



REPUBLIC OF KENYA



**Ombima v Fresh An Juice Limited (Cause 1811 of 2016)
[2022] KEELRC 1359 (KLR) (21 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1359 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1811 OF 2016**

**K OCHARO, J
JULY 21, 2022**

BETWEEN

ISAIAH OWUOR OMBIMA CLAIMANT

AND

FRESH AN JUICE LIMITED RESPONDENT

JUDGMENT

1. Through a memorandum of claim dated September 5, 2016, the claimant impleaded the respondent herein seeking the reliefs:
 - i. That this honourable court be pleased to find that the termination of the claimant's employment by the Respondent was unjustified, unlawful, unfair, wrongful and illegal.
 - ii. Kenya Shillings Thirteen thousand nine hundred and thirty-two [Kshs. 13,932] for every month not paid from the date of dismissal till determination of this matter.
 - iii. Costs of this suit.
 - iv. Interest on [i], [iii] and [iv] from the date of dismissal until payment in full at Court rates.
 - v. Any other or further relief that this court may deem fit.
2. Upon being served with summons to enter appearance, the respondent did enter appearance on the November 7, 2016, and subsequently filed a statement of defence dated January 19, 2017. In its defence, the Respondent denied the claimant's cause of action and the reliefs sought.
3. The claimant's case was heard on the October 5, 2021, while the respondent's was on the December 7, 2021. At the hearing the parties adopted the witness statements that they had filed as part of their evidence in chief. The claimant sought admission of the documents that were filed contemporaneously with pleadings as his documentary evidence.



The Claimant's case

4. The claimant testified that he was employed by the respondent as a general worker on the November 1, 2016. The employment was under an appointment letter – Exh. 1. His starting salary was Kshs. 12,000 plus a house allowance of Kshs. 1800 for a month.
5. That on the January 23, 2016, he was called to the Human Resource manager's office, whereat the Human Resource manager informed him that his contract of service had been terminated at the instructions of one of the directors of the respondent.
6. The claimant contended that this communication was not with any reasons for the termination. prior to the same, the claimant had neither been served with any show cause letter, and or taken through any disciplinary process.
7. Contrary to the allegations by the Respondent, he did not steal any property belonging to it or at all. At the time of the dismissal, he was earning Kshs. 13,400.
8. The dismissal was unfair and unjustified. He asserts that he is entitled to the reliefs sought as a consequence.
9. In his evidence under cross examination, the Claimant accepted that he knew Lilian Wambui. The lady never gave him any reason for the dismissal. He was in the employment of the Respondent for a period of over 10 [ten] years.
10. The Claimant contended that when goods were brought to the Respondent, but got rejected for one reason or the other, an inventory of them was taken and subsequently they would be disposed of. Before disposal, they would be placed under a specific shade.
11. The Claimant denied ever stealing any of those rejected fruits at any time.
12. The Claimant denied the suggestion by the respondent that he was given a show cause letter but refused to acknowledge receipt thereof.
13. He admitted that the Respondent was making NSSF remittances for him.

The Respondent's case

14. The Respondent presented one, Lilian Wambui Kinyua, its Human Resource manager to testify on its behalf. The witness contended that on several occasions it was reported to the Claimant that the Claimant was stealing apples that had been rejected by the Respondent for being of bad quality.
15. That the Claimant was caught red handed with a carton of apples that had been rejected and which were supposed to be returned to the ware-house as was the procedure. The Claimant having worked for the Respondent for a long period, he was or ought to have been aware of the procedure.
16. The company being of the view that he might have stolen many more boxes, decided to summarily dismiss the Claimant. According to the witness the conduct of the Claimant amounted to gross misconduct.
17. The Claimant refused to pick the salary for that month.
18. In her evidence under cross examination, the witness stated that it was the duty of the Claimant to ferry fruits to the ware house. If the fruits were bad, they would be placed at a specific place for disposal. If they were good, they would be taken to the store.



19. The carton that the Claimant is said to have been found with, was within the Respondent's premises. He did not take it out of the premises.
20. The witness further stated that the Claimant had taken two out of the three cartons that had been delivered on that day to where they were supposed to be stored.
21. The witness stated that the Claimant was just dismissed summarily, without being accorded a hearing. The witness testified that therefore the Claimant was not accorded a hearing.
22. The witness stated that she would not remember the date when the alleged act of theft occurred. She would too not remember the date when the Claimant was dismissed.

The Claimant's submissions

23. In his very brief submissions, counsel for the Claimant submitted that considering the circumstances of this matter, the dismissal of the Claimant was unfair in terms of section 45 [2] of the *Employment Act*. This puts Claimant on the seat of entitlement to the reliefs sought.

The Respondent's submissions

24. The Respondent's counsel identifies three issues for determination in this matter. Whether the Claimant's termination was unjustified, unlawful, unfair, wrongful and illegal, whether the Claimant is entitled to the reliefs sought, and who should bear the costs of the suit.
25. It was submitted that the letter of appointment was clear on when a summary dismissal sanction would be attracted under the Claimant's contract of employment. Clause 11, postulated the circumstances.
26. The Claimant did not place all the three boxes where he was supposed to. He retained one box. It matters not whether it was found within the Respondent's premises or outside. The Claimant's intention was ill. The circumstance would justifiably attract a summary dismissal.
27. On the reliefs, it was submitted that the Claimant is not entitled to the service pay claimed, by dint of the provisions of section 35 of the *Employment Act*. The Claimant as admitted was a member of NSSF. To buttress this point, reliance was placed on the case of *Board of Management – Ng'araria Girls Secondary School vs. KUDHEIHA Workers* [2017] eKLR, where the Court rendered itself, thus;

“This law is intended to ensure employees do not enter into retirement without social security. At the same time, the interest of employers is safeguarded, through the restriction on employees being paid, double Social Security benefits. Service pay is therefore payable under section 35 [5] only to employees who are not covered under the different Social Security mechanisms elaborated under section 35 [6].
28. As regarded payment of the Kshs. 13,931 per a month from the date of dismissal till the determination of this matter, the Respondent sees no justification for this. It amounts to a desire for unjust enrichment.
29. It was submitted that the claim for House allowance is only introduced at the submissions level by the Claimant. It was not pleaded for. It cannot be granted.

Analysis and Determination.

30. The following broad issues emerge for determination in this matter, 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 matter?

Whether the summary dismissal of the Claimant was fair.

- 31. When called upon to consider the fairness of a termination of an employee's employment or dismissal of an employee from employment the Court is charged with the responsibility to consider two aspects, Procedural and Substantive fairness. The two questions of Procedural and Substantive fairness are intertwined and I propose to deal with them together.
- 32. It is now trite law that section 41 of the Employment Act, 2007 provides for a mandatory procedure that any employer contemplating termination of an employee's employment or dismissal of the employee must adhere to. Any non-adherence to the procedure has a consequence of leading the termination or dismissal being deemed unfair in terms of the provisions of section 45 of the Employment act.
- 33. In past decisions, this Court has held that a fair procedure contemplated in the above-mentioned provision entails, Notification/information, Hearing and Consideration. An employer contemplating dismissal of an employee must notify the employee of his/her intention and the grounds upon which the same is contemplated to be anchored on. Then accord the employee a chance to make a representation on the grounds, and lastly consider the representations before making a decision.
- 34. From the material placed before this Court, it is clear that the process leading to the Claimant's dismissal did not follow the procedure contemplated under section 41 of the Employment Act. In fact, according to the Respondent's witness the process did not seem necessary as the Claimant was being summarily dismissed.
- 35. By reason of this premises, I hold that the summary dismissal was procedurally unfair.
- 36. I now turn to substantive fairness. Section 43, 45 and 47 [5] of the Employment Act, 2007 speak to substantive fairness. They place some specific legal obligations on the employer, which obligations he or she must discharge in order to attract a verdict that the termination of an employee was substantively fair, whenever there is a dispute relating to the termination.
- 37. Section 43 of the Employment Act provides that in a matter where termination of an employee's employment is in dispute, the employer shall prove the reason[s] for the termination, and if he/she fails to, the termination shall be deemed unfair in terms of section 45 of the Act.
- 38. Section 45 of the Act is in the tone that it is not enough for an employer to prove the reason for the termination, but as he does so he has to go further and establish that the termination was premised on valid and fair reason[s]. Put in another way the termination must be on genuine reasons.
- 39. The Respondent's counsel submitted that the employment contract between the Claimant and the Respondent provided for the circumstances that would attract the sanction of summary dismissal against the Claimant, one of them, "if an employee commits or on reasonable and sufficient grounds is suspected of having committed an offence against or substantial detriment of the employer or the employer's property." In the Courts view it is not enough for an employer to cite reasonable suspicion, he/she must bring forth circumstances that arose the suspicion. They must be genuine and reasonable reasons.
- 40. In order for the Court to determine in favour of the employer that there were genuine and reasonable circumstances that would stir the suspicion, the Court is charged with the responsibility to consider the material placed before it by the parties in its entirety.



41. From the evidence by the Respondent's witness it does not come out clearly whether the box that the Claimant was alleged to have not placed where it was supposed to, was containing apples that had been rejected or apples that were okay and that were supposed to be taken to the warehouse. I say this because her evidence in chief and that under cross examination are contradictory on this aspect.
42. The Respondent's witness admitted in her evidence under cross examination that the alleged box was not taken outside the premises of the Respondent. The box was not hidden. By reason of this premise, I find considerable difficulty to agree that the reason for the summary dismissal was valid, fair and justified.
43. The Respondent's counsel submitted that in her evidence under cross examination, the Claimant admitted that he kept one box for himself, with due respect this is imaginary of the counsel. There was no such evidence.
44. In conclusion, the summary dismissal was substantively unfair.

Of the reliefs

45. The Claimant having succeeded in her claim for unfair and wrongful termination and considering the substantial deviation of the Respondent from what the law expected it as an employer in matters termination, and the length of time of service by the Claimant to the Respondent, I am satisfied that he is entitled to a compensatory award. The award can only be within the confines of section 49 [1] [c] of the *Employment Act*, not as the Claimant has sought. I hereby award him seven [7] months gross salary, Kshs. 97,524.
46. The Claimant cannot be awarded service pay. He admitted in his evidence in chief that he was a member of NSSF; consequently, by dint of the provisions of section 35 [6] of the Act, he does not qualify for the award.
47. The contract of employment between the Claimant and Respondent was in nature one terminable under section 35 of the Act, by a 28 days' notice. Clause 6 of the letter of appointment provided for a 30 days' notice period. The contractual term being superior than the statutory notice period, in consequence therefore, the contract was terminable by a 30 days' notice. It is clear that the Claimant was not given any notice as contemplated under the contract of employment. I award him notice pay, Kshs. 13,932.
48. In the upshot, Judgment is hereby entered in favour of the Claimant in the following terms;
 - a. That the summary dismissal of the Claimant from employment was unfair.
 - b. Compensation pursuant to the provisions of section 49 [1][c] of the *employment Act*, Kshs. 97,524.
 - c. One month's salary in lieu of notice, Kshs. 13,932.
 - d. Interest at Court rates on [b] & [c] above from the date of this Judgment till full payment.
 - e. Costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 21ST DAY OF JULY, 2022.

OCHARO KEBIRA

JUDGE

Delivered in presence of:



Mr. Mbiri holding brief for Ms. Ngige for the Claimant.

Ms. Abwao for the Respondent.

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 15th March 2020 and subsequent directions of 21st 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

