



**Njue & another v Unga Farm Care East Africa Ltd (Cause
47 of 2015) [2022] KEELRC 3773 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3773 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 47 OF 2015
HS WASILWA, J
JULY 28, 2022**

BETWEEN

JOSPHAT NJERU NJUE 1ST CLAIMANT

ALEXANDER KAYUNI NYAKINYA 2ND CLAIMANT

AND

UNGA FARM CARE EAST AFRICA LTD RESPONDENT

JUDGMENT

1. The claimants herein filed a joint claim dated February 5, 2015 on February 19, 2015, claiming to have been unfairly terminated by the respondent and seeking to be compensated for the unfair termination.
2. The claimants therefore sought for the following reliefs.
 - a) A declaration that the claimants were unfairly terminated.
 - b) 12 months' compensation for the unfair termination.
 - c) One month's salary *in lieu* of notice.
 - d) Payment of unpaid salary.
 - e) Payment of unpaid overtime and leave days.
 - f) Payment of unpaid acting allowance.
 - g) Costs of this claim.
3. The background of this case is that, the claimants were both employed as Premix dispenser on the November 3, 2005 and July 22, 2003 respectively. They were both serving on contract basis which was renewed annually.



4. They aver that they worked diligently for the respondent and the 2nd claimant was even moved up the ranks and received several accolades as demonstrated in the documents marked AKN (b)-(c). He was promoted to be the acting process operator on July 1, 2011, September 7, 2011 and on November 28, 2011 which was due for payment of acting allowance as per the respondent policy and as captured in the said letters. He avers that he committed all his time and energy towards serving the respondent.
5. However, on the February 20, 2012 they were both suspended for one week on allegations of being involved in fraud. They were arrested and charged in Nakuru Chief Magistrate's Court, Criminal case number 651 of 2012 which was determined in the favour of the claimants and acquitted.
6. A day later on the February 21, 2012, the claimants were all summarily dismissed from employment without being accorded any notice or disciplinary hearing. At the time of dismissal, the 1st claimant was earning salary of Kshs 18,427.25 while the 2nd claimant was earning Kshs 22,254.87.
7. It is averred that at the time of termination, the 2nd claimant had accumulated overtime and leave pay which was not paid for. Also that the 2nd claimant was acting in charge and due for payment of acting allowances which was never forthcoming.
8. The respondent entered appearance on the March 11, 2015 through the firm of Wambua Musembi and Company Advocates and filed a response to claim on the May 19, 2015 admitting to employing the claimants but denied that they worked diligently. It is averred that the claimants were negligent in how they handled their duties and even received several warning letters in the course of employment.
9. According to the respondent, the claimants were serving on contractual basis and clause 5 of the said contract provides as follows; -

“You undertake at all times to obey all order and instructions lawfully given to you by those in authority over you and diligently and faithfully to employ your time in the company's business and at all times to be of sober and temperate habits. You also undertake to be just and faithful in all dealings and transactions within the companies business and render account of all matters relating thereto and inform the company of all letters, accounts, writings, acts of negligence dishonest or misconduct affecting the company.”
10. It is stated that the claimants breached the afore stated clause and engaged themselves in acts of gross misconduct of stealing, exposing the respondent to loss and therefore that their termination was legally effected and done in accordance with provisions of section 44(4) of the Employment Act.
11. The circumstances leading to the termination, according to the respondent, is that investigation were carried out into the events of the night of February 18, 2012 which revealed that the claimants worked in cahoots to defraud the respondent 245 bags of Indian Soya valued at Kshs 716,425. It is on this basis that the respondent summarily terminated the services of the claimants herein.
12. Prior to the dismissal, the claimant had allegedly received several warning letters touching on their conduct and performance as such they did not have clean record as alleged.
13. Having been summarily terminated as a result of engaging in gross misconduct, the respondent avers that there was no need of serving any notices or subjecting them to any hearing.
14. The respondent prayed for the claim to be dismissed with costs.
15. The claimants filed a reply to the defence on the June 3, 2015 denying the allegation therein and reinstating the contents of their claim. In addition, they stated that they were summarily terminated



without cause and the suspicion of theft that lead to them being charged with Criminal case number 651 of 2021, was never established, both by the respondent and in the criminal case.

Claimants' Case.

16. The 2nd claimant, Alexander Kayuni Nyakinya, testified as CW-1 adopted his witness statement dated September 14, 2021 and produced the document in the list of documents dated February 3, 2015 as claimant's exhibits. He testified that he was an employee of the respondent and discharged from employment upon being charge with offense of fraud under criminal case number 651 of 2012, which they were acquitted under section 87 (a) of the *Criminal Procedure Code*.
17. On cross examination by Musembi Advocate, the witness testified that he was employed by the respondent on July 22, 2003 as premiss dispenser however that he was not given a copy of the code of conduct.
18. Upon further cross examination the witness testified that he knows of a code of conduct and that it was given to him to read but not to sign. He stated that he knew some of the offense that could get him fired. He stated that he was terminated for being suspected to be part of people engaged in fraud at the respondent and charged in court and later acquitted under section 87 (a) of the *CPC*. He stated that he was not paid a single cent on termination.
19. On re-examination he maintained that he was charged for alleged fraud and terminated from employment without being heard.
20. Josphat Njeru Njue, the 1st claimant testified as CW-2 and also adopted his witness statement of September 14, 2021, which reiterated the contents of the claim.
21. Upon cross examination by Musembi Advocate, CW-2 testified that he was employed sometimes in June/July, 2006. He avers that he signed a contract with the respondent but not any other document. He however admitted seeing a document called code of business which set out what an employee can do and cannot do. He denied receiving any warning letter and maintained that he only received a letter of termination and suspension.
22. Upon further cross examination, the witness testified that he received a warning letter once for going to work late on September 8, 2008. He stated that he was suspended on allegation of stealing from the respondent, however details of the allegation were not supplied to him though he was later charged in court with stealing by servant.
23. On re-examination, the witness testified that he was not charged for the warning letter but for alleged stealing by servant which charges he was acquitted of under section 87(a) of the *CPC*.

Respondent's Case.

24. The respondent called its Human Resource assistant, Titus Odero, as RW-1. The said witness adopted his statement filed on March 30, 2022. He testified that he knows the claimants as the employees of the respondent who were terminated for gross misconduct. That they were implicated in fraud, arrested and charge in court as such the termination was justified having been implicated in fraud. He avers that the claimants were summarily terminated and never cleared with the respondent.
25. Upon cross examination by Chetalam Advocate, the witness testified that he was not working for the respondent during the termination of the claimant and basically relied on record to give his testimony. He states that the cause of termination was on alleged fraud. He states that investigation was carried out before the said claimants were singled out though he did not have a copy of the investigation report.



The witness allege that the claimants were subjected to disciplinary hearing though he could not give details or evidence of the same.

26. On re-examination, the witness testified that an employee could be terminated if they received three warning letter in a year.

Claimants' Submissions.

27. The issues for determination according to the claimant are as follows; whether or not their termination of the claimants' was unfair and unlawful, whether the claimants are entitled to the reliefs sought and who should bear costs.
28. On the first issue, it was submitted that the respondent suspended the claimants on allegation of fraud on February 20, 2012 for a period of one week to allow for investigation into fraud involving theft of Indian Soya, however that on the next day while the claimants were serving their suspension notices, they were summarily terminated from service on allegation of being part of the ploy that defrauded the respondent of 245 bags of raw Indian Soya costing Kshs 716, 425. He argued that no evidence was tendered to support the allegations; neither was there any evidence tabled before the court that tried the criminal cause causing the claimant to be acquitted under section 87(a) of the CPC for lack of evidence. It is on that backdrop that the claimant submitted that no reason was therefore tendered to support the respondent actions of terminating their services contrary to the provision of section 43 of the Employment Act as such the termination was unfair.
29. It was also argued that the respondent alleged that an employee is due for termination if they are served with three warning letter in a year, however that what is filed in court are; one warning letter for 2008, another one for 2010, one for 2011 and a final one for 2012, therefore ruling out the reason of being served with three warning letter in a year as a basis for termination.
30. On whether due process was followed, it was submitted that none was followed, no notice was issue and that no disciplinary proceedings were carried in total violation of the provisions of section 41 of the Employment Act. To support his argument the claimants relied on the case of James Muiriru Njenga V Nakumatt Holding Limited [2015] eklr where the court held that; -

“The respondent submitted that they did not give the claimant a hearing as his case was serious, the respondent had lost huge sums of money that the claimant had acknowledged and when he was charged in court with a criminal offence, it was an affirmation that indeed he had committed gross acts of misconduct that warranted the summary termination under the provisions of section 44 of the Employment Act. However, this is not a case of summary dismissal; the notice issued to the claimant was that of termination of employment. Such a termination required due process of a notice of any allegations against the claimant, a hearing and such hearing be done in the presence of his representative as under section 41(1) of the Employment Act. This is not said to have been done as the respondent seek to justify the summary action taken. Even in a case where the notice had been stated as a summary dismissal which is not the case here, section 41(2) still apply with regard to the claimant being given a chance to be heard before his dismissal. The criminal case notwithstanding, there was an employment relationship between the parties herein that are secured and guarded in law. Criminal proceedings do not negate such a relationship. To terminate the relationship, the applicable law must be adhered to. 23. I find no justification in the manner the claimant was terminated; nothing prevented the respondent from following due process. Where the respondent had valid grounds to rise with the claimant with regard to the loss of huge sums of money in his care and custody, such are matters that were within the knowledge of the



respondent and should have formed the basis of the hearing. To act as the respondent did in terminating the claimant through a summary process, find not rationale of reasonable explanation. The resulting action of termination was wrong and unfair as under section 45 of the *Employment Act*. To rely on the provisions of section 44 to justify the action taken by the respondent is a misapplication of the law. I find the termination of the claimant was procedurally unfair.”

31. Similarly, that since the respondent failed to demonstrate the reason for termination and subject the claimant to disciplinary hearing, the termination was unfair according to section 45 of the *Employment Act*.
32. On the reliefs sought, the claimant submitted that they have proved their case to the required standard and urged that the relief be granted as prayed. However, that in respect of unpaid overtime, leave and acting allowance the same apply to only the 2nd claimant.

Respondent’s Submissions.

33. The respondent submitted from the onset that the claim by the 2nd claimant ought to be struck out for the reason that the verifying affidavit was sworn on the February 2, 2015 when the memorandum of claim is dated February 5, 2015, meaning, at the time of swearing the verifying affidavit there was nothing to verify. To support his case, the respondent relied on Nakuru HCCC NO 220 OF 2004; *Charles Ole Suyua and another V Mary Siano Sarisar and 6 others* (Unreported) and the case of *Pastor John Cheruiyot and 6 others V County Council of Baringo and 3 others* Nakuru HCCC No 120 of 2004 (Unreported) where the court faced with an incompetent affidavit, held that a verifying affidavit that is incompetent cannot stand therefore the claim remain unverified and incompetent.
34. For that reason, it was submitted that the claim with regards to the 2nd claimant ought to be struck out for being incompetent.
35. The respondent submitted that the reasons for terminating the services of the claimants were justified. He argued first, that the claimant having been implicated with fraud that costed the respondent Kshs 716, 425, and charged in court, the respondent had a reason to terminate them in the circumstances. Secondly, that the employment contract provides for termination of an employee upon being served with three warning letter in a year, therefore that having been served with more than three warning letters the claimants were bound for termination.
36. On the reliefs sought, it was submitted that having been justified in the termination, the reliefs sought are not warranted, however that even if the court was inclined to give such an award a maximum award of 12 months’ salary compensation is not justified for the reason that the claimants had only worked for the respondent for a period of 6 months. In support of this argument the respondent relied on the case of *Francis Mbugua Boro V Smartchip Dynamic Limited* [2017] eKLR, where the court awarded a claimant who had worked for three years, 4 months’ salary compensation for unfair termination.
37. The respondent argued that the claim for unpaid salary by the claimants, Leave, overtime and acting allowance claim by the 2nd claimant, were never supported with any evidence as such not payable.
38. In conclusion, the respondent urged this court to find in their favour and dismiss the claim with costs.
39. I have examined all evidence and submissions of the parties.
40. The respondents submitted that the claim for the 2nd claimant should be struck out for being sworn after the claim was filed.



41. They aver that this implies that the claim was filed without a verifying affidavit.
42. It is true that this claim was filed on 19/2/2015 and a verifying affidavit sworn or filed on the same date.
43. The claim by the respondents that the verifying affidavit is incompetent for being sworn before the claim was filed is not true as both were filed on the same day. This argument is therefore disregarded.
44. From the pleadings filed herein the claimants were initially suspended from employment vide a letter dated February 20, 2012 for being implicated in fraud.
45. The letter of suspension indicates that they were to be on suspension for 1 week pending conclusion of investigations in the matter and they were to report back to work on February 27, 2012.
46. On 21/2/2012, however a day later the claimants were dismissed from employment summarily with effect from February 18, 2012 on account of fraud.
47. What is evident here is that indeed the claimants were suspected of fraud. There is no investigation report exhibited before court to show that they were indeed found culpable.
48. They were indeed charged in court with offence of theft and were also discharged under section 87 (a) of CPC because no evidence was produced by the complainants.
49. It is also true that the claimants were dismissed summarily without being accorded an opportunity to be heard.
50. Section 41 of the Employment Act 2007 states as follows;

“41. Notification and hearing before termination on grounds of misconduct

- (1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
- (2) Notwithstanding any other provision of this part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make”.

There is no evidence that this was done.

51. Section 45 (2) of the Employment Act 2007 states as follows;

“ 45.

- (1) 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”.

52. My finding is that the respondent dismissed claimant without establishing validity of reason for dismissal and without subjecting the claimants to a disciplinary process.

53. It is therefore true that their dismissal was unfair and unjustified and I declare it so.

54. In terms of remedies, I find for claimants and award them as follows;

1st Claimant Josphat Njeru Njue

1. 1 Month's salary *in lieu* of notice = 11,944/=
 2. Unpaid 19 days salary for February 2012 = 11,670.59/=
 3. 10 months salary as compensation for the unlawful termination
= 10 x 11,944 = 119,440/=
- TOTAL = 143,055/=
- Less statutory deductions

2nd Claimant Alexander Kayuni Nyakinyua

1. 1 month's salary in lieu of notice = 22,254.87/=
 2. Unpaid 19 days salary for February 2012
= 14,284.75/=
 3. 10 months salary as compensation for unfair termination
= 10 x 22,254.87
= 222,545/=
- TOTAL = 259,085/=
- Less statutory deductions
4. The respondent 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 28TH DAY OF JULY, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mutai for claimant – present



Musembi for Respondents – present

Court Assistant - Fred

