



**Onyancha v Uzuri Foods Limited (Cause 1688 of 2016)
[2022] KEELRC 3779 (KLR) (19 August 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3779 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1688 OF 2016
SC RUTTO, J
AUGUST 19, 2022**

BETWEEN

ROBERT ONYANCHA CLAIMANT

AND

UZURI FOODS LIMITED RESPONDENT

JUDGMENT

1. The claimant brought the instant suit vide a Memorandum of Claim dated May 25, 2016, through which he avers that he was employed by the respondent in the year 2013, to undertake duties as a scale molder. He avers that he fell ill in the month of June, 2015 and given a sick off for two days. That he was issued with a warning letter upon resuming and thereafter, was suspended for seven days. That he was subsequently dismissed from employment. The claimant has termed his dismissal from employment as unlawful, unfair and inhumane and thus seeks various reliefs against the respondent, all totaling the sum of KShs.383,410.00, being overtime pay, notice pay and compensatory damages.
2. The claim was challenged with the respondent stating that the claimant neither worked diligently nor faithfully as he has alleged. The respondent further denies the claimant's assertion that his termination was wrongful and unlawful. It further avers that the claimant was summarily dismissed from employment after he absconded duty for over ten days. Consequently, the respondent has asked the Court to dismiss the claim with costs.
3. The matter proceeded for part hearing on November 4, 2021, when the claimant presented and closed his case. During the defence hearing on March 14, 2022, the respondent had an opportunity to present its case.

Claimants' case

4. The claimant took the stand and testified in support of his case. To start with, he adopted his witness statement and bundle of documents to constitute his evidence in chief.



5. In his testimony, the claimant stated that he fell ill on June 20, 2016 and was given a sick off for two days by the doctor. That he called the supervisor and one Mr. Kamau to inform them of his predicament. That on reporting back to work, he was advised by his supervisor to carry the letter from the doctor so that it can be placed in his file. That upon handing the letter to his supervisor, he was forced to sign for a warning letter but he declined to do so, as he had done nothing wrong. That the supervisor then gave him a suspension letter for seven days and upon reporting back to work, he was not allowed to resume work as the security guards informed him that he was not allowed to enter the respondent's premises.

Respondent's case

6. The respondent called oral evidence through Ms. Quinter Ouma, who testified as RW1. She identified herself as the Human Resource Manager of the respondent and proceeded to adopt her witness statement and the bundle of documents filed on behalf of the respondent, to constitute her evidence in chief.
7. The respondent through its counsel, sought leave to amend paragraphs 4 and 5 of RW1's witness statement in respect of the month, from July to June. A similar amendment was made in regards to the year at paragraph 6 of the witness statement from 2018 to 2015. The leave was granted.
8. It was RW1's testimony that the claimant absented himself from work for two days, that is, 20th and June 21, 2015. That the claimant reported to work on June 22, 2015 and claimed to have been sick. That upon being asked for the sick off, the claimant stated that he had bought drugs from a chemist hence had no sick off but he brought one the following day. That thereafter, the claimant was suspended for seven days and was expected to report back to work on June 30, 2015. That the claimant reported on July 2, 2015 and the Assistant Production Manager told him to go back the following day, ready for work.
9. It was RW1's further testimony that the claimant never showed up until July 13, 2015. That subsequently, he was required to explain his absence. That he never responded as to why he was absent from work since July 3, 2015 until July 13, 2015. That as a result, he was issued with another show cause letter but he never responded to the same hence his dismissal.

Submissions

10. The claimant did not file any submissions despite being given an opportunity to do so.
11. On its part, the respondent submitted that the claimant had not substantiated the allegation that he was unwell. That further and without lawful cause and/or permission, the claimant never reported to work on the appointed date on July 2, 2015. That as such, the reasons for the dismissal of the claimant were substantively fair as he absented himself from work without lawful cause.
12. The respondent further submitted that the claimant was given an opportunity to explain himself, which explanation was found wanting, hence his dismissal. That as such, he was accorded a fair hearing. The respondent placed reliance on the cases of *Julius Kyalo Malonza v Ruth Osolo t/a Eraeva Catering Services*, ELRC Cause No 301 of 2016 and *Catherine Mugure v Hill Court Hotel & Spa Limited* ELRC (Nakuru) Cause No. 104 of 2018.

Analysis and determination

13. Flowing from the pleadings on record, as well as the evidence placed before me, this Court is being called to resolve the following questions: -
 - a) Was the claimant's dismissal from employment unfair and unlawful?



b) Is the claimant entitled to the reliefs sought?

Unfair and unlawful dismissal?

14. The resolution to this question turns on the provision of sections 43, 45 and 41 of the *Employment Act* (Act). Pursuant to section 43(1), an employer bears the burden of proving the reasons for termination and failure to do so, such termination is deemed to be unfair. Further and pursuant to subsection (2), such reasons are those it genuinely believed to exist at the time of the employee's termination.
15. Additionally, Section 45 (2) (a) and (b) 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 relates to the employee's conduct, capacity or compatibility; or based on its operational requirements.
16. Further, in line with section 45 (2) (c) of the Act, an employer is required to prove that it complied with the requirements of fair process in terminating the services of an employee. Section 41(1) of the Act provides in an elaborate fashion the requirements of fair procedure. In particular, it requires an employer to notify an employee of the intended termination. Accordingly, the employee is to be notified of the reasons thereof in a language he or she understands and in the presence of another employee or a shop floor union representative.
17. What I have enumerated above constitutes the parameters of fair termination and define the test necessary to determine whether an employee's termination was substantively and procedurally fair.
18. I will start with the first limb which is whether the claimant's termination was substantively fair. From his letter of dismissal, the claimant was dismissed for failure to report to work. The said letter reads in part: -

“...You did not come back until 1/7/2015 when you found Madam Eunice who instructed you to come the following day in order to join your shift and also to see (sic) production manager you did not report until 13/7/2015.

An explanation was required of you by 15/7/2015 after the meeting in (sic) Production Managers office which was not forthcoming until 17/7/15. Your explanation cannot be acceptable since:

1. Your sickness was never reported neither by yourself nor your workmate (whom we don't know)
2. You did not report of your whereabouts until you appeared on 13/7/15.

In this case, you absconded work from 3/7/15 to 13/7/15 and this amounted to summary dismissal...”

19. From the record, it is apparent that the real reason for the claimant's dismissal was failure to report to work from 3rd to July 13, 2015. To justify the reason for the claimant's dismissal, the respondent has presented work attendance registers which indicate that he was absent from work from July 3, 2015 to July 13, 2015.
20. It is notable that the claimant did not refute the respondent's assertion. He has not denied that he was not at work from July 3, 2015 until July 13, 2015. To this end, he never filed any Reply to the respondent's Memorandum of Response. If indeed, he was at work on the dates mentioned, then the claimant did not state as much in reply to the respondent's assertion. Similarly, in the event the claimant had a plausible explanation for his absence from work, he did not file any reply stating as much.



21. Under section 44(4) (a) of the Act, absenteeism from work without lawful cause, is a ground for summary dismissal. The provisions is couched as follows:-

“(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if—

(a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work...”

As stated herein, the claimant did not refute the respondent’s allegations regarding his absence from work between 3rd to July 13, 2015. There was also no explanation to justify his absence. This is what culminated in his dismissal from employment. It also bears to note that the claimant’s letter dated July 16, 2015, does not explain where he was from 3rd July, 2015. This further lends credence to the respondent’s assertion that the claimant was indeed, absent from work between 3rd to July 13, 2015.

22. The claimant’s conduct when considered against the provisions of section 44(4) (a) of the Act, availed the respondent reasons to commence disciplinary action against him. In this case, the claimant’s dismissal was substantively fair.

23. Turning to the question of the limb of procedural fairness, the respondent has averred that it asked the claimant to explain his absence from work. On record, is a letter dated July 16, 2015, through which the claimant has explained his absence on 20th and 21st June, 2015. Notably, he has not explained his absence from work July 3, 2015 to July 13, 2015.

24. Connected to the above, the respondent noted as follows in the claimant’s letter of dismissal that; “an explanation was required of you by 15/7/2015 after the meeting in Productions Managers office which was not forthcoming.”

25. From the foregoing, it is evident that the respondent in as far as practicable, complied with the requirements of section 41 of the Act as the claimant was required to render his explanation regarding his absence from work.

26. The upshot of the foregoing is that the Court finds that the claimant’s termination was neither unfair nor unlawful hence he is not entitled to compensatory damages or notice pay.

27. As regards the claim for overtime, the same is dismissed as the claimant has not particularized the amount he is seeking from the respondent. In this regard, he has not stated the date he worked overtime so as to justify the global figure of Kshs 183,522.00. Indeed, it is not clear how he arrived at the said figure.

28. On this issue, I will echo the determination in the case of [*Rogoli Ole Manadiegi v General Cargo Services Limited*](#) (2016) eKLR, where the Court expressed itself as follows: -

“It is true the employer is the custodian of employment records. The employee, in claiming overtime pay however, is not deemed to establish the claim for overtime pay by default of the employer bringing to court such employment records. The burden of establishing hours or days served in excess of the legal maximum, rests with the employee. The claimant did not



show in the trial court when he put in excess hours, when he served on public holidays or even rest days... he did not justify the global figure claimed in overtime, showing specifically how it was arrived at...”

29. In light of the above decision which I wholly adopt, the claimant was bound to prove entitlement to the claim for overtime. Having failed to do so, the claim to this extent fails.

Orders

30. In the final analysis, the claim is dismissed in its entirety with no orders as to costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF AUGUST, 2022.

STELLA RUTTO

JUDGE

Appearance:

For the Claimant Ms. Mungoni

For the Respondent Mr. Museve

Court Assistant Abdimalik Hussein

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

