



**Manuel v Perimeter Protection Limited (Cause 74 of 2017)  
[2022] KEELRC 1318 (KLR) (25 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1318 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 74 OF 2017  
K OCHARO, J  
JULY 25, 2022**

**BETWEEN**

**OPWORA FUNGU MANUEL ..... CLAIMANT**

**AND**

**PERIMETER PROTECTION LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. Through a Memorandum of Claim dated December 9, 2016, the Claimant instituted a Claim against the Respondent seeking the following reliefs;
  - a. A declaration that the dismissal of the Claimant from employment was unfair and unlawful and that the Claimant is entitled to pay of his terminal dues and compensatory damages
  - b. An order for the Respondent to pay the Claimant his due terminal benefits and compensatory damages totalling to Kshs 622,425.
2. The Memorandum of Claimant was filed together with the Claimant's witness statement and a bundle of documents that she intended to place reliance on as documentary evidence in support of his claim.
3. Upon being served with summons to enter appearance, the Respondent did enter appearance on the 29<sup>th</sup> day of February 2017, and filed a Reply to memorandum of claim dated 13<sup>th</sup> march 2017 together with a list of documents.
4. At the close of pleadings, the matter was heard inter-pates on merit. The Claimant's case was heard on the December 9, 2021 and the Respondent's on the February 21, 2022.



### **The claimant's case.**

5. It was the Claimant's case that he was employed by the Respondent on or about November 18, 1995 as a day guard and was stationed at 197 Lenana Place where he worked diligently without any leave until his dismissal. At the time of his dismissal from employment his salary was Kshs 16,598.
6. The Claimant states that on the 8<sup>th</sup> of April 2016 he assisted a visiting client to secure a parking slot and on the same day at around 4 pm he was summoned together with three of his colleagues on an allegation of soliciting parking fees from the visiting client.
7. The Claimant states that on the 11<sup>th</sup> of April 2016 he was issued with a dismissal letter by the operations manager, this notwithstanding that the boss/director had directed the manager to allow the Claimant continue working. The dismissal was not preceded by due procedure.
8. The Claimant contends that the Respondent's actions to summarily dismiss him was unlawful and against the provisions of the Kenyan constitution, *Employment Act* 2007, the principles of natural justice and the tenets of good labour and best international practices.
9. The Claimant contends that the Respondent's decision to summarily dismiss him was unwarranted and unjustified as he had worked for the Respondent for a period of 10 years 6 months without blemish. He was never accorded a hearing.
10. The Claimant seeks from the Respondent terminal benefits and compensatory damages tabulated below;
  - a) One month's salary in lieu of notice.....Kshs 16,598
  - b) Unpaid/Untaken off days (4/30 x 12 months x 10 years, 6Months x Kshs 16,598) .....Kshs 278,846.40
  - c) Unpaid/Untaken Public Holidays (11/30 x Kshs 16,598 x 10 years 6 months x2 double rate..... Kshs 127,804.60
  - d) Compensatory Damages for Unlawful/Unfair dismissal being Kshs 16,598 x 12 months .....Kshs 199, 176
11. In his evidence under cross examination, the Claimant testified that it was one of his duties to aid visitors park properly. On the material day he assisted a lady to park. He had worked at that station for four years, never at any time did he solicit for money from any visitor.
12. Prior to the day in issue, he had been found guilty of misconduct not related to the subject incident and had warnings.
13. The Claimant denied ever receiving a notice to show cause. However, referred to the latter dated April 8, 2016, he admitted that he received the letter and that it was captioned "gross misconduct." To the letter, he made a response.
14. The Claimant accepted that he used to proceed for leave, and that his pay slips for various months had items indicating that he used to be paid for overtime.
15. The Claimant stated that he was not aware that the lady complained that he had solicited for a bribe from her.



### **Respondent's case.**

16. The Respondent states that upon receipt of a formal complaint from its client that the Claimant had solicited for money from her, it issued a notice to show cause to him on the 8<sup>th</sup> April 2016. In response, the Claimant admitted the allegation and offered an apology.
17. Upon consideration of the complaint and the response rendered, it summarily dismissed the Claimant.
18. The Respondent states that the summary dismissal was lawful and in accordance with section 44 of the *Employment Act* and prays that the claim be dismissed with costs.
19. In his evidence under cross examination, the witness stated that the Claimant was manning the exit barrier alone. He maintained that the Claimant solicited for a bribe from the Respondent's Client, the email from her is testament of this.
20. Questioned on the contents of the email by the client, the witness stated that the email only mentioned a perimeter guard. The email was not specific on the guard involved. The Respondent however did its investigations on the matter, to get to the guard who was involved.
21. In coming to the conclusion that the Claimant was the guard, the Respondent relied on statements from the member of staff who was at the material time manning the CCTV system. The member was not called to testify in court.
22. It was stated that the Claimant left the barrier he was manning and went to where the Client was parking.
23. Referred to the alleged statement by the member of staff, the witness admitted that the same does not mention that the Claimant was seen taking a bribe from the client.
24. In his response to the notice to show cause, the Claimant didn't admit the allegation of bribery, he only stated that he helped direct the client.
25. The witness accepted that the Respondent didn't place before the court any disciplinary hearing minutes to prove the alleged hearing against the Claimant. He went on to state that the hearing was done through witness statements.
26. As regards the Claimant's terminal dues, the witness asserted that though he didn't have any document in court to prove the same, to the best of his knowledge, the Claimant was duly paid.
27. His attention drawn to the last paragraph of the show cause letter, the witness accepted that it expressly warned the Claimant against refusing to acknowledge receipt of the same, terming the content as a standard one.

### **Claimant's submissions.**

28. The Claimant distilled three issues for determination thus;
  - a) Whether there were valid reasons warranting the Claimant's dismissal from employment,
  - b) Was fair procedure applied before disengaging the Claimant from employment?
  - c) Is the Claimant entitled to the prayers sought?
29. On the first issue, Counsel submitted that Sections 43 and 45 of the *Employment Act*, 2007 places a legal burden on the employer to prove reasons for termination of an employee's employment and that the reason[s] are valid, and fair procedure was followed.



30. It was submitted that the Respondent falsely accused the Claimant of soliciting funds from a client and immediately dismissed him.
31. The Claimant submitted that soliciting of funds is a criminal offence and prosecutable as such. Indeed, if the Claimant was guilty of the alleged misconduct, the Respondent would have reported the matter to the police.
32. The Claimant further submits that despite the Respondent relying on the CCTV footage as the basis of dismissing the Claimant, the same was neither tabled before the court nor the CCTV controller called to testify.
33. The Claimant further submits that he was never subjected to any disciplinary hearing to defend himself against the allegations.
34. The Claimant relies on the holding in the case of Anthony Mkala Chivati vs Malindi Water & sewerage Company Ltd (2013).
35. On the 2<sup>nd</sup> issue, the Claimant submitted that Section 41 of the *Employment Act* places upon an employer the obligation to adhere to fair procedure in the process leading to an employee's dismissal from employment or termination of his employment.
36. The Claimant submitted that he was never subjected to disciplinary process and never given a chance to interrogate his accusers as contemplated under Section 41 of the Act.
37. The Claimant relies in the holding in *Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd* (2013) eKLR held that to buttress his submissions on procedural fairness, thus; -

“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. This gives a concomitant statutory right to be informed to 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.”

38. The Claimant further relied on the holding by Lady Justice Mbaru in the case of Kenya Union of commercial food and allied workers Vs Meru North Farmers SACCO Limited where she stated that Section 41 of the *Employment Act* is couched in mandatory terms and non-adherence to the procedure therein renders the outcome of the process unfair.
39. The Claimant submits that he was dismissed without just cause as required under section 43 of the *Employment Act* and the Respondent undermined the due process as mandated under Section 41 of the Act, thus the dismissal was unfair and unlawful and prays that the claim be allowed as prayed.

#### **Respondent's submissions.**

40. The Respondent identified two issues for determination;



- (i) Whether the Claimant's termination was unfair
  - (ii) Whether the Claimant is entitled to the terminal benefits and compensatory damages sought in the memorandum of claim.
41. On the first issue the Respondent's counsel submitted that this is a case of summary dismissal. The Respondent had reasonable and sufficient grounds to terminate the Claimant without notice as provided under section 44 of the *Employment Act*, 2007.
  42. The Claimant was involved in a gross misconduct in the nature of those stipulated under section 44(4)(g) of the *Employment Act*. He was reasonably suspected to have solicited a bribe from the Respondent's client, a criminal offence against or to the substantial detriment of his employer.
  43. The Respondent further submits that the Respondent had been given several warning letters during the pendency of his employment.
  44. The Respondent relies on the holding in the case of *George Okello Munyolo vs Uniliver Kenya Limited* (2019) eKLR to support its submission that it was justified to summarily dismiss the Claimant.
  45. On the second issue the Respondent submitted that the Claimant was summarily dismissed therefore the prayer for one month's salary in lieu of notice cannot be availed to him.
  46. Further the Respondents submit that the Claimant was dully compensated for any work done on an off day or any public holiday.
  47. The Respondent submits that the Claimant was rightfully dismissed therefore the maximum compensation for wrongful dismissal should fail.
  48. The Respondent submitted that the Claimant was fairly terminated and the claim is aimed at self-enrichment and therefore it should fail.

#### **Analysis and Determination.**

49. From the material placed before this court, the following broad issues emerge for determination, thus;
  - [a]. Whether the summary dismissal of the Claimant from employment was fair.
  - [b]. Whether the Claimant is entitled to the reliefs Sought.
  - [c]. Who should bear the costs of this suit.

#### **Whether the summary dismissal was fair.**

50. Whenever a question of fairness in the termination of an employee's employment or a summary dismissal of an employee from employment is placed before a court for determination, for consideration shall be two aspects, procedural and substantive fairness. Procedural fairness looks at the process leading to the termination or dismissal, while substantive fairness speaks to the decision to terminate or dismiss.
51. Absence of the two components or any of them in a termination of an employee's employment or dismissal of an employee from employment legally renders the termination or dismissal unfair pursuant to the provisions of section 45 of the *Employment Act*, 2007.
52. Section 41 of the Act provides for the procedure that an employer contemplating to terminate an employee's contract of employment has to follow. It is now trite law, the procedure is mandatory



and any deviation from it shall render the termination or dismissal unfair, even if there were to be substantial justification for the termination or dismissal.

53. In the past decisions this court has held that procedural fairness entails three components based on the provisions of section 41 of the *Employment Act*. First, the notification/information component- the employer has to inform the employee against whom he/she intends to act, of the intention to and the grounds stirring the intention. Second, the hearing component- the employer has to accord the employee an opportunity to make representations on the grounds. Put in another way, the employee shall be accorded a chance to defend himself against the accusations. Lastly, the Consideration component- the employer has to consider the representations by the employee and or the accompanying person contemplated under the provision, before deciding on the accusations.
54. The Respondent contended that it received a report that the Claimant had solicited for a bribe from one of its clients. Following the report, it issued a show cause letter dated 8<sup>th</sup> April 2016. The Claimant in his evidence in cross examination admitted that he was served with the letter, and that he acknowledged receipt of the same by appending his signature thereon. Too, that he responded to the letter.
55. I have carefully considered the contents of the letter, I am satisfied that it with sufficiency brought out the accusation against the Claimant and the Respondent's intention to act against him in default of showing of a sufficient cause. To this end, I am convinced that the first component of procedural fairness was present in the dismissal of the Claimant.
56. The Claimant contended that he was not heard before the summary dismissal decision was made against him. This was contrary to the stipulations of *the Constitution*, the tenets of natural justice, and the provisions of the *Employment Act*. The Respondent on the other hand through its witness, contended that the Claimant was taken through a disciplinary hearing as envisaged in law. The court has not lost sight of the Respondent's witness's testimony under cross examination that the hearing was in the nature of taking into consideration, the statements that had been presented to the management.
57. The Court has carefully considered the Response to the Claimant's Memorandum of Claim, and the statement by its witness turned evidence in chief, and what comes out is the fact that therein it wasn't stated that the Claimant was heard in the manner mentioned by the witness in his evidence under cross examination or at all.
58. Considering the point at which the Respondent and its witness brought up the alleged manner of hearing, I am convinced that the evidence was an afterthought. I am persuaded that the Claimant was not heard in the manner contemplated under the provisions of section 41 of the *Employment Act* or at all.
59. Having found that the Claimant was not heard before the decision to dismiss him was made, it is not difficult consequently to conclude that the last component[consideration] was absent in the process.
60. In the Upshot, I find that the dismissal was procedurally unfair.
61. I now turn to the substantive justification of the dismissal. Sections 43, 45 and 47[5] speak to substantive fairness in matters termination of an employee's employment or dismissal of an employee from employment. The provisions place various legal burdens on an employer to discharge if the termination/dismissal has to be considered substantively fair.
62. Section 43 requires an employer in a dispute like the instant one to prove the reasons for the termination, otherwise the termination/dismissal shall be deemed unfair by dint of the provisions of section 45. It is imperative to state that however that it is not enough for the employer to prove the



reasons, he/she must go a further mile to demonstrate that the reason[s] was valid and fair, as required by the provisions of section 45[2] of the Act. The reason must be well-grounded and logically correct, therefore.

63. Section 47[5] imposes another obligation on the employer, that of establishing that the termination/dismissal was justified. The reason[s] must be just.
64. At this point it becomes imperative for the court to state that under section 43[2], the reasons for the termination of a contract are matters that the employer at the time of termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employer.
65. This court has considered the fact that there was a complaint from the client that the Claimant had solicited money from her, the Claimant admitted to have interacted with her, he apologized over the incident, he left the barrier and went to assist the client park, client who alleged that money was solicited from her, and come to an inescapable conclusion that any reasonable employer would believe in the circumstances that a bribe was solicited.
66. In the circumstances, I am persuaded that the misconduct of the Claimant was of a gravity sufficient to attract a summary dismissal under section 44 of the Act. This Court has not lost sight of the fact that the Claimant had warnings against him that flowed from misconducts of a similar nature to the one that was the subject matter of the dismissal.
67. The summary dismissal was substantively justified therefore.

#### **Of the Reliefs**

68. The Claimant sought for a one month's salary in lieu of notice, Kshs. 16,598. There is no contention that the determination of the Claimant's employment was through a summary dismissal. This Court having found that the dismissal was substantively justified, it cannot be fair to condemn the Respondent to make the pay under this head.
69. The Claimant further sought for compensation for unpaid/ untaken off-days, Kshs. 278,864.40. In his evidence under cross examination the Claimant admitted that in the course of his employment he would enjoy his off days. The Claim is therefore declined. Even if he were not to make any admission, this Court would still not grant the relief as the claim under the head is expressed to be for a period of 10 years, without caring about the provisions of section 90 of the *Employment Act*, which imposes a limitation of time on matters like the instant one. The Court declines to award.
70. For the reasons hereinabove, the Claimant's claim for Unpaid/untaken public holidays meets a similar fate like the Claim for Unpaid off days. Further, in the past decisions this Court has had to state that the habit by litigants throwing figures to court without specificity, and evidence led thereon, has to come to an end. In a year there are a number of Public Holidays, some which are specifically set out in our Constitution, others that the relevant Cabinet Secretary declares from time to time. In the manner the Claimant's claim is couched, if any award were to be made, clearly the same will be anchored on speculation, and this Court doesn't and cannot have any justification to venture into that space.
71. A compensatory relief for unfair termination was sought. The authority for the Court to make the award flows from the provisions of section 49[1][c] of the *Employment Act*. The authority is exercised depending on the circumstances of each case. The circumstances influence the grant and the extent thereof. I have considered that, liability in this matter attaches against the Respondent only on the procedural aspect of the dismissal, the Claimant contributed to the dismissal through his conduct and that he had prior warnings from his employer-the Respondent, and conclude that the Claimant is only entitled to 3 months gross salary, Kshs. 49, 794.



72. In the upshot, judgement is entered infavour of the Claimant in the following terms;

- [a]. A declaration that the dismissal of the Claimant from employment was procedurally unfair, but substantively justified.
- [b]. Compensation pursuant to the provisions of section 49[1][c] of the [Employment Act](#), Kshs. 49,794.
- [c]. Interest at Court rates on [b] above from the date of this judgment till full payment.
- [d]. Costs of this suit.

**READ, SIGNED AND DELIVERED THIS 25<sup>TH</sup> DAY OF JULY 2022.**

**OCHARO KEBIRA**

**JUDGE**

**In Presence of**

**Waiganjo for the Respondent.**

**Mr. Omamo 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**

