted duty must demonstrate efforts made towards getting the employee to resume duty. At the very least, the employer is expected to issue a notice to the deserting employee that termination of employment on the ground of desertion is being considered.”



11. Variably, it was submitted that the Claimant was summarily terminated by the Respondent without being informed of the reasons for termination neither was he given an opportunity to defend himself as envisaged under the section 41 of the Employment Act. It was then argued that the termination of the Claimant has failed in both substantive justification and procedural fairness and he cited the case of Walter Ogal Anuro V Teachers Service Commission [2013] eKLR.
12. The Claimant also cited the case of Mary Chemweno Kiptui v Kenya Pipeline company Limited [2014] eKLR, Where the Court held that; termination of an employee is bound to be unfair where an affected employee is not accorded a hearing in the presence of a union representative or in the presence of a fellow employee of their choice in compliance with section 41 of the Employment Act, 2007.
13. In conclusion the Claimant submitted that they have made out a case to the required standard and urged this Court to allow the claim as prayed.

### **Respondent's Submissions.**

14. The Respondent submitted from the onset that this Court erred in expunging its documents from record when they had filed and served the same on 7<sup>th</sup> October, 2021 through the Claimants email address xxxx@yahoo.com about 5 months before the day of hearing. He submitted that Article 159(2) (d) of the Constitution enjoins this Court to administer justice without due regard to procedural technicalities. Accordingly, that when the application to expunge the Respondent's documents from record was allowed by this Court, its right to hearing as guaranteed under Article 50 of the Constitution was violated. He further argued that the said document are the Claimants payslips and muster roll that would have aided this Court in arriving at a just conclusion as to the issues raised in this claim.
15. On whether the Claimant was unfairly terminated, it was submitted that the Respondent found the Claimant siphoning oil on being summoned to answer to the issue, he absconded duty and their efforts to reach him were futile therefore that the notice was not served on him on that ground.
16. The Respondent then maintained that the termination of the Claimant was based on desertion of duty and not unfair as pleaded. He then argued that the Claimant is not entitled to the Orders Sought.
17. I have examined evidence of the parties and submissions file herein. From the Claimant's evidence, he was terminated unfairly.
18. The Respondents aver that the Claimant absconded duty. There is however no evidence that the Respondents being satisfied that the Claimant had absconded duty made any effort to trace him or at least serve him with a Notice to Show Cause indicating they were considering terminating him for absconding duty.
19. In any case the Respondents admit that they were served with a letter from the Labour office after the Claimant reported his case.
20. The Respondents didn't respond even to this letter to indicate the desertion they now allege. In any case if the Claimant had absconded duty, this would have been a good time to reach out to him and subject him to a disciplinary process.
21. The Respondents also allege that the Claimant was caught red handed preparing to siphon fuel from a fuel tank.
22. The witness who caught the Claimant red handed was never called as a witness.
23. The act of the Claimant if there was also a criminal act but no report was made to the police of the same.



24. Despite the allegation that the Claimant intended to siphon fuel, he was also not subjected to any disciplinary process as envisaged under Section 41 of Employment Act.
25. The Respondents contend that their important documents were expunged from the record being a payslip and master roll.
26. It beats logic how the 2 documents even if they had been considered, would have corrected the fact that there was no evidence of the alleged siphoning and that the Claimant was not subjected to any disciplinary process.
27. Section 45 (2) of the Employment Act 2007 states as follows;

“ 45. (1).....

- (2) 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; and
  - (c) that the employment was terminated in accordance with fair procedure”.

28. In case of the Claimants, the Respondents have not established the validity of reason for termination nor fair process. I therefore find the dismissal of the Claimant unfair and unjustified.
29. In terms of remedies, I find for Claimant and I award him as follows;
  1. 1 months salary in lieu of notice = 9,780.95/= as pleaded
  2. 1 months salary as leave for the year of exit = 9,780.95/=
  3. Underpayment of salary as pleaded = 133,653.55/=
  4. 10 months salary as compensation for the unfair and unlawful termination = 10 x 9,780.95/= = 97,809.5/=Total= 251,025/=
- Less statutory deductions
5. Claim for overtime and work on public holidays not proved.
6. The Respondents will pay costs of this suit plus interest at court rates with effect from the date of this Judgment.

**DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 2<sup>ND</sup> DAY OF JUNE, 2022.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**



Daye for claimant – present

Wandolo holding brief Orare for respondents – present

Court Assistant - Fred

