



**Ouko v Equator Bottlers Limited (Cause 17 of 2020)  
[2022] KEELRC 1308 (KLR) (7 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1308 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE 17 OF 2020**

**CN BAARI, J  
JULY 7, 2022**

**BETWEEN**

**TOM OKOTH OUKO ..... CLAIMANT**

**AND**

**EQUATOR BOTTLERS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. Before Court is the Claimant's Memorandum of Claim dated February 17, 2020, and filed on similar date. The Claimant seeks a declaration that his termination from the service of the Respondent is unfair, and further prays for payment of 12 Months' salary for unfair termination and one-month salary in lieu of termination notice.
2. The Respondent filed a response to the Claimant's claim on March 6, 2020, and the Claimant filed a reply to the statement of response on June 15, 2020.
3. The suit was first heard on December 8, 2021, when the Claimant testified in support of his case. He adopted his statement and produced the bundle of documents filed in support of his case.
4. The Respondent's case was heard on January 31, 2022, with the Respondent presenting her Human Resources Business Partner one, Florence Mukiria to testify on her behalf. Ms Mukiria adopted her statement of January 28, 2022, and produced a bundle of documents dated February 16, 2021, in support of the Respondent's case.
5. Both parties filed submissions in the matter.

**The Claimant's Case**

6. The Claimant's case is that he was first employed by the Respondent on a contractual basis, and thereafter absorbed into the Respondent's permanent service as a team Leader where he served until January 8, 2020.



7. The Claimant avers that on December 3, 2019, he received a notice to show cause requiring that he explains why he failed to carry out his duties as a team leader as per the laid down procedures. The Claimant further avers that he responded to the show cause letter on the same date.
8. The Claimant states that he was subsequently given a disciplinary notification form inviting him to be present on December 13, 2019, to be heard on the charges levelled against him spelt out as failure to perform his duties on November 5 and 30, 2019.
9. The Claimant states that the disciplinary process did not conform to the rules of Natural Justice owing to the fact that it did not address the elements of negligence which he was accused of. The Claimant further states that he reported to work on November 5, 2019, for night shift and signed in at 18:20hrs and that the truck subject of the disciplinary proceedings arrived in the plant at 16:16 hrs, when the Claimant had not reported to his workstation.
10. The Claimant avers that he was the Warehouse Team Leader in charge of warehouse operations, and had not been assigned any responsibility in the department of warehouse stocks where the alleged negligence took place on November 6, 2019, and thus the issues addressed in the disciplinary meeting did not fall within his job description.
11. The Claimant avers that in his time in the service of the Respondent, he did not face any disciplinary action for misconduct nor did he have performance related issues, and as such, the Respondent ought to have engaged him in a Performance Improvement Plan(PIP) before terminating his employment on grounds of poor performance.
12. The Claimant states that his termination was unlawful, unjustified and in brazen breach of Article 41(1) of the Constitution of Kenya 2010 and Section 45(2)(a)(b)(ii) of the Employment Act 2007, for not having been accorded an opportunity to make amends as required by the law prior to terminating his employment on grounds of poor performance.
13. The Claimant avers that at the time of his wrongful termination from employment, his consolidated basic salary was Kshs 131,000 as evidenced by his letter of appointment.
14. On cross-examination, the Claimant told the court that his duties entailed maintaining accurate daily, weekly, and monthly records of items stored in the Respondent's warehouse. He further confirmed that there were products (plastic bottles) that fell on November 30, 2019, during his shift.
15. The Claimant indicated during cross-examination that he escalated the incident to his superiors through an email he wrote on December 2, 2019, but which email he could not produce in evidence as he could not access his office emails.
16. The Claimant confirmed on cross-exam that he attended a disciplinary hearing and further confirmed minutes produced by the Respondent as the minutes of the disciplinary hearing.
17. The Claimant further confirmed that his working shift was for 12 hours but that he did not work for the 12 hours on the day of the incident.
18. The Claimant again confirmed on cross-examination that though he was informed of his right of appeal, he did not appeal and neither did he call witnesses during the disciplinary hearing.
19. The Claimant states that his termination letter indicated the reason for termination to be negligence. He further told court that he was not on duty when the truck left before being fully off-loaded and that he was not on duty when the truck left.



## The Respondent's Case

20. The Respondent's case is that the Claimant was employed as Warehouse In-charge on May 24, 2011 on a basic salary of Kshs 30,000 and a House Allowance of Kshs 5,000. The Respondent further avers that on December 13, 2017, the Claimant's basic salary was increased by 4% and his variable pay by 2% so as to motivate him to offer excellent performance, and an unwavering commitment to his responsibilities.
21. It is the Respondent's further case that on March 15, 2019, the Claimant was appointed to the position of Warehouse team leader on a monthly basic salary of Kshs 131,000.
22. The Respondent states that the Claimant was asked to explain his absence from work during his shift through an email sent to him by the Warehouse Manager on November 6, 2019. The Respondent further states that the Claimant responded to email vide his letter dated November 6, 2019.
23. The Respondent's further states that the Claimant was again issued two show cause letters dated December 2, 2019 and December 3, 2019, which required that he explains why disciplinary action should not be taken against him for failing to ascertain the complete offloading of glass from a hired truck as per the Standards Procedure and failing to escalate the issue of the damaged iron sheet perimeter wall for timely action.
24. It is the Respondent's case that the Claimant responded to the show cause letter vide his letter of December 2, 2019. The Respondent further states that the Claimant was invited for a disciplinary hearing of the charges against him scheduled for December 13, 2019, and further informed of his right to be accompanied by a representative of his choice.
25. It is the Respondent's case that following the disciplinary hearing, the Claimant was found to have been negligent in his role as Team Leader, and his employment was terminated on January 8, 2020, on that account. The Respondent further states that the Claimant was informed of his right of appeal against the decision within 14 days.
26. The Respondent avers that the Claimant's termination was fair and lawful as he was given a chance to be heard and defend himself prior to termination.
27. The Respondent states that the Claimant's is not entitled to compensation for unfair termination for reason that his employment was terminated for negligence of duty, and which is a ground for termination as per the relevant Company procedures and policies and the *employment act*, 2007.
28. It is the Respondent's case that the entire cause is incompetent, misconceived and bad in law and should be dismissed forthwith with costs.

## The Claimant's Submissions

29. It is submitted for the Claimant that courts have since settled that before an employee is terminated for poor performance, he/she should be accorded an opportunity to improve through being subjected to a Performance Improvement Plan (PIP). The Claimant had reliance in the holding in *Alex Wainaina Mbugua v Kenya Airways Limited* for the holding that where an employee is found to be of poor performance, the duty is upon the employer to demonstrate that before terminating the employee, all efforts were put in place to support the employee.
30. It is further submitted for the Claimant that he was not accorded a fair hearing for reason that the persons mentioned in the suit were not called to give their testimony of what transpired on the day of the incidents subject of the termination.



31. The Claimant further submitted that he is entitled to pay in lieu of termination notice based on the fact that he was terminated and that the termination took effect immediately without having been notified of the termination.
32. The Claimant submits that his termination was unfair and should be compensated in accordance with Section 49 of the *Employment Act*, 2007.

### **The Respondent's Submissions**

33. The Respondent submits that the grounds for the Claimant's termination are valid and fair. They sought to rely in the holding in the case of *Pius Machafu Isindu v Lavington Security Limited* [2017] eKLR to buttress this position.
34. It is submitted for the Respondent that the Claimant was taken through fair disciplinary procedure as required under the law and that he was informed both of his right to representation and appeal. They had reliance in *Peter Gitabi v Kenya Nut Company Ltd* (2016) eKLR.
35. The Respondent finally submits that the Claimant was fairly terminated and is thus not entitled to the reliefs sought.

### **Analysis and Determination**

36. I have considered the rival pleadings, the witnesses' testimonies and the Parties' written submissions. The issues for determination are:
  - i. Whether the Claimant was unfairly terminated.
  - ii. Whether the Claimant is entitled to the reliefs sought

### **Whether the Claimant was unfairly terminated.**

37. The Claimant's case is that he was unfairly terminated on the ground that the disciplinary process did not meet the requirements of both the *Constitution* and the *Employment Act*, 2007.
38. Termination is unfair if the Employer's termination process falls short of the requirements of Sections 41, 43, 45 and 47(5) of the *Employment Act*.
39. The Respondent's letter terminating the Claimant's employment is dated January 8, 2020. The letter indicates the reason attached to the termination as negligence of duty. The specifics of the negligence as explained in the show cause letter, is letting a truck leave the Respondent's premises without being fully off-loaded, and failure to report the falling of pellets stored in the Respondent's warehouse.
40. The question for this court is whether the Respondent adhered to the law when terminating the Claimant. Section 41 of the *Employment Act* describes the ideal procedure for an Employer considering termination of an Employee, and which procedure is applicable across board except where an employer has her own internal procedure that accords with the Employment laws. In the case of *Mary Mutanu Mwendwa v Ayuda* [2013] eKLR the Court held that the *Employment Act* has made it mandatory by virtue of section 41 for an employer to notify and hear any representations an employee may wish to make whenever termination is contemplated by the employer and is entitled to have a representative present.



41. Section 41 of the *Employment Act*, states:
- “(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.”
42. The Claimant admitted receiving show cause letters that spelt out the charges against him. He further confirmed having responded to the show cause, and appearing before a disciplinary committee of the Respondent. He further told the court that the invitation for the disciplinary hearing, informed him of his right to representation by a person of his choice, including a fellow employee.
43. The Respondent in their response further confirmed that the Claimant was given a hearing and further produced minutes of the disciplinary meeting as evidence before court. In *Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited* [2013] eKLR the court held that the right to be accorded a hearing and be accompanied by a fellow employee or union representative during the hearing is a sacrosanct right.
44. There is no doubt in the mind of the court that the Claimant was accorded fair process as envisaged under Section 41 of the *Employment Act*, 2007. To this end, I find the Claimant’s termination procedurally fair.
45. The second issue to fully make a determination of a fair termination concerns the reasons for the termination. The Respondent’s reason for terminating the Claimant is neglect of duty, premised on allegations of lost glass and broke pellets/plastics that were store in the Respondent’s warehouse that was under the care of the Claimant as the Warehouse Team Leader.
46. The Claimant in his oral testimony admitted that the plastics/pellets fell during his shift. He also admitted having been at work for a time shorter than his 12 hour shift. The Claimant denied that he let a truck leave before it was fully off-loaded.
47. Sections 43, 45 and 47(5) of the *Employment Act*, require that an employer proves the reasons for termination/dismissal, prove that the reasons are valid and fair, and prove that the reasons are justified. (See *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR)
48. In *British Leyland v Swift* (1981) I R L R 91, Lord Denning describe the test of what a reasonable employer could or could not do in the following words:
- “The correct test is: was it reasonable for the employers to dismiss? If no reasonable employer would have dismissed him, then the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair.....”
49. The question for this court is whether the Respondent’s reasons for terminating the Claimant are valid, just and fair. (See *Cooperative Bank of Kenya Limited v Banking Insurance & Finance Union* [2017] eKLR)
50. The evidence before court did not clearly prove the time when the incident subject of the disciplinary hearing, and the subsequent termination took place. Documents such as CCTV footage and handing over forms, would have shown whether the incident occurred during the Claimant’s shift so as to require him to report the incident to the Respondent.



51. The Claimant's evidence is that he got to know about the incident through social media and which prompted him as team leader to file a report of the incident. There is therefore no sufficient proof that the incident occurred during the Claimant's shift so as to validate and/or justify the Respondent's reasons to terminate the Claimant.
52. On the second reason for termination which is failure to report fallen pallets and damage to an iron sheet perimeter wall, while the Claimant on cross examination admitted that this occurred during his shift, he maintained that he reported the incident through office email which he could not access for reason of having left the employ of the Respondent.
53. Guided by the dictum of Lord Denning in *British Leyland v Swift (Supra)*, I find the reasons given for the Claimant's termination unreasonable. The penalty of termination meted out on the Claimant was too harsh in a job scarce economy in view of the charges leveled against him. This in my view, was a resolve to get rid of the Claimant notwithstanding that the misconduct was minor. It would be injudicious of this court to allow an employer throw an employee's 9 years of service through the window.
54. I find and hold that the termination of the Claimant did not meet the substantive justification test. The termination is unfair.

**Whether the Claimant is entitled to the reliefs sought.**

55. The Claimant's prayer before this court is for a declaration of unfair termination, an award of 12 months' salary equivalent for unfair termination and one month's salary in lieu of termination notice.
56. A finding of an unfair termination no doubt entitles the Claimant to compensation in accordance with Sections 49 and 50 of the *Employment Act, 2007*.
57. In *Kenya Ports Authority v Festus Kipkorir Kiprotich* [2014] eKLR it was held that the measures of compensation should be guided by the statutory capping at the time of termination.
58. The Supreme Court in *Kenfreight (E A) Limited v Benson K. Nguti* [2019] eKLR observed that the *Employment Act* provides for a number of remedies for unlawful or wrongful termination under Section 49 and it is up to the judge to exercise his or her discretion to determine whether to allow any or all of the remedies provided.
59. The Claimant was first appointed into the service of the Respondent on May 24, 2011. He was terminated on January 8, 2020, this is close to nine (9) years later. Other than the charges leading to his termination, the Claimant did not have previous cases of misconduct or at least no evidence was led in this respect.
60. Considering the years the Claimant was in the service of the Respondent and further considering that he contributed to his termination, I deem an award of 6 months' salary sufficient compensation for the unfair termination.
61. The Claimant was neither given notice nor paid in lieu of the termination. Consequently, he is awarded one months salary in lieu of termination notice as prayed.
62. In conclusion, Judgment is entered for the Claimant as against the Respondent as follows: -
  - a) 6 months' salary in compensation for unfair termination at Kshs. 786,000/-
  - b) 1-month salary in lieu of notice at Kshs. 131,000/-
  - c) Costs of the suit and interest until payment in full.



63. It is so ordered.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 7<sup>TH</sup>  
DAY OF JULY, 2022.**

**CHRISTINE N BAARI**

**JUDGE**

**Appearance:**

**Ms Mabalau H/B for Mr M M Omondi for the Claimant**

**Ms Mulongo H/B Mr. Kiragu for the Respondent**

**Christine Omollo- C/A**

