



**Wafula v Chandaria Industries Limited (Cause 1758 of 2017)  
[2022] KEELRC 1544 (KLR) (5 August 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1544 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1758 OF 2017  
SC RUTTO, J  
AUGUST 5, 2022**

**BETWEEN**

**CHEYE WAFULA ..... CLAIMANT**

**AND**

**CHANDARIA INDUSTRIES LIMITED ..... RESPONDENT**

**JUDGMENT**

1. It is common ground that the claimant was employed by the respondent on 10<sup>th</sup> June, 2010 as a machine operator. The claimant avers that he was ordered out of the respondent's premises by the head of department by the name Mr. Sheti. That the said Mr. Sheti told him his services were no longer needed. The claimant avers that the respondent's actions were unwarranted and unjustified hence claims notice pay, unpaid leave, unpaid house allowance, service gratuity and certificate service.
2. The respondent opposed the Claim through its response filed on 13<sup>th</sup> December, 2017. According to the respondent, the claimant fought and injured a fellow employee, Mr. Martin Okoth at the work place and refused to switch off the machine on account that he wanted to gain two hours that had been lost due to a machine breakdown. The respondent avers that the claimant's conduct was not acceptable hence warranted summary dismissal. Consequently, the respondent asks that the claim be dismissed with costs.

**Claimant's case**

3. During the trial which took place on 28<sup>th</sup> March, 2022, the claimant testified in support of his case and at the outset, sought to adopt his witness statement and documents filed in support of his claim, to constitute his evidence in chief. The said documents were also produced as his exhibits before Court.
4. It is the claimant's case that on 17<sup>th</sup> July, 2015, he was on the night shift when a piece of tissue got stuck in the machine hence he responded together with his coworkers. That as they were all attempting to



press the emergency button of the machine, Mr. Okoth slid, fell down and got hurt. To this end, he denied fighting the said Mr. Okoth.

5. The claimant further told Court that he went to the office of the human resource to explain himself but he was placed on suspension while Mr. Okoth was admitted in hospital. That he reported back to the office after one week and one Mr. Mbulika told him to accept that he fought with Mr. Okoth. That Mr. Mbulika then advised him to go and wait for Mr. Okoth to resume work. That when he did not see any communication forthcoming from the respondent, he went and reported the matter to the labour office whereafter the respondent was summoned. That he was later paid the sum of Kshs 31,000/= but the same was not sufficient. He denied receiving a show cause letter and being taken through a disciplinary hearing. He informed the Court that he was not paid house allowance and never proceeded on leave during his employment with the respondent. He asked the Court to allow his claim.

### **Respondent's case**

6. The respondent presented oral evidence through Mr. Joash Mbulika who testified as RW1. He identified himself as the Personnel Officer of the respondent. At the outset, RW1 adopted his witness statement and bundle of documents filed on behalf of the respondent to constitute his evidence in chief. The documents were also admitted as the respondent's exhibits before Court.
7. RW1 testified that the claimant fought with his colleague by the name Mr. Okoth on 17<sup>th</sup> July, 2015 in the presence of other employees. That he was summoned and interrogated by his supervisor by the name Mr. Kumar and he confessed to fighting Mr. Okoth. That the claimant wrote a letter of confession and agreed to cover the medical expenses of Mr. Okoth. RW1 further stated that the said letter of confession was brought to him and was not written in his presence. That the claimant had been arrested hence wanted to sort out the matter outside Court.
8. It was RW1's further testimony that he gave instructions that the claimant should not report to work. That he corresponded with the claimant and issued him with a letter to show cause. That the claimant was invited to appear for a disciplinary hearing on 23<sup>rd</sup> July, 2015 but the same was adjourned as the shop steward was not present. That the claimant was later taken through a disciplinary hearing, as a result of which a decision to terminate him was arrived at. RW1 stated in further testimony that the claimant was given the show cause letter by hand. That the claimant was later paid his terminal dues and he did not complain about the same.

### **Submissions**

9. It was the claimants' submission that there is no evidence that he was served with a warning letter or show cause and was not subjected to a disciplinary hearing prior to his dismissal. It was further submitted by the claimant that the reasons for his dismissal were not justifiable as the case instituted against him was withdrawn and settled when he agreed to cover the medical expenses. Reliance was placed on the case of *Walter Ogal Anuro vs Teachers Service Commission* (2013) eKLR, *David Gichana Omuya vs Mombasa Maize Millers Ltd* (2014) eKLR and *Donald Odeke vs Fidelity Security Ltd* Cause No 1998 of 2011.
10. The respondent's submissions are not on the physical record of the Court and were not traceable on the online portal. It is therefore presumable that the same were not filed.

### **Analysis and determination**

11. From the pleadings, the evidence presented by both sides and the submissions on record, the following issues stand out for determination: -



- a. Whether there was a justifiable reason to terminate the claimant's employment?
- b. Whether the claimant was subjected to fair procedure prior to being dismissed from employment?
- c. Is the claimant entitled to the reliefs sought?

### **Justifiable reason for termination?**

12. Section 43(1) and 45 (2) (a) and b) of the *Employment Act* (Act) lays down the basis for determination of this issue. In this regard, Section 43(1) of the Act places the burden of proving the reasons for termination on an employer and failure to do so, such termination is rendered unfair. Further, Section 45 (2) (a) and (b) of the Act, renders a termination of employment as unfair where 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.
13. In the instant case, the reason for the claimant's dismissal is discernible from his letter of summary dismissal which is couched as follows: -

“Sub: Dismissal

Please refer to our letter dated 20<sup>th</sup> July, 2015 and the meeting held on 24<sup>th</sup> July, 2015 between yourself, Martin Okoth, the Shop steward and the undersigned.

You physically fought and caused injuries to Martin Okoth after he complained about your switching off of the Machine.

The matter has been reported to Ruaraka Police Station under Ref: ob28/19/7/2015 and you have admitted the offense in writing and promised to refund cost of mediation.

Your conduct is not acceptable and justifies summary dismissal.

Consequently, you are dismissed from employment effective 17<sup>th</sup> July, 2017.

By copy of this letter, the Financial Controller will pay your final dues.

Yours faithfully,

Chandaria Industries Ltd”

14. In view of the contents of the claimant's letter of summary dismissal, it is evident that he was dismissed following allegations that he fought his colleague while at work. The claimant has refuted these allegations.
15. In view of the opposing positions, it is imperative to revisit the evidence on record in order to arrive at a considered determination. The respondent presented evidence in the form of an email dated 18<sup>th</sup> July, 2015 in which one Mr. Prerak Avinashkumar addressed RW1 and others copies in the said email as follows: -

“...Immediately, Okoth came to my house at around 1:35 am and he informed me about this matter. I called all these people in the office and after arguing and questioning Mr. Cheye accepted his mistake. He also accepted that him and Pepe had an agreement to having a rest. He also accepted that he pressed the emergency button and stopped the machine. He also accepted that he punched Okoth first...Today morning Mr. Cheye called me and told me not to raise this issue. I have got the pictures of blood and surrounding area of the issue. On



Monday as soon as IT department will open I will upload in the computer and will send it to you...I would like to take disciplinary action on Cheye and Pepe both as these guys are disturbing lots in the department and they are not performing well.”

16. In response to the email by Mr. Prerak, RW1 instructed as follows in his email of 20<sup>th</sup> July, 2015: -

“ Pending final decision and recovery of Mr. Okoth, the two helpers namely Cheye and Pepe should not work.
17. There is also a copy of radiological request report form dated 20<sup>th</sup> July, 2015 in the name of Mr. Martin Okoth. It states as follows against the “Brief clinical summary”; “assault to the face”. This discounts the claimant’s assertion that Mr. Okoth sustained his injuries when he fell down.
18. There is also a document dated 19<sup>th</sup> July, 2015 signed by the claimant and countersigned by two other parties; Okoth Livingstone Martin and Silvanus Otieno. The document is titled agreement to cover medical expenses and reads as follows: -

“ Concerning the situation of my brother Okoth whom we fought and the injuries I caused him. I have agreed to commit myself to pay any medical expenses that will be used in order to see him recover to normal condition. And this will be done weekly every Friday with the amount of Kshs 2,000 until I pay the whole figure that will be used. I promise to cooperate with the entire family of the injured in all ways. I have committed myself weekly because am a casual worker who earns weekly wages. Thank you for your understanding.”
19. Further, on record is a copy of an extract of an OB, No. 28/19/7/2015 from Ruaraka Police station.
20. It is notable that the claimant did not mention the issue of the alleged fight with Mr. Okoth in his statement of claim. Further, besides denying engaging in the alleged fight during trial, the claimant did not file a reply to the response by the respondent, to rebut its assertions to that effect.
21. Further, during cross examination, the claimant stated that Mr. Okoth was injured while at work. He also admitted writing the letter of 19<sup>th</sup> July, 2015 but added that he did so under coercion. Further, he admitted seeing the said letter in Court when it was filed together with the response. It is therefore odd that he did not see the need to rebut the same once it was filed by the respondent. In addition, it is worth noting that the claimant did not discount the extract of the OB that was exhibited by the respondent.
22. The foregoing observations lend credence to the respondent’s assertions that the claimant was engaged in a fight with the said Mr. Okoth while at work.
23. As regards the claimant’s contention that he was forced to sign the letter through which he admitted fighting with Mr. Okoth, with due respect, that denial cannot suffice. Here is why. First, the claimant never averred as such in his claim nor in a reply to the respondent’s response. Therefore, the same can only be termed as an afterthought. Second, he did not furnish the particulars of the alleged coercion. On this score, I will follow the determination by Ndolo J in the case of *Wenslaus Oduki Odinga v Kenyatta National Hospital Board* [2013] eKLR, where the learned Judge held as follows: -

“ Apart from the general claim of duress, the Claimant did not adduce any particulars. An employee alleging duress or inducement to sign a document in a non-custodial environment must provide details of such duress or inducement. It is not enough to say “I was forced or I was confused.” The Claimant failed to provide any such details and his claim that he was



forced to sign the admission is therefore rejected. This in effect means that the Respondent had a substantive justification for terminating the Claimant's employment.”

24. In this case, the claimant did not furnish the particulars constituting the alleged coercion. He merely alleged that he was coerced. Therefore, the claimant's assertion that he was under coercion when he signed the letter in question, is unsubstantiated.

25. It further bears to note that the standard of proof in proving that there was reason for termination is on a balance of probability. This is pursuant to the provisions of section 43(2) of the Act which provides that the reason or reasons for termination of an employee are matters that the employer at the time of termination genuinely believed to exist, and which caused the employer to terminate the services of the employee. This was aptly put as follows by the Court of Appeal in the case of *Kenya Revenue Authority vs Reuel Waithaka Gitahi & 2 others* [2019] eKLR: -

“The standard of proof is on a balance of probability, not beyond reasonable doubt, and all the employer is required to prove are the reasons that it “genuinely believed to exist,” causing it to terminate the employee's services. That is a partly subjective test.”

26. And further, the Court of Appeal had this to say on the import of section 43 (2) of the Act in the case of *Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike* [2017] eKLR: -

“Under Section 43 of the Act, the onus is on an employer to prove the reason or reasons for the termination, failing which the termination shall be deemed to be unfair. The test is, however, a partly subjective one in that all an employer is required to prove are the reasons that he “genuinely believed to exist,” causing him to terminate the employee's services. In the present case, it seems quite clear from the evidence on record that KPLC believed, and had ample and reasonable basis for so believing, that Wasike had attempted to steal cable wire from KPLC stores which he was in charge of. That being the case, we think the learned Judge plainly erred in entering into a detailed examination of whether or not the 300 metres of cable wire were part of the 1,100 metres that were being legitimately removed from the store, as well as an examination of whether or not there was sufficient documentation in proof of the discrepancy, and the like. It was enough, we think, that the gateman found cables that were concealed and should not have been getting out of the stores.”

27. In view of the foregoing authorities, which I align myself with, and noting the evidence exhibited by the respondent it would thus appear that it had reasonable grounds to commence disciplinary action against the claimant.

28. In light thereof, it is my finding that the respondent has proved to the requisite standard, that it had reasons to terminate the claimant's employment.

29. Having so found, I now move to determine whether the claimant was accorded procedural fairness.

#### **Whether the claimant was subjected to fair procedure prior to being dismissed from employment?**

30. The issue of procedural fairness finds its underpinning under Sections 45 (2)(c) and 41 of the *Employment Act*. Under Section 41 of the Act, an employer is required to notify an employee of the reasons it is considering terminating his or her services. Such reasons ought to be communicated in a language the employee understands and in the presence of another employee or a shop floor union representative of own choice.



31. In the instant case, the claimant state that upon being sent home, no communication was forthcoming from the respondent. In this regard, he has denied being issued with a show cause letter and being granted hearing.
32. The respondent exhibited a show cause letter dated 20<sup>th</sup> July, 2015. RW1 stated that the claimant received the said letter by hand. Be that as it may, there is no evidence that the claimant received the same. This is why. First, he has not countersigned on the same in acceptance, and second, there was no suggestion or indication by the respondent that the claimant refused to sign for the same.
33. The respondent has also stated that it took the claimant through a disciplinary hearing. Despite its assertions, there is no proof that the claimant was invited for a disciplinary hearing and if at all he appeared, there is no documentary evidence in the form of minutes or notes taken during the said hearing. As such, the respondent's assertions to that effect have not been supported.
34. At this juncture, it is worth mentioning that the provisions of section 41 of the Act, are mandatory in nature, hence not open for selective application.
35. Noting the seriousness of the allegations facing the claimant and considering that if proved could lead to his dismissal and which dismissal came to pass, it was prudent that the respondent accords the claimant an opportunity to defend himself. In absence of evidence to prove fairness of the process, the respondent is at fault.
36. To buttress my finding, I gather support from the Court of Appeal in the case of *Postal Corporation of Kenya vs Andrew K. Tanui* [2019] eKLR, where it was held that: -  

“It is our further view that Section 41 provides the minimum standards of a fair procedure that an employer ought to comply with...Four elements must thus be discernible for the procedure to pass muster: -

  - (i) an explanation of the grounds of termination in a language understood by the employee;
  - (ii) the reason for which the employer is considering termination;
  - (iii) entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;
  - (iv) hearing and considering any representations made by the employee and the person chosen by the employee...”
37. In following with the holding of the Court of Appeal I find and hold that the respondent having failed to prove that it accorded the claimant procedural fairness, the resultant dismissal was unlawful and unprocedural.

## **Reliefs**

### **One month's salary in lieu of notice**

38. As the Court has found that the claimant was not terminated in line with fair procedure, he is awarded one (1) month's salary in lieu of notice.



### **Compensatory damages**

39. As I have found that the claimant's dismissal was procedurally unfair, I will award him compensatory damages equivalent to three (3) months' gross salary. This award takes into account his own contribution towards his dismissal from employment.

### **Unpaid house allowance**

40. As regards the claim for house allowance, the same would have succeeded as the pay slip exhibited by the claimant, only contains the component of basic pay and overtime. There is no mention of house allowance. However, I note that the claim is time barred in light of the provisions of Section 90 of the *Employment Act*. Why do I say so? The claim herein is in the nature of a continuing injury hence ought to have been brought within twelve (12) months after the cessation thereof. The cessation for purposes of this provision is the time when the employment relationship terminated. As such, time started running from 3<sup>rd</sup> August, 2015 when the claimant was terminated and it stopped on 3<sup>rd</sup> August, 2016, whereas the claim was filed on 4<sup>th</sup> September, 2017. It therefore follows that the claim was time barred by the time it was lodged.

### **Certificate of service**

41. The claimant is entitled to a certificate of service since the employment relationship is admitted.

### **Orders**

42. In the final analysis, the claim succeeds and the claimant is awarded the following reliefs: -
- a. Compensatory damages in the sum of Kshs 31,680.00 which sum is equivalent to 3 months of his gross salary.
  - b. One month's salary in lieu of notice being Kshs 10,560.00.
  - c. The total award is Kshs 42,240.00.
  - d. Interest on the amount in (c) at court rates from the date of Judgement till payment in full.
  - e. The claimant shall also have the costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5<sup>TH</sup> DAY OF AUGUST, 2022.**

.....  
**STELLA RUTTO**

**JUDGE**

Appearance:

For the Claimant Ms. Alividsa

For the Respondent Mr. Rakoro

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 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 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**

