



**Alex v Unilever Tea Kenya Limited (Cause 105 of 2019)
[2022] KEELRC 1620 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1620 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 105 OF 2019
CN BAARI, J
JULY 28, 2022**

BETWEEN

BENSON ODHIAMBO ALEX CLAIMANT

AND

UNILEVER TEA KENYA LIMITED RESPONDENT

JUDGMENT

Introduction

1. Before Court is the Claimant's Memorandum of Claim dated 25th October, 2019, and filed on 6th November, 2019. The Claimant seeks a declaration that his termination is unlawful, malicious and unprocedural. He further prays for an award for payment of terminal dues, leave days for every year worked from 2012 to 2018, an order for issuance of a certificate of service and the costs of the suit and interests.
2. The Respondent entered appearance and filed the Respondent's Memorandum of Defence on 24th February, 2020.
3. The suit was heard on the 7th February, 2022, where the Claimant testified in support of his case. He adopted his statement and produced the bundle of documents filed in support of his case.
4. The Respondent's case was heard on similar date, and the Respondent presented one Ms. Winnie Ochieng, her Legal Counsel & Integrity Officer, to testify on her behalf. Ms. Ochieng adopted her statement, and produced a bundle of documents dated 3/9/2021, in support of the Respondent's case.
5. Both parties filed submissions in the matter.



The Claimant's Case

6. The Claimant states that he was employed by the Respondent as a Food Production and Services Supervisor on 16th March, 2012. It is his case that he was confirmed to the position of Hospitality Officer by letter of Confirmation dated 6th December, 2012.
7. It is the Claimant's further case that he was employed on permanent and pensionable terms of service, and which service could only be terminated in accordance with the Respondent's Human Resource Procedures.
8. The Claimant avers that he rendered selfless and commendable service to the Respondent as per his terms of employment. It is his case that in his time in the employ of the Respondent, he was appreciated for his work ethics, and which is evidenced by the Annual Reward Statement.
9. The Claimant states that on July 16, 2018, the Respondent summoned him to respond to claims brought against him relating to issues with staff that he supervised. The Claimant states that the issues ranged from unfair treatment, bullying, harassment, sexual harassment, forced labour, and breach of the law amongst others.
10. It is the Claimant's case that he was asked to show cause why disciplinary action should not be taken against him not later than 9 a.m on July 19, 2018. The Claimant avers that on 30th July, 2018, the Respondent purported to conduct a hearing against him, interviewed various people and thereafter drew minutes of the said hearing culminating in his dismissal from the service of the Respondent.
11. The Claimant states that being aggrieved by the decision of the Respondent to summarily dismiss him from their service, he appealed against the decision on October, 12, 2018. The Claimant further states that he Respondent purported to consider the appeal and upheld its decision to dismiss him on October 23, 2018.
12. The Claimant states that he was given up to 05/11/2018 to wrap up his engagement with the Respondent, which notice he states was abrupt, unprocedural and unlawful.
13. The Claimant states that the termination of his employment was without reason, unprocedural and unlawful, and claims his terminal dues in full.

The Respondent's Case

14. It is the Respondent's case that she employed the Claimant on March 16, 2012, as a Food Production & Services Supervisor. The Respondent contends that the Claimant was expected to, and had agreed to comply with the terms of his contract of employment as well as the Respondent's Code of Business Principles during the tenure of his employment.
15. The Respondent states that sometime in 2018, it came to their attention that the Claimant may have been involved in serious breaches of the Respondent's Code of Business Principles (COBP) specifically; the policies on Respect, Dignity & Fair Treatment, Protecting Unilever's Physical and Financial Assets.
16. The Respondent avers that her staff made allegations against the Claimant ranging from breaching the Respondent's Code on Respect, negligence in conducting his duties and committing criminal acts amongst others serious allegations.
17. The Respondent states that it wrote to the Claimant on July 16, 2018 highlighting the aforesaid allegations and requested the Claimant to show cause why disciplinary action should not be taken



against him for breach of the COBP, and required him to submit a written explanation, which he did vide his letter dated July 19, 2018.

18. The Respondent states that, upon the conclusion of the investigations it issued the Claimant with a notice to attend a disciplinary hearing on July 26, 2018. The Respondent further states that the Claimant was informed inter alia of his right to representation by a colleague or a shop steward and provided with the Investigation Summary on 28th July, 2018 to enable him prepare for the hearing on 30th July, 2018.
19. The Respondent avers that the Claimant attended the disciplinary hearing as scheduled, and was given an opportunity to defend himself against each of the allegations levelled against him. It is the Respondent's case that the disciplinary hearing was conducted for two days and that on both days, the Claimant was accompanied by a colleague as his representative.
20. The Respondent states that she found that the Claimant mistreated, bullied and harassed Evans Obala, Nicolas Onyango, Walter Munyikombo and Geoffrey Mete; sexually harassed Eunice Omulumbi; and subjected Anthony Siele to forced labour. The Respondent further states that the Claimant was also found to have been negligent in conducting his duties by failing to follow company grievance handling procedures and disciplinary process while handling the case of Eunice Omulumbi and Regina Lusala and committing a criminal act to the detriment of the Company by subjecting Anthony Siele to a form of forced labour where he worked every day of the week without a rest day from November, 2017, to July, 2018.
21. The Respondent states that the aforesaid breaches by the Claimant constituted misconduct and led the Respondent to the decision to summarily dismiss him for gross misconduct with effect from October 8, 2018. The Respondent states that she informed the Claimant of his right of appeal against the summary dismissal.
22. The Respondent avers that the Claimant appealed against the decision to terminate his employment contract, and that it considered the appeal and found no justifiable reasons to interfere with the decision made on October 5, 2018. The Respondent states that she wrote to the Claimant on October 23, 2018, upholding the decision to summarily dismiss him from employment.
23. The Respondent further states that the Claimant's dismissal for gross misconduct was warranted, and was effected in accordance with the law and the Respondent's internal procedures.
24. The Respondent denies that the Claimant is entitled to any compensation for unlawful, malicious and unprocedural termination as prayed in his Statement of Claim.

The Claimant's Submissions

25. It is submitted that the termination of the Claimant was unfair as it was based on invalid reasons and an unfair procedure. The Claimant further submits that a breakdown of the evidence adduced indicates that the Respondent devised a plan which involved collecting statements from the Claimant's team members, and that the disciplinary hearing consisted of no evidence but reference to statements supposedly given by the Claimant's team members.
26. The Claimant submits that the Respondent's procedure in terminating the Claimant's employment and treatment of his appeal violated the principles of natural justice as there was a conflict of interest on the part of the Managing Director's.



27. The Claimant submits that he has shown that the Respondent employed unfair means and invalid reasons to ensure that the Claimant's employment was terminated. It is further submitted that the Respondent has failed to adduce any evidence for the Claimant's termination from employment.
28. It is submitted that the Claimant having proven his case on a balance of probability, it is only fair that he is awarded as prayed.

The Respondent's Submissions

29. The Respondent urges this Court to find that the Claimant's dismissal was justified as it had, on a preponderance of probability, sufficient reason to believe that the accusations levelled against the Claimant were true.
30. It is the Respondent's submission that it reasonably believed that the Claimant was guilty at the time of his dismissal, based on the various investigations carried out, evidence presented by the parties and the findings of the disciplinary hearings.
31. The Respondent further submits that it was found on a balance of probability that the Claimant was guilty of the charges levelled against him and which constituted gross misconduct. The Respondent submits that in disciplinary proceedings the burden of proof is beyond reasonable doubt, but rather, on a balance of probabilities. The Respondent sought to rely on the holding in *Anthony Mulaki V Addax Kenya Limited*, Cause No. 822 of 2012 to buttress this position.
32. The Respondent submits that the Claimant's conduct was tantamount to gross misconduct which warranted summary dismissal as provided under section 44(4) of the Act. The Respondent further submits that the Claimant demonstrated by his actions and conduct, a wilful disregard for the Respondent's Policies and Procedures
33. The Respondent submits that she lost trust in the Claimant's ability to continue discharging his duties and act respectfully towards his colleagues and maintain a non-offensive working environment. The Respondent further submits that the Claimant failed to uphold the Respondent's policies on Respect, Dignity & Fair Treatment towards all employees. The Respondent had reliance in *Agnes Kayata Mbiti v Housing Finance Company Limited* [2017] eKLR to support this position.
34. The Respondent submits that the Claimant's termination was procedurally fair within the meaning of Section 41 of the Act, as due process was followed before the decision was made to terminate his employment. The Respondent relied in *Anthony Mkala Chitavi v. Malindi Water & Sewerage Company Ltd* [2013] eKLR to support this position.
35. The Respondent submits that the Claimant has not satisfied his burden under section 47 (5) of the *Employment Act*. The Respondent further submits that the Claimant has failed to discharge this burden as his Claim is premised on unsubstantiated allegations which he has made no attempt to prove.
36. The Respondent submits that the Claimant is not entitled to the reliefs sought in his Memorandum of Claim. The Respondent further submits that the Claimant was summarily dismissed in accordance with section 41 of the *Employment Act* as the Respondent had reasonable and sufficient grounds to warrant the Claimant's dismissal and has complied with due process as set out in the *Employment Act*.

Analysis and Determination

37. I have considered the pleadings, the witnesses' testimonies and the Parties' written submissions. The issues for determination on are:



- i. Whether the Claimant was unfairly terminated.
- ii. Whether the Claimant is entitled to the reliefs sought

Whether the Claimant was unfairly terminated.

38. A termination of employment is deemed to be fair where the employer meets a just cause standard by prioritizing fair treatment of an employee through adherence to procedural fairness, and the substantive justification for the termination.
39. Procedural fairness refers to a disciplinary hearing that affords an employee an opportunity to state his/her defence. Section 41 of the *Employment Act* is the primary provision on matters of procedure in a termination process. This section demands that an employer before terminating the services of an employee on the grounds of misconduct, poor performance or physical incapacity explains to the employee, in a language the employee understands, the reasons for which termination is being considered.
40. In the case of *Anthony Mkala Chitavi v. Malindi Water & Sewerage Company Ltd* [2013] eKLR, the Court had these to say on fair procedure:

“The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee....Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible. Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.”
41. Section 41 of the *Employment Act*, 2007, further requires that an employer should proceed to hear and consider any representation that an employee may wish to make, and inform the employee of his right to be represented by a fellow employee or a shop floor steward. In *Silvester Malei Kyengo v Kenya Meat Commission* (2019) eKLR, the court opined:

“In this case the Claimant was first served with a show cause letter stating the charges against him, interdicted pending investigation, accorded an oral hearing in the company of another employee of his choice and finally served with a termination letter confirming that his defence was considered but his services terminated for reasons cited in the letter. Such procedure in my view passes the test of procedural fairness and I so hold.”
42. In a further case of *Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited* [2013] eKLR the court held that the right to be accorded a hearing and be accompanied by a fellow employee or union representative during the hearing is a sacrosanct right.
43. The Claimant was issued with a show cause letter dated July 16, 2018, listing about 5 charges that were leveled against him and requiring that he responds to the charges by 9:00a.m on July 19, 2018. The Claimant responded to the show cause letter vide his letter of 18th July, 2018.
44. The Claimant was invited for a disciplinary hearing vide a letter dated July 23, 2018, and the hearing was slated for July 26, 2018. Upon request by the Claimant, the hearing was scheduled to July 30, 2018. Prior to the hearing, the Claimant was supplied with the investigation report on July 28, 2018.



45. A look at the sequence of activities culminating in the Claimant's dismissal connotes a rushed process. The Claimant had only two days to respond to the show cause, and another two days to familiarize with the investigation report before the hearing. In *Daniel Wanjau Muboro v Ol Pejeta Ranching Limited*, ELRC Cause No. 1813 of 2011, it was held that an employer has an obligation to avail the employee sufficient opportunity to prepare for the hearing.
46. The charges leveled against the Claimant were many and involved several other employees of the Respondent. To have proceeded with the hearing in the manner it did, the Respondent cannot be said to have afforded the Claimant his right to be heard as required under the law. It matters not that the Claimant did not raise an objection, and even when the Claimant asked for an extension, the period allowed was only two more days. (See *Bottomley Musamali Jumba v Defence Forces Carteen Organization* Cause No. 2543 of 2012.)
47. I find and hold that the Respondent subjected the Claimant to unfair treatment in the manner it conducted the disciplinary process. The termination does not meet the fairness test on account of procedure.
48. The second aspect of fairness in a termination case, is the reason for which the employer terminated the employee. The Court of Appeal in *Reuben Ikatwa & 17 others v Commanding Officer British Army Training Unit Kenya & another* [2017] eKLR while citing with approval the following excerpt from the *Halsbury's Laws of England*, 4th Edition, Vol.16(1B) para 642 stated:
- “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 response to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another;...In assessing an employer's action therefore, the Court is not expected to supplant its own decision with that of the employer. In other words, the Court does not ask what it would have done in the circumstances of the particular case; all the Court asks is whether overall, the employer acted responsibly and reasonably and if the answer to this question is in the affirmative, the Court should not interfere with the employer's decision.”
49. In *Kenfreight (EA) Ltd v Benson K. Nguti* [2016] eKLR the Supreme court stated thus:
- “Termination of employment will be unfair if the court finds that in all the circumstances of the case, it is based on invalid reasons or if the reason itself or the procedure of termination is itself not fair”
50. Sections 43, 45 and 47(5) of the *Employment Act*, require that an employer proves the reasons for termination/dismissal, prove that the reasons are valid and fair, and prove that the reasons are justified. (See *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR)



51. In *British Leyland v Swift* (1981) I. R. L.R. 91, Lord Denning describe the test of what a reasonable employer could or could not do in the following words:
- “The correct test is: was it reasonable for the employers to dismiss? If no reasonable employer would have dismissed him, then the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair.....”
52. The question for this court is whether the Respondent’s reasons for terminating the Claimant are valid, just and fair. (See *Cooperative Bank of Kenya Limited v Banking Insurance & Finance Union* [2017] eKLR)
53. The Respondent put across a long list of wrongs said to have been committed by the Claimant. A total of seven (7) employees of the Respondent had a complaint or two against the Claimant, some of which are said to have been repeated severally. The charges paint the Claimant as a boss who thrived in threats to get work done, and one who used his position to have other employees do work that did form part of their work description.
54. Guided by the dictum of Lord Denning in *British Leyland v Swift* (Supra), I find the reasons given for the Claimant’s termination valid and justified as any employer faced with the conduct displayed by the Claimant would justifiably terminate the employee. The Claimant’s termination met the substantive justification test, and so I hold.

Whether the Claimant is entitled to the reliefs sought.

55. The Claimant seeks a declaration that his termination is unlawful, malicious and unprocedural. He further prays for an award for payment of terminal dues, leave days for every year worked from 2012 to 2018, an order for issuance of a certificate of service and the costs of the suit and interests.
56. A finding of an unfair termination no doubt entitles the Claimant to compensation in accordance with sections 49 and 50 of the *Employment Act*, 2007.
57. In *Kenya Ports Authority v Festus Kipkorir Kiprotich* [2014] eKLR it was held that the measures of compensation should be guided by the statutory capping at the time of termination.
58. The Supreme Court in *Kenfreight (E.A) Limited v Benson K. Nguti* [2019] eKLR observed that the *Employment Act* provides for a number of remedies for unlawful or wrongful termination under section 49 and it is up to the judge to exercise his or her discretion to determine whether to allow any or all of the remedies provided.
59. The claimant was first appointed to the service of the respondent on March 16, 2012, and terminated on October 8, 2018. The Claimant was in the service of the Respondent for over six (6) years. The Claimant’s termination has been found to have met the substantive justification test and only found to be unfair on account of the procedure adopted by the Respondent.
60. To this end, considering that the Claimant largely contributed to his termination, I deem an award of six (6) months’ salary sufficient compensation for the procedural breach, and it is so awarded.

Terminal Dues

61. The respondent’s letter dismissing the claimant indicates that he would be paid his terminal dues, including salary for the month of dismissal, pension benefits and any pending leave days. The Respondent’s sole witness told the court that the claimant had been paid all his terminal dues.



62. Neither party produced documents to confirm that the payments were either made or not made. The claimant herein bore the evidentiary burden to prove that his terminal dues were not paid.
63. The claimant did not prove that the Respondent owed him terminal dues. The claim fails and is dismissed.

Certificate of Service

64. An employee is entitled to a certificate of service irrespective of the reasons for the dismissal. Although the respondent told the court that she issued the claimant with a certificate of service, a claim the claimant has denied, I order that the respondent re-issues the certificate irrespective of whether the same had earlier been issued.
65. In conclusion, Judgment is entered for the claimant as against the Respondent as follows: -
- a. 6 months' salary in compensation for unfair termination at Kshs. 1,079,874.86/-
 - b. A certificate of service
 - c. Costs of the suit and interest until payment in full.
66. It is so ordered.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 28TH DAY OF JULY, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Siganga present for the Claimant

Ms. Onyango h/b for Mrs. Opiyo for the Respondent

Christine Omollo- C/A

