



**Karichu v Tea Holdings Ltd (Cause 1894 of 2017)
[2022] KEELRC 1277 (KLR) (8 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1277 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1894 OF 2017**

SC RUTTO, J

JULY 8, 2022

BETWEEN

JOSEPH MWANIKI KARICHU CLAIMANT

AND

TEA HOLDINGS LTD RESPONDENT

JUDGMENT

1. The claimant instituted the instant suit vide a Memorandum of Claim dated 22nd September, 2017, through which he avers that he was employed on or about 1st May, 2006, by the respondent as an Estate Manager. He avers that he took on his job and worked for the respondent with great dedication until 1st March, 2016 when he was summarily dismissed. He states that the summary dismissal was wrongful, unlawful and illegal hence claims against the respondent, the sum of Kshs 630,000/= being salary in lieu of notice, service pay, compensatory damages and costs of the demand letter.
2. The respondent in opposing the claim, avers that the reasons for the claimant's dismissal were factual, truthful and valid and that he was dismissed for gross misconduct hence was not entitled to a warning letter or notice prior to. The respondent has asked the Court to dismiss the claim with costs.
3. The matter proceeded for hearing on 10th March, 2022 and each side presented oral evidence, through one witness respectively.

Claimant's case

4. At the start of the hearing, the claimant sought to rely on his witness statement together with the bundle of documents which were filed with the claim. He asked the Court to adopt the same as part of his evidence in chief. The documents were also produced as exhibits before court.
5. In his testimony before Court, the claimant denied the allegations contained in his letter of summary dismissal. In this regard, he denied being negligent, incompetent and insubordinate. He stated that the



respondent wanted to remove him from employment by hook or crook, in preference of a person of his own choice. He further testified that he was not served with any warning letter prior to his dismissal.

6. It was his further testimony that he was never taken through a disciplinary hearing and that he did not appeal his dismissal as he did not expect a different outcome. That further, the respondent frustrated the conciliatory process before the labour office hence his decision to file the instant suit. In closing his testimony in chief, the claimant asked the court to allow his claim as prayed.

Respondent's case

7. On its part, the respondent called Mr. John Macharia, its Manager, who testified as RW1.
8. At the outset, he sought to rely on his witness statement, which he asked the Court to adopt as part of his evidence in chief.
9. The respondent's case as presented by RW1 is that the reasons for the claimant's dismissal were genuine. That as an overall manager, the claimant failed to effectively supervise several company projects resulting in decline in tea production. That the claimant further failed to implement various guidelines to meet conformity standards for farm certification. It was his further testimony that the claimant absented himself from work without lawful excuse as he spent a lot of working hours in his residence within the estate, sleeping and watching television, instead of carrying out his duties. It was his further testimony that the claimant went to a competitor, Ngorongo Tea factory in January, 2016 in the company of another employee by the name Mr. Mburu, where they exposed insights of the respondent's business to the General Manager of the said competitor company.
10. RW1 further testified that the claimant attempted to sabotage the farm's operations by trying to incite workers to strike so as to discredit the other managers. That he also failed to appeal his dismissal hence he accepted the reasons stated in the letter of dismissal. That further, he attended the conciliatory meetings at the labour office twice and that indeed, it is the claimant who failed to attend the said conciliatory meetings.

Submissions

11. It was submitted on behalf of the claimant that his dismissal was unprocedural, unfair, unlawful and wrongful. That the reasons for his dismissal were not valid, concocted, made up and unjust. In further submission, the claimant stated that the respondent did not give him an opportunity to defend himself in any disciplinary hearing. That further, the respondent failed to substantiate the specific dates and instances where all the alleged grounds of misconduct are said to have taken place.
12. That further, the testimony of RW1 was hearsay as he testified of what he had been told by the respondent's managing director. It was further submitted that the respondent had failed to discharge its burden of proof under Section 47(5) of the *Employment Act*. In support of his submissions, the claimant placed reliance on the provisions of sections, 41 and 45 of the *Employment Act*, and on the authorities of *David Gichana Omuya vs Mombasa Maize Millers Ltd* (2014) eKLR and *Anthony Mkala Chitavi vs Malindi Water & Sewerage Company Ltd* (2013) eKLR.
13. The respondent submitted that the claimant was informed of the reasons for his dismissal. That further, the claimant failed to prove that his dismissal was unfair and that on its part, it had discharged its burden by justifying the grounds for the dismissal. The respondent placed reliance on the case of *Consolata Kemunto Aminga vs Milimani High School* (2019) eKLR. The respondent further submitted that the claimant was not entitled to damages as he had not proved that his dismissal was wrongful.



Analysis and determination

14. Upon considering the issues arising from the pleadings, the evidentiary material placed before me and the submissions on record, the issues falling for the Court's determination can be distilled as follows: -
- a) Whether the claimant's termination was unfair and unlawful?
 - b) Is the claimant entitled to the reliefs sought?

Whether the claimant's termination was unfair and unlawful?

15. The claimant has alleged that his termination was unprocedural, unfair, unlawful, wrongful and lacking in justification. On the other hand, the respondent states that the claimant's dismissal was valid and fair.
16. In order to prove fair termination under the *Employment Act* (Act), an employer must prove that there was substantive justification to warrant the termination of an employee and that the same was undertaken procedurally. As was determined in the case of *Walter Ogal Anuro vs Teachers Service Commission* [2013] eKLR, for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness. Subsequently, I will proceed to apply the two tests to the instant case.

i. Substantive justification

17. The Act addresses substantive justification under Section 43(1), which requires an employer to prove reasons for termination, and in absence thereof, such termination is deemed to be unfair. Further, section 45 (2) of the Act provides that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and is related to the employee's conduct, capacity or compatibility; or based on the operational requirements of the employer. The burden of proof in this instance, lies with the employer.
18. This legal position has been reaffirmed through case law over and over hence I will not belabour the issue. For instance, the Court of Appeal in the case of *Chairman Board of Directors (National Water Conservation and Pipeline Corporation) vs Meshack M. Saboke & 2 others*, Nairobi Civil Appeal No. 241 of 2015, held thus: -
- “In light of the above provision, 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 are themselves not fair. Section 43 of the *Employment Act* deals with proof of reasons for termination placing the burden on the employer to prove the reasons for termination failure to which termination is deemed unfair within the meaning of section 45.”
19. The reasons for which the claimant was dismissed from employment can be discerned from his letter of summary dismissal which is couched as follows:-

“This is to inform you that you have been summarily dismissed from employment for the following reasons. That contrary to the *Employment Act* of the Laws of Kenya CAP 226 section 17(c) and (g) on diverse days while employed in tea holdings Ltd, you committed the following:

Willful neglect and or failure to perform your duties on many occasions.



Incompetence, you have on numerous occasions shown the lack of ability, negligence or the lack of willingness to follow instructions from myself and also from those placed in authority over you.

You have involved yourself in activities that are detrimental to your employer, which include misrepresentation of facts to your employer and also about your employer to third parties, restoring (sic) in damage and or material loss to your employer's property and operations.

You have on numerous occasions absented yourself from your place of duty, without permission or lawful excuse.

The above matters and others not listed justify the summary dismissal of an employee for lawful cause, as stipulated under the Labour Laws of Kenya CAP 226.

You are therefore summarily dismissed and upon being paid for the days worked, are hereby requested to vacate the premises with immediate effect.”

20. What manifests from the reproduced letter of dismissal, is that the claimant was dismissed on account of negligence of duty, incompetence, failure to follow instructions, absenteeism and involving himself in activities detrimental to his employer.
21. In order to prove substantive justification, an employer is required to prove that the reason leading to an employee's termination was fair and valid. In this regard, it is crucial that an employer substantiates the allegations against an employee through evidence, so as to justify fairness and validity of the reasons which resulted in the termination.
22. In the instant case, the allegations against the claimant were very vague and did not contain any specific particulars. For instance, the dates on which the claimant was alleged to have absented himself from duty were not stated in the letter of dismissal. The letter merely states “on numerous occasions”. Further, better particulars of the allegations of incompetence and negligence were not provided. The allegations were accompanied by blanket statements.
23. Coupled with the foregoing, the respondent did not produce evidence in whatever form or manner, to back up its allegations against the claimant.
24. In his testimony before Court, RW1 stated that the claimant had incited the respondent's workers to go on strike and that some of the workers wrote letters to that effect. Nonetheless, these letters were not produced in Court. Further, none of the workers were called as witnesses before Court by the respondent, to corroborate the testimony of RW1.
25. In addition, RW1 testified that the respondent received reports of the claimant's absenteeism from its security personnel. Be that as it may, none of the said security personnel were called to corroborate the claims of absenteeism against the claimant.
26. In a nut shell, it was not enough for the respondent to spell out the allegations constituting the reasons for the claimant's dismissal. As a matter of fact, it was incumbent upon the respondent to provide further evidence to support the allegations against the claimant and by failing to do so, the accusations against him remained unsubstantiated hence cannot be determined to be fair and valid.
27. On this score, I will echo the findings of the Court of Appeal in the case of *[Ol Pejeta Ranching Limited vs David Wanjau Muhoro](#)* [2017] eKLR, where it was held that the allegations against the respondent were too general hence termed his termination as unfair.



28. Against this background, I find that the respondent did not satisfy the requirements of section 43(1) read together with section 45(2) (c) of the Act and as such, it has not proved that there was substantive justification to warrant termination of the claimant.

ii. Procedural fairness

29. Section 45(2) (c) of the Act provides that for termination to be fair, it ought to be in line with fair procedure. In this respect, section 41(1) of the Act requires an employer to accord an employee a hearing prior to termination. This procedure entails notifying the employee of the allegations he or she is required to respond to and thereafter granting him or her the opportunity to make representations in response to the said allegations.

30. The respondent in this case did not lead any evidence to prove that it accorded the claimant an opportunity to respond to the allegations against him. In as much as RW1 testified that the claimant was called severally by the respondent's managing director and given a dressing down, there was no documentary evidence to that effect.

31. It is also instructive to note that the provisions of section 41 of the Act are mandatory. Such was the determination by the Court of Appeal in the case of *Postal Corporation of Kenya vs Andrew K. Tanui* [2019] eKLR.

32. By all indications, the respondent did not afford the claimant an opportunity to be heard and to this end, it went against the provisions of section 41 hence his dismissal was not lawful.

33. The net effect of the foregoing, is that there was no substantive justification to warrant the claimant's termination and further, there is no evidence that he was accorded procedural fairness. This fell short of the requirements stipulated under section 45 of the Act hence his termination was unfair and unlawful and I so find and hold.

Reliefs

34. As I have found that the claimant's termination was unfair, I will award him seven (7) month's salary as compensatory damages. This award has taken into account the length of the employment relationship and the fact that the respondent did not substantiate the allegations against the claimant or accord him a fair hearing.

35. The claimant is also awarded one month's salary in lieu of notice as his dismissal was unfair and unlawful. It is worth mentioning that the claimant's claim for two months salary in lieu of notice has not been justified. In this regard, the claimant did not exhibit an employment contract to prove that the two months' notice claim was contractual.

36. The claim for the costs of the demand letter is declined as the same was not proved despite being a specific claim.

Orders

37. In the final analysis, I enter judgment in favour of the claimant against the respondent and he is awarded: -

- a. Compensatory damages equivalent to seven (7) months' gross salary being Kshs 203,000.00.
- b. One (1) month's salary in lieu of notice, being the sum of Kshs 29,000.00.
- c. The total award is Kshs 232,000.00.



- d. Interest on the amount in (c) at Court rates from the date of Judgment until payment in full.
- e. The respondent shall also bear the costs of this claim.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF JULY, 2022.

STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Wachira

For the Respondent Ms. Kilonzi

Court Assistant Barille Sora

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 had 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 *Civil 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.

STELLA RUTTO

JUDGE

