



**Ogana v Kingsway Tyres Limited (Cause 1067 of 2018)
[2022] KEELRC 12794 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12794 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1067 OF 2018
K OCHARO, J
SEPTEMBER 22, 2022**

BETWEEN

PATRICK WAFULA OGANNA CLAIMANT

AND

KINGSWAY TYRES LIMITED RESPONDENT

JUDGMENT

Introduction

1. The claimant herein through his statement of claim dated May 31, 2018, sued the respondent seeking for the following reliefs:
 - (a) A declaration that the termination of the claimant by the respondent on the April 23, 2018 was unfair, uncouth and unlawful.
 - (b) An order compelling the respondent to pay his terminal dues including maximum compensation amounting to Kshs 1,551,463.83.
 - (c) Costs of the suit and interest.
2. Upon being served with summons to enter appearance, the respondent entered appearance on the July 25, 2018, and filed a reply to memorandum of claim on the August 16, 2018.
3. The claimant’s case was heard on the October 5, 2021, while the respondent’s was on the October 19, 2021. The respondent presented Ms Laura Mercy Mbingu to testify on its behalf.
4. The witness statements and documents that the parties had filed were admitted as their evidence in chief and documentary evidence respectively.



The Claimant's Case

5. It was the claimants' case that he came into the employment of the respondent on or about the January 5, 2001 as a machine attendant. His starting salary was Kshs 23,000/= (twenty-three thousand) which subsequently rose to Kshs 69,365 inclusive of house allowance.
6. The claimant contended that in his said employment, he was charged with the responsibility of, ensuring quality production within the respondent's factory, and supervision of junior staff.
7. The claimant alleged that while on duty on the April 20, 2018, he fell sick. Consequently, he sought for permission from his manager, which permission was granted, to proceed for medication at Gorban Hospital. Upon being treated he was given a one day sick off.
8. When he reported back to work on Monday, the April 23, 2018, he was directed to report to the respondent's head office which was based at a different location from the factory. At the head office, the respondent's director Mr Kama informed him that he had been dismissed from employment, alleging that he (the claimant) had misconducted himself while at his station of work. He was not given the specifics of the misconduct.
9. The claimant contended further that on the April 24, 2018, and April 25, 2018, he went back to the respondent's head office seeking to know the reason(s) for his dismissal, but the same was not given to him.
10. He asserted that his employment was brought to an end without, any letter of termination and being paid his terminal dues and /or issued with a certificate of service.
11. The claimant contended that he was forced to engage services of counsel who issued a demand letter to the that the respondent. In response thereto, the respondent alleged that he was under a disciplinary process on ground that he had been involved in stealing of its property.
12. The claimant stated that under its letter of response, the respondent forwarded a show cause letter, purporting that a copy thereof had been served upon him.
13. It was his further contention that the show cause letter was merely an afterthought. It was never served on him on the April 23, 2018, April 24, 2018 or the April 25, 2018.
14. In his evidence under cross examination the claimant testified that he sought for, and, was granted, permission to go to hospital. That at the gate the respondent's security guards checked his bag and allowed him to proceed out. He was not found with any property belonging to the respondent.
15. The only report that was made to the police, was after he had left the employment of the respondent. The claimant denied the allegation that he absconded duty following an alleged theft incident.
16. The claimant maintained that he was neither issued with a show cause letter or termination letter. His terminal dues were never paid.
17. In his evidence under re-examination, he contended that after his sick off he reported back to work on the April 23, 2018, he was never served with the alleged show cause letter of the even date.
18. He stated further that the respondent had not at all tried to get him through the telephone number that they had in their records.



The Respondent's Case

19. The respondent's witness stated that the claimant was an employee of the respondent at its Relamic Factory at Enterprise Road from 2001, up until April 20, 2018 when he absconded duty after stealing from the respondent.
20. On or about the April 20, 2018 the claimant requested for leave to seek medical attention which leave was granted by the respondent's Branch Manager, Mr Selvasu Bramancian.
21. The witness stated that as per the respondent's policy and procedure, the claimant was stopped at the gate by the security guards as was he exiting so that his bag would be searched. However, the claimant resisted and instead threw the bag into a passing vehicle and took off running.
22. That the occupants of the vehicle threw the bag out, upon picking up the bag and checking the contents thereof, the guards discovered five' pieces of bonding gum, the respondent's property. That a further search of the claimant's luggage at the respondent's premises revealed more items belonging to the respondent. The respondent reported the matter to the Industrial Area Police Station.
23. The witness asserted that the claimant's allegation that he was dismissed on the May 23, 2018 is untrue and an afterthought prompted by a guilty mind. The truth being, he absconded work never to report back. The claimant's employment was never terminated as alleged by the claimant or at all.
24. The conduct of the claimant was one that amounted to gross misconduct and sufficient enough to legally attract a summary dismissal. The claimant stole the respondent's property and absconded duty. The respondent thus proceeded and issued the claimant with a show cause letter dated April 23, 2018.
25. The show cause letter was not responded to despite service of the same upon the claimant. As at the time of filing of the suit herein by the claimant, the respondent hadn't completed its disciplinary process against him. The suit is premature therefore.
26. As there was no termination of employment as alleged by the claimant or at all, the reliefs sought by the claimant are therefore not deserved.
27. Referred to the demand letter by the claimant's counsel dated April 26, 2018, the witness acknowledged that it was in a tone that the claimant was at work on the 23rd, 24th and April 25, 2018, and that his employment was terminated orally.
28. The witness stated further that she knew Kamal and that in these proceedings he has not come out to deny or confirm that he met the claimant on the April 23, 2018.
29. The alleged theft incident was reported to the police on the April 20, 2018. Despite the report there was no investigation report from the police.
30. The witness contended that the show cause letter was dispatched to the claimant through his last known address. However, referred to the letter she admitted that the same did not bear any postal address. The respondent company had the details of the claimant.
31. For the 17th years that the claimant worked for the respondent he did not have any disciplinary issue. The show cause letter required the claimant to respond thereto by the September 24, 2018.
32. In her evidence under re-examination the witness testified that the respondent used postal address 34008 Nairobi to post the letter to the claimant.



33. At the head office, the claimant was told to get back to the station of work and pick the show cause letter later.

The Claimant's Submissions

34. The claimant's counsel identified three broad issues for determination their:

- (a) Was the claimant terminated from employment or did he abscond /deserted employment?
- (b) Should claimant be paid the reliefs prayed for?
- (c) Who bears the costs of the claim.

35. Counsel submitted that the claimant's evidence that he was dismissed verbally was not challenged, Mr Kamal who the claimant contended conveyed the dismissal decision did not deny this in writing or by testifying in court.

36. It was further submitted that the respondent failed to prove that the claimant involved himself in the alleged act of theft of its property, the theft incident was allegedly reported to the police on the April 21, 2018 *vide* OB No 51/21/04/018, 4 years later there has been no report out of the police investigation, and the claimant arrested, arraigned and charged in a court of law.

37. The claimant's counsel further submitted that the show cause letter was issued to sanitize a process which was improper from the onset. The letter does not bear the postal address to which it was sent.

38. The claimant's counsel submitted further that the purported show cause letter was issued after the termination of employment had already taken plate. It is not possible therefore that the respondent would proceed with a disciplinary process against the claimant.

39. It was contended that if at all the claimant was dismissed for abscondment or desertion of duty then there was no show cause letter that was issued and a disciplinary process undertaken on this account.

40. The respondent did not prove that it tried to contact the claimant in writing or call him on phone with a view of ascertaining his whereabouts after the April 20, 2018. It was a duty upon the respondent to establish that the termination of the claimant's employment was preceded by a reasonable attempt(s) to contact him. To buttress this submissions the claimant placed reliance on the decision in [*Joseph Nzioka v Smarbh Coating Ltd* \[2017\] eKLR](#) where Nduma, J stated:

“Dismissal on account of absconding must be preceded by evidence showing that reasonable attempt was made to contract the employee concerned and that a show cause letter was issued to such employee calling upon such employee to show cause why his services should not be terminated on account of absconding duties.”

41. The claimant's counsel submitted that the respondent was under an obligation to demonstrate that procedural fairness was as contemplated under section 41 of the [*Employment Act*](#) was adhered to. Since it failed to so demonstrate the termination was procedurally unfair. To buttress this point reliance was placed on this courts' decision in [*Raustus Ayua Odioko v China Wu Yi Company Ltd* \[2021\] eKLR](#).

42. Having proved that the termination was procedurally and substantively unfair, the claimant is entitled to the reliefs sought.



The Respondent's Submissions

43. Counsel for the respondent distilled two issues for determination thus:
- (a) Whether the claimant was dismissed unfairly and unlawfully.
 - (b) Whether the claimant merits the reliefs sought.
44. It was submitted that the claimant's service of employment was neither terminated nor was the claimant dismissed from employment.
45. The respondent argued that the claimant was guilty of two misconducts that would under the provisions of section 44 of the *Employment Act* attract a summary dismissal sanction, namely that he stole from the respondent and subsequently absconded duty. This notwithstanding the respondent did not terminate the claimant's employment but issued a show cause letter why disciplinary action should not be taken against him.
46. The claimant never responded to the show cause letter. Consequently, he squandered an opportunity to defend himself against the accusations. He cannot be heard to argue therefore that he was not treated fairly. Reliance was placed on decisions in *Peter Njuguna Chege v Tisales Limited* [2020] eKLR to buttress these submissions.
47. It was argued that the claimant's contention that he was not served with the show cause letter is untrue. The respondent's witness testified that the letter was sent to the claimant's last known address. Subsequently the letter was served through his advocate.
48. Putting reliance on the case of *David Wabome v Schencer Limited* [2014] eKLR where the court held;
- “From the foregoing I find that the claimant secured all the communication sent to him by email and that email was an accepted mode of communication. I further find that he was given ample opportunity to defend himself after the initial refusal to accept the warning letter and that he had already decided even before the warning letter was issued that he would not accept it under any circumstances”
- to bluster the argument that other modes of service besides personal service are valid.
49. It was submitted that the claimant was a registered member of the National Social Security Fund and as such by dint of the provisions of section 35(6) of the *Employment Act*, he cannot be entitled to the relief sought of service pay. That the respondent did place ample evidence before court to demonstrate that it regularly deducted the claimant NSSF dues and dutifully remitted the same to the relevant entity.
50. To award the claimant service pay shall amount to double payment and unjust enrichment on the part of the claimant. Support was sought in the decision in *Elijah Kipkoros Tunoi v Ngara Opticians T/A Bright Eyes Ltd* [2014] eKLR.
51. Regarding the claimant's claim for payment of salary in lieu of notice, it was submitted that since he was neither dismissed nor his employment terminated by the respondent, an order for payment of the salary in lieu of notice cannot be availed to him.
52. The claimant worked for only 20 days in the month of April 2018, he cannot be granted pay for the entire month.
53. As regards the claimant's claim for 26 leave days it was submitted that he worked for only four (4) months before he absconded and therefore prorate she is only entitled to 6 days leave pay.



Analysis And Determination

54. Considering the pleadings, evidence and submissions by the parties, the following issues emerge for determination:
- (a) How did the claimant's employment determine?
 - (b) If it was brought to an end by the respondent, was it substantively and procedurally fair?

How Did The Claimant's Employment Determine?

55. As between the claimant and the respondent there is no common cause as regards whether or not the former's employment was brought to termination by the latter.
56. The respondent and the claimant were however in agreement on one crucial fact, that the latter was on the April 20, 2018 permitted to proceed for medical attention. It is concerning what happened thereafter, that two do not agree on.
57. I have carefully considered the respondent's version that the claimant attempted to sneak out with its property that he had stolen. The version sounds interesting but one that cannot be bought easily. With due respect it affronts common sense. The claimant threw a bag containing the stolen items into a passing vehicle and in turn the occupants of the motor vehicle threw the same out. I got interested to interrogate what the make of the motor vehicle was, the respondent's evidence clearly points out that it was not a pick-up, it was a van. According to one of the handwritten statements that the respondent placed before this court, the bag was thrown by the claimant into the motor vehicle through its window. It would require scientific precision for that to happen considering that the alleged motor vehicle was in motion.
58. None of the security guards was made a witness in this matter by the respondent. It is my view that a guard's testimony on the alleged incident at the gate was necessary in the circumstances of this matter.
59. The long and short of this, I am not persuaded by the respondent's story.
60. The claimant testified that the respondent's director terminated his employment verbally. Considering the totality of the evidence that was placed before me, it is not difficult to conclude that this evidence was not challenged sufficiently or at all. The director who was mentioned to have been at the center of the termination of the claimant's employment did not testify. The respondent's witness would not adequately and did not challenge the claimant's evidence. The director's evidence was crucial. The failure to have him testify attracts an adverse inference, his evidence would have been adverse to the respondent's case.
61. In conclusion, this court comes to a finding that the claimant's employment came to determination not in the manner put forth by the respondent but in the manner by the claimant.

Was The Termination Substantively And Procedurally Fair?

62. Having found as I have hereinabove that the claimant's employment was brought to an end by the respondent when its director verbally terminated the same, I now turn to consider whether the termination was substantively and procedurally fair.
63. Section 43 of the *Employment Act* placed a legal burden on the respondent to prove the reason(s) for the termination of the claimant's employment and a failure to so prove could attract the default consequence contemplated under section 45 of the *Act*, the termination being deemed unfair.



64. The respondent did take a position that it did not in any manner terminate the claimant's employment. Consequently, it did not lead any evidence to establish the reason(s) for the termination.
65. The respondent alleged that the claimant absconded work because of a guilty mind. This court having taken the position as regards the respondent's version as it has hereinabove, I find that this alleged reason for separation was not proved.
66. In sum, the termination was not substantially fair.
67. Section 41 of the [employment Act](#) a provision of the law which the court has severally held as being mandatory. In nature provides for procedural fairness. It provides for what an employer contemplating termination of an employee's employment must do and avail.
68. The provision above stated reflects procedural fairness encompassing three components. The first component notification/information. The employer must inform the employee to be affected, of his or her intention to terminate the employment and the grounds stirring the intention. Second, the hearing component, the employer must avail the employee an opportunity to defend himself or herself against the grounds and the right to accompaniment. The consideration component, the employer must consider the representations made by the employee and/or the person accompanying him before deciding to terminate the employee's employment or summarily dismiss him or her. Consideration is imperative for if it is absent the purpose for hearing, and the protection accorded to the employee under the [Employment Act](#) shall be brought to naught.
69. The respondent contended that it did send a show cause letter to the claimant through his last known address. The claimant denied this allegation. It therefore became a duty upon the respondent to demonstrate to court that service was effected in the manner alleged.
70. I have considered the show cause letter dated April 23, 2018 presented to court by the respondent, it does not have any specific postal address to which it was dispatched. The address section reads:

“ Patrick Wafula Ogama Machine Attendant,
Relamic Nairobi “

If indeed the letter was sent as alleged by the respondent, thereon it would be having the postal address. The address section of the letter is crafted in a manner signifying that a personal service of the same was intended.
71. In the circumstances prove of the fact that postage was actually done was imperative. No certificate of postage or affidavit of service was placed before this court.
72. Counsel for the respondent argued that the show cause was in any event sent to the claimant's counsel. Considering the fact that the letter was sent to the counsel for information purpose and not for onward transmission to the claimant and that the letter was so sent long after the date April 24, 2018 when the claimant was required to have given a response to the accusations that were contained therein, I am not convinced that the submissions are sound and come to the aid of the respondent's case.
73. The respondent's witness testified that the address to which the show cause letter was sent obtains on the claimant's pay slip. A careful look at the pay slips, reveal that none of them bears any postal address. That the witness was an uncreditworthy, is the inescapable conclusion here.
74. In the circumstances of this matter, the respondent failed to prove that the process leading to the termination of the claimant's employment had the three components hereinabove alluded to or any of them.



75. The termination of the claimant's employment was procedurally unfair:

Of The Reliefs

76. The claimant sought for, *inter alia* salary for the month of April 2018, Kshs 69,365.00/= This court has not lost sight of the fact that he did not work for the entire month. I agree with the respondent's submissions that this court can only award a prorated amount under the head. Consequently, I award the claimant Kshs 46,243.30/=
77. The claimant further claimed compensation for 26 leave days. How he arrived at the 26 days is not supported by evidence. In his submissions, he submits for compensation for 21 days. The respondent did not lead any evidence either to challenge the claimant's claim under this head. However, this fact does not give the claimant an automatic entitlement to compensation for 26 days untaken leave. In the circumstances of the matter, I am persuaded by the respondent's submissions that the claimant can only be awarded compensation for untaken leave days computed on the 4 months worked in the year 2018. As a result, I award him Kshs 16,185.20/=
78. The claimant's claim for service pay fails by dint of the provisions of section 35(6) of the Employment Act. The claimant did not assert that he was not a member of NSSF or that the respondent could deduct NSSF funds from his salary but nonetheless failed to remit the same to the relevant authority. The pay slips that the claimant placed before this court are all indicative that he was a member of NSSF.
79. Lastly, the claimant sought for a compensatory relief pursuant to the provisions of section 49(1) (c) of the Employment Act, 2007. He seeks for the maximum amount awardable thereunder, 12 months gross salary. An award of the relief contemplated under section 49 (1) (c) of the Employment Act is a discretionary award, granted depending on the peculiar circumstances of each case. I have considered the fact that the respondent did not satisfy this court that it had a fair and valid reason to terminate the claimant's employment, that there was naught compliance with the provisions of section 41 of the Employment Act, length of service that the claimant had rendered the respondent and the candidness of the respondent on the circumstances surrounding the termination, and hold that the claimant is entitled to a compensatory award under section 49 (1) (c) of the Act and to the extent of 4 months gross salary. Therefore Kshs 277,460/=
80. The employment the subject matter of this claim was one terminable by a twenty-eight days' notice. The notice was not issued. The claimant is hereby awarded a one month's salary in lieu of notice, pursuant to the provisions of section 36 of the Act, Kshs. 69,365.00/=
81. In thus upshot, judgment is hereby entered in favour of the claimant in the following terms:
- (a) One month's salary in lieu of notice Kshs 69,365.00/=
 - (b) Unpaid salary for 20 days worked in the month of April 2018 Kshs 46,243.00/=
 - (c) Compensation for 7 days untaken leave Kshs 16,185.20/=
 - (d) Compensation pursuant to section 49 (1) (c) of the Employment Act, 4 months gross salary Kshs 277,460/=
 - (e) Costs of this suit.
 - (f) Interest on the awarded sum at court rates from the date of this judgement till full payment.

READ, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2022.



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OCHARO KEBIRA

JUDGE

In presence of:

Ms Rono for the respondent.

No appearance for claimant.

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 March 15, 2020 and subsequent directions of April 21, 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 *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.

A signed copy will be availed to each party upon payment of court fees.

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OCHARO KEBIRA

JUDGE

