



**David Mururi Njuka v Ponty Pridd Holdings Limited (Cause  
102 of 2017) [2022] KEELRC 3804 (KLR) (14 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3804 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 102 OF 2017  
K OCHARO, J  
JULY 14, 2022**

**BETWEEN**

**DAVID MURURI NJUKA ..... CLAIMANT**

**AND**

**PONTY PRIDD HOLDING LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. At all material times the Claimant was in the employment of the Respondent as a truck driver. Alleging that he was wrongfully and unfairly summarily dismissed by the Respondent, the Claimant impleaded the Respondent through his Memorandum of Claim seeking for the following reliefs;
  - [a]. A declaration that the Claimant's services were terminated unfairly and unlawfully by the Respondent.
  - [b]. Terminal dues to be tabulated as follows;
    - i. Unpaid salary for August 2016
    - ii. Unpaid holidays
    - iii. Severance pay for four years
    - iv. Overtime
    - v. Weekend Pay
    - vi. Damages for unfair termination [12 months' salary]
    - vii. Certificate of service.



2. Upon being served with summons to enter appearance, the Respondent did enter appearance and filed a Memorandum of Response. In accordance with the procedure Regulations, on the July 13, 2017, the Claimant filed a response to the Respondent's pleading. At the close of pleadings, the matter got destined for hearing on merit.

### **The Claimant's Case**

3. At the hearing, the Claimant moved the court to adopt his witness statement that he filed contemporaneously with the Memorandum of Claim as his evidence in chief and the documents filed under the list of documents dated 14<sup>th</sup> January 2016 as his documentary evidence. This was not met with any opposition from the Respondent, the statement and the documents were so adopted.
4. The Claimant's case is straight forward and not complex to understand. He came into the employment of the Respondent on the 26<sup>th</sup> March 2013, as a truck driver. He worked as such till the August 15, 2016, when he was summarily dismissed. He alleged that the dismissal was unfair as he was not accorded an opportunity to be heard. Procedural fairness was not present in the dismissal.
5. He asserted that the Respondent failed to pay him his terminal dues as hereinabove brought forth.
6. It was his case that for all that time he was in the employment of the Respondent, he never proceeded for leave as the Respondent didn't accord him an opportunity to. He alleged further that he worked during public holidays, however, he was not compensated for the work. He was never allowed any off day in a week. He worked 24 hours daily, and despite working overtime he was never paid for the same.
7. The Claimant stated that contrary to the Respondent's assertion that he absconded duty, he didn't. The Respondent summarily dismissed him and demanded that he returns their property like the keys and the reflectors, a thing that he did. He was never given any termination letter.
8. Cross examined by counsel for the Respondent, the Claimant stated that he was now working for another transport company known as Metro logistics. He got into their employment on the September 9, 2016.
9. He reiterated his evidence that for the entire period he worked for the Respondent, he could work for 24 hours daily. That he would only get a chance to sleep when waiting for the Vehicle to offload .
10. The Claimant denied that he was ever involved in theft of the Respondent's property in the course of his employment. That though he had stated in his witness statement that he was summarily dismissed on the 15<sup>th</sup> August 2016, he was actually dismissed on the September 15, 2016.
11. He stated that on the September 2, 2016, he was called for a meeting by the Respondent but he was not able to turn up for the same as then he was on his way to Kisumu to deliver goods by a motor vehicle belonging to Metro logistics.
12. In his evidence in re-examination, the Claimant testified that he was given a notice to show cause on the 2<sup>nd</sup> September 2016, and as at this time he was in the employment of Metro logistics. This is the only letter he received from the Respondent.

### **The Respondent's Case**

13. The Respondent presented one witness, Ms. Stella Mputhia its Director Human Resource to testify on its behalf in defence against the Claimant's case. The witness urged the Court to adopt her witness statement that was filed herein as her evidence in chief and the Documents that the Respondent lodged herein as the Respondent's exhibits.



14. The witness stated that sometimes in the year 2016, the Respondent received complaints from its customers that Keg beer was reaching them in underweight barrels and sometimes adulterated. Further that sometimes the barrels would be delivered while leaking, and sometimes some barrels would miss in the consignment.
15. This prompted the Respondent to commence covert investigations. The investigations bore fruit. One of the drivers was caught red handed siphoning Keg from one of the trucks. Upon being interrogated, he mentioned the Claimant adversely, as the one who introduced him to the business. Further investigations revealed that 21 drivers of the Respondent the Claimant inclusive, were in the business of consistently siphoning Keg on transit.
16. On the September 2, 2016, the Respondent summoned all the 21 drivers who had been implicated of the vice. The invitation letter was received by the Claimant. On the September 6, 2016, the Respondent's Disciplinary Committee, held a meeting with them. The drivers where given a chance to explain themselves on the accusation. The Claimant didn't turn up for the meeting. Subsequently, the Committee resolved that show cause letters be issued to all the twenty one.
17. By a show cause letter dated September 10, 2016, the Claimant was required to within three days show cause why disciplinary action would not be taken against him. The letter didn't elicit any response from the Claimant. On the 16<sup>th</sup> September 2016, the Committee considered all the responses that had been availed by the drivers.
18. Subsequently, it was discovered that the Claimant had joined the employment of a competitor, therefore deserting his duties with the Respondent. He left the Respondent's employment without clearing with them.
19. The witness asserted that the Claimant was given an opportunity to be heard but refused and or ignored to seize the same. The decision by the Disciplinary Committee was justified in the circumstances of the matter. The Claimant is not entitled to any of those reliefs he has sought.
20. In her evidence under cross examination, the witness stated that when the Respondent was summoned to appear before the Labour Officer, it did so by its Counsel. The witness that she is in charge of employee records and that the Claimant had no outstanding leave days. Any employee proceeding for leave had to fill a leave form. The Respondent didn't tender any of them by the Claimant.
21. The witness stated that in the year 2016, the Respondent company had in its employment about 20 drivers and 10 relieving drivers. Further that the number of days a driver would work depended on the time he took to deliver a cargo and get back to the Respondent's Headquarters. Whenever a driver worked during public holidays, the same could be compensated through leave and off days.
22. The Claimant absconded duty immediately the Respondent commenced the operation regarding the illegal siphoning of the on-transit Keg. The Respondent could not know where he had absconded to. The witness acknowledged however, that she could not state the exact date when the Claimant absconded.
23. The "operation report "mentioned the Claimant and one Joseph adversely, both of whom have sued the Respondent for unlawful termination.
24. It was the witness's testimony that the Respondent's Code of conduct, was specific on the working hours for its drivers.
25. In her evidence in re-examination, the witness asserted that the Respondent involved the police in its investigations. Out of the investigations, some drivers were found culpable and dismissed, others were



given a clean bill of health after successfully showing cause why they wouldn't be dismissed, while others like the Claimant deserted duty.

26. The Respondent's drivers normally enjoyed two off days weekly.

### **The Claimant's Submissions.**

27. The Claimant's Counsel identified a single issue for determination, was the Claimant summarily dismissed and were his services terminated unfairly and unlawfully? It was submitted that the report placed before this court, the operation report does not bring forth the name of the Claimant among the drivers who were either arrested or were people of interest regarding the siphoning of the keg. Further that those persons who mentioned the Claimant as the one who introduced them to the business of siphoning the on-transit Keg were never called to testify, and therefore, the Respondent was relying on hearsay in an attempt to establish its defence herein.
28. The Respondent too failed to produce a report from the police in support of its contention that there were people who were caught red handed in the act of siphoning the keg and who implicated the Claimant.
29. It was argued that the Claimant having denied service of the show cause letters dated 2<sup>nd</sup> September 2016 and 10<sup>th</sup> September 2016, it became duty upon the Respondent to prove service, a thing it did not do. Too, the Respondent's witness alleged that the Respondent conducted several safety meetings, and that there were several warnings issued against the Claimant, she failed to place any documents before the court to establish that.
30. It was further submitted that Section 41 of the Employment Act required the Respondent to notify the Claimant the grounds of misconduct that it intended to base the dismissal on and require him to explain himself on the grounds. Section 43 of the Act placed a duty on the Respondent to prove the reason for the dismissal, however, the Respondent failed to discharge this burden. To buttress his submissions that in order for a termination to be held to have been fair, the employer must demonstrate that the reason[s] for the termination was fair and that fair procedure was adhered to, Counsel cited the decision in Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR.
31. The Respondent's assertion that the Claimant deserted his duties was in bad faith and not proved. The Respondent didn't place before court any evidence to demonstrate what efforts it made to trace the Claimant.
32. Despite the legal obligation placed upon it by the provisions of Section 51 of the Employment Act, the Respondent failed and or neglected to issue the Claimant with a certificate of service.
33. The Claimant's counsel contended that according to the Respondent's drivers code of practice and conduct its drivers were required to drive from 0600 hours [6:00 am] to 2000[8:00 pm]. Meaning that the Claimant used to work for sixteen hours in a day. The Respondent never compensated the Claimant for the hours worked overtime.
34. The Claimant is entitled to the reliefs sought in his pleadings having established his case.

### **The Respondent's Case**

35. On the issue as to whether the Claimant was unlawfully and unfairly dismissed from employment, Counsel for the Respondent submitted that the issue of unfair termination touches on both substance and procedure, and this is exemplified by the provisions of Section 45 of the Employment Act. According to Section 43 of the Act, the reasons for 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 employee. To support this, Counsel cited the holding of the Court of Appeal in *Naima Khamis v Oxford University Press [E.A] Ltd* [2017]eKLR ,thus;

“On the first issue, that is whether the termination was lawful, we wish to take note of the provisions of section 43[1] of the Employment Act, which provides that in any claim arising out of termination of a contract, the employer is required to justify the reason or reasons for the termination, and where the employer fails to do so, the termination is deemed to have been unfair. Also, Section 45[2][c] requires a termination be done according to a fair procedure. From the foregoing, termination of employment may be substantially and or procedurally unfair. A termination is also deemed substantively unfair where the employer fails to give valid reasons to support the termination. On the other hand, procedural unfairness arises where the employer fails to follow the raid down procedure as per the contract, or fails to accord the employee an opportunity to be heard as required by the law.”

36. Respondent that there were reports on tempering of the Respondent’s goods on transit by its own drivers in cohorts with third parties. This is discernable from the Respondent’s documents that were placed before this court. That the Claimant through a letter dated September 2, 2016, was invited to attend a meeting that was slated for the 6<sup>th</sup> September 2016, whereat the Respondent was to address this issue with its drivers but the Claimant did not turn up. Subsequently, the Respondent issued the Claimant with a show cause letter dated September 10, 2016.
37. The Court was invited to take note of the fact that by the September 9, 2016, the Claimant was already an employee of Metro Logistics, and therefore while the Respondent was making every effort to give the Claimant a fair hearing, the Claimant had already sought for employment elsewhere. The Claimant was given an opportunity to be heard, nonetheless, he failed to seize the same.
38. On whether the Claimant is entitled to the reliefs sought, it was submitted that the Claimant having failed to establish that he was unlawfully and unfairly dismissed from employment, he cannot be heard to claim for compensation for unlawful termination. As regards the claim for unpaid dues for month of August, no payment can be availed to the Claimant as he didn’t work for that month. That in any event, he alleged under cross examination that he was dismissed in the month of February 2016. The Claim was unproven therefore.
39. The Claim for overtime worked was just thrown to court. The Claimant had a chance of seeking for production of documents from the Respondent in regard thereto during the pretrial stage but he did not. The claim under this head was not proved.
40. The Claimant has sought for compensation for untaken leave, Kshs. 120,000. This figure was not proved. How he arrived at the same, the Claimant didn’t place any evidence before the court. As regards severance pay, the Respondent’s counsel argued that from the pay slips produced by the Claimant it is clear that he was a member of a scheme, and therefore he is not entitled to the pay he has sought.
41. As regards the Claimant’s claim for compensation for overtime, Kshs. 2, 438,352, it was contended that the Claimant didn’t provide any evidence as to the extra hours worked, the number and days. The Claimant alleged that for all the three yeas he worked, he would work 24 hours. This allegation is incapable of believe. The Respondent’s evidence that it had shunting drivers, and that the drivers had two days off in a week was not challenged. Too, that during offloading times the Claimant had a number of hours to rest.



42. The Driver's code, provided that a driver could not drive the Respondent's vehicle beyond 8:00 pm. The policy further stipulated that the drivers were supposed to take regular and adequate rest breaks, at least 8 hours. Therefore, the Claimant's claim that he worked overtime is not founded.

### **Analysis and Determination.**

43. From the pleadings herein by the parties, their respective evidence and the submissions by their counsel, the following issues emerge for determination, thus;
- [i]. How did the Claimant and the Respondent separate?
  - [ii]. Was the Claimant summarily dismissed and if so was the termination fair?
  - [iii] Is the Claimant entitled to the reliefs sought or any of them?

### **How did the Claimant and the Respondent separate?**

44. It was the Claimant's case that the Respondent summarily dismissed him from employment on the 15<sup>th</sup> August 2016, while the latter maintained that at around this time the Claimant deserted duty when it had started an operation to apprehend and bring to book those who were engaged in siphoning Products on transit. In a situation like is in this matter where parties take diametrically opposite positions on an issue, the court has to decide whose evidence it has to believe on that issue. Normally, the party's pleadings, demeanor and the evidence more especially under cross examination come to the aid of the court. Keeping in view the burden placed upon an employee under Section 47[5] of the Act, thus;

“For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

This Court sought to investigate whether from the pleadings, the witness statement turned evidence in chief, and the oral testimony, of the Claimant there was sufficient material to attract a conclusion that the burden was discharged. The court notes that the Claimant in his evidence, just like he did in his pleadings made a bald assertion that the Respondent summarily dismissed him. I am of the view that the provision requires of an employee more than just stating “the Respondent summarily dismissed me or that the Respondent unfairly terminated my employment.”

45. Since the Claimant is required to establish a prima facie case that an unfair termination or wrongful dismissal occurred to enable the evidential burden shift to the employer to demonstrate that the termination or dismissal was justified, it behooves the employee to place material before the court with some clear details from which it can be discerned how the termination or dismissal occurred, and why it should be concluded that the same was unfair and wrongful. I am unable to conclude that the Claimant did this. The Claimant didn't discharge the burden under the stated provision therefore. Put in another way, I am not persuaded that the Separation occurred in the manner expressed by the Claimant.
46. The Respondent on the other hand asserted that the Claimant deserted duty immediately he realized that it had started conducting an “operation” to bring to book those drivers who were engaged in the illicit business of siphoning on transit Keg and selling the same to third parties. I have carefully considered the various reports that the Respondent placed before this Court on the operation. It has caught this Court's eye that the 1<sup>st</sup> Report indicated that those who had been found red handed committing the act were to appear before court on Monday 15<sup>th</sup> August, 2016. It was the Claimant's



case that he was dismissed on this date, August 15, 2015. I have agonized over whether indeed the Respondent did dismiss the Claimant on the date when those who had been apprehended were to be taken to court, or whether it was a coincidence that the two events happened at the same time, I am not convinced that there was such a coincidence, keeping in view, the fact that as at this time the operation was on. The process that the Respondent undertook thereafter to address the issue with its drivers militates against an assertion that the Claimant was dismissed before the operation/ investigations were over. The Court was impressed with the evidence of the Respondent's witness. It was candid and not shaken in cross examination.

47. It is by reason of this premises that this Court concludes that the version by the Respondent as regards how the Claimant left the Respondent's employment is the correct one. The Claimant deserted duty.

**Was the Claimant summarily dismissed and if so was the Dismissal Fair.**

48. It is trite law that whenever a court is called upon to decide on whether a termination of an employee's employment was fair or a dismissal of an employee was wrongful, the court has to deliver itself on two aspects, procedural fairness and substantive justification/fairness. Procedural fairness relates to the procedure leading to the termination or dismissal, while substantive fairness to the decision to terminate or summarily dismiss.
49. The Respondent contended that its disciplinary committee recommended summary dismissal against the Claimant on the 16<sup>th</sup> of September 2016. The Claimant equally stated that he was summarily dismissed. The only point of divergence was the date when it occurred. Having found as I have hereinabove that the Respondent's version is the correct version, the Court holds that the Claimant was summarily dismissed on the 16<sup>th</sup> September 2016.
50. Having held as I have hereinabove, I turn to consider the substantive justification of the summary dismissal. Section 43 of the Employment Act provides that whenever there is a dispute regarding termination of an employee's the employer is required to prove the reason[s] for the termination. However, it is not enough for the employer to prove the reason[s], he/she has to go a further mile to prove that the reason[s] was valid and fair. This what section 45[2] of the Act dictates.
51. Section 44[4] of the Employment Act provides for those acts by an employee that may amount to gross misconduct so as to attract a sanction of summary dismissal. Relevant to this matter are the acts described under Section 44[4][a] and [g], thus;

“[a]. Without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work.

.....  
[g]. An employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial prejudice of the employer's property.”

52. Section 44[4][a] speaks to desertion of duty, having found as I have, that the Respondent deserted duty, I find that the Respondent had a valid and fair reason to make the decision to Summarily Dismiss The Claimant. The Court has not lost sight of the Claimant's admission in his evidence under cross examination that as at the 9<sup>th</sup> September 2016, he had gotten into the employment of Metro logistics, a company that the Respondent's witness stated was the Respondent's competitor. It is clear that he so did before the Respondent would complete the disciplinary process for those it deemed culpable of the illicit business. This fortifies the Respondent's contention that the Claimant did desert duty.



53. The Respondent contended that the Claimant was mentioned by a colleague who upon being apprehended, informed the investigators that it is the Claimant who introduced him to the business. In the circumstances of the whole matter, the complaints from the Respondent's customers, the operations by the Respondent's agents to root out the vice, the arrest of the Respondent's drivers and third parties in the act of siphoning the products, the fact that the colleague mentioned the Claimant were factors enough to attract an employer to reasonably suspect that the Claimant had committed a criminal offence against or to the substantial prejudice of its property.
54. By reason of these premises, the Court comes to an inescapable conclusion that the Respondent had a substantive justification to summarily dismiss the Claimant from employment.
55. I now turn to the procedural fairness aspect. The Respondent asserted that through its letter dated 2<sup>nd</sup> September 2016, it invited its drivers to a meeting to make representations regarding the complaints by customers that the Keg on transit was being tempered with before it reached them. In his testimony under cross examination he acknowledged that he received the invitation but didn't attend because he was on the road to Kisumu, ferrying goods by Metro Logistic's truck. However, the Claimant didn't assert that he notified the Respondent of his predicament. This leaves an impression of him as an employee who had made up his mind not to have anything to do with his employer.
56. From the minutes of the 7<sup>th</sup> September 2016, the court notes that the Committee decided that all the drivers involved be issued with show cause letters as to why disciplinary action should not be taken against them. The Respondent contended that following this decision, the Respondent issued show cause letters to them, the Claimant inclusive. The Claimant contended that he was never served with the alleged show cause letter. The Court is of the view that the Respondent was under duty to demonstrate how and when, the show cause letter was served on the Claimant. Keenly looking at the Respondent's evidence, one cannot see that there was an effort geared towards demonstrating this.
57. Section 41 of the *Employment Act*, which is mandatory in nature, required the Respondent to inform the Claimant that it intended to summarily dismiss him, and the grounds that the action was to be anchored on. Then accord the him an opportunity to make representations on the grounds. Having stated that the Respondent didn't prove that it notified the Claimant of its intention and the grounds stirring the same, through the alleged show cause letter, and therefore too that he was not invited to attend the disciplinary hearing, it is not difficult to conclude that the Respondent didn't prove that the summary dismissal was procedurally fair.

#### **Whether the Claimant is Entitled to the Reliefs Sought or any of them.**

58. The Claimant sought for Unpaid salary for the month of August 2016. The Court has hereinabove found that he deserted duty on or about the 15<sup>th</sup> August 2016, the day when he alleged to have been dismissed summarily. It follows therefore that in that month he worked for 15 days. The Respondent did not at all place any evidence before this court that he was paid for the 15 days worked in the month of August 2016. The Claimant is consequently awarded Kshs. 15,125, under this head.
60. The Claimant sought for compensation for holidays worked but not paid for, Kshs. 27,135.00. It is common knowledge that we have various holidays in a year, others which are sometimes declared by the relevant Cabinet Secretary, outside of those that are specifically put forth in the *Constitution* of Kenya, 2010. I have considerable challenges in understanding this Claim. It is one that has just been thrown to court. The Claimant's pleadings are not specific as regards the specific public holidays which he worked on and did not get paid for. His evidence too was wanting in specificity in this regard. In order for him to have come up with the specific figures he has sought under this head, one would safely



conclude that he had some specific public holidays in mind. The Claim under this head was not proved, I grant nothing under it.

61. The claims for leave allowance, overtime, and weekend pay, were Claims that the Claimant specifically pleaded as special damages, they needed to be specifically proved. He didn't prove the same. I am of the view that the Claimant needed to do more in terms of adducing evidence in support of the claims other than making those bold but unsupported assertions that "I worked overtime or during public holidays without pay." If the Claimant felt that he was entitled to the compensation under these heads but would not have documentary evidence to tender before the Court as they are in the possession of the Respondent, nothing could have been easier for him than to engage the discovery processes. In sum the Claimant did not prove entitlement to these reliefs, I decline to award the same.
62. The Claimant sought for a compensatory relief under the provisions of section 49[1][c] of the Employment Act, to the maximum extent contemplated thereunder. A grant of the relief, and the extent thereof is discretionary, dependent on the peculiar circumstances of each case. I have carefully considered the fact that the summary dismissal was substantively justified, that the Claimant deserted duty and got employment elsewhere before the Respondent would complete the disciplinary process, that the Claimant contributed to the dismissal, and that the only default by the Respondent was that it didn't prove that it served the Claimant with the notification, therefore making this Court to conclude that the summary dismissal was unfair, and get impelled to conclude that the circumstances militate against an award of any sum as compensation.
63. Under Section 51 of the Employment Act, 2007, an employee whose employment has been terminated, or who has been dismissed from employment is entitled to a certificate of service without any condition. The Respondent didn't prove that the certificate was issued to the Claimant. Consequently, it is hereby ordered that it issues the certificate within 30 days of this judgement.
64. In the upshot, the Claimant's suit herein substantially fails and only succeeds in the following terms;
  - [a]. Unpaid salary for half month August 2016, Kshs. 15,125.
  - [b]. That the Respondent do issue to the Claimant a certificate of service within 21 days.
  - [c]. Interest on [a] above with effect August 30, 2016, at court rates, till full payment.
  - [d]. Costs of the suit proportionate to the success of the Claimant in this Claim.

**READ, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 14<sup>TH</sup> DAY OF JULY 2022.**

**OCHARO KEBIRA**

**JUDGE**

In Presence of

Mr. Kofuna for the Claimant.

No appearance 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 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**

