



**Waweru v Keroche Breweries Limited (Cause 530 of 2014)
[2022] KEELRC 12799 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12799 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 530 OF 2014
DN NDERITU, J
SEPTEMBER 22, 2022**

BETWEEN

JOSEPH WAITHAKA WAWERU CLAIMANT

AND

KEROCHE BREWERIES LIMITED RESPONDENT

JUDGMENT

1. By way of memorandum of claim dated October 15, 2014 filed through Muthanwa & Co Advocates the Claimant, in summary, prays for-
 - a) A declaration that the Claimant's dismissal by the Respondent was unfair, wrongful, and unlawful.
 - (b)
 - (i) Overtime pay - Kshs 637,000.00
 - (ii) House allowance - Kshs 117,000.00
 - (iii) Gratuity/severance pay - Kshs 30,000.00
 - (iv) Expenses - Kshs 6,500.00
 - (v) Compensation for unfair, wrongful, and unlawful dismissal - Kshs 360,000.00Total - Kshs 1,150,500.00
 - (c) Costs of the cause.



2. As expected, the claim is accompanied with a verifying affidavit, Claimant's statement, a list and bundle of documents.
3. The Respondent entered appearance on November 20, 2014 and filed a response to the claim on even date through Ndung'u Karanja & Co Advocates. The Respondent denied the entire claim by the Claimant and filed a bundle of documents along with the response to the claim. A witness statement by Nicholas Kipchirchir (RW1) was also filed.
4. On December 9, 2014 the Claimant filed a reply to the defence filed by the Respondent in which the Claimant reiterated the contents of the claim.
5. A notice of change of Advocates was filed on May 22, 2018 wherein Kilukumi & Co Advocates took over from Ndung'u Karanja & Co for the Respondent.
6. The Respondent filed a supplementary list of documents on September 20, 2019.
7. This cause came up in court for hearing on December 8, 2021 when the Claimant (CW1) testified and closed his case. On the same day Nicholas Kipchirchir Kechir (RW1) testified for the Respondent and the Respondent closed its case.
8. After parties closed their respective case, Counsel for both parties agreed to address the court by way of written submissions. Counsel for Claimant asked for 30 days from December 8, 2021 within which to file his written submissions. By March 7, 2022 Counsel for the Claimant had not filed his written submissions and as such Counsel for the Respondent was allowed to file written submissions without the benefit of responding to submissions by Counsel for the Claimant. This court is thus writing this judgment without the benefit of written submissions from Counsel for the Claimant as none was filed.

II. Claimant's case

9. Based on the pleadings filed together with the oral and documentary evidence adduced, the Claimant's (CW1) case is that he was employed by the Respondent as a driver on June 7, 2012 at an agreed monthly salary of Kshs 30,000/=.
10. The Claimant alleges that he was wrongfully, unfairly, and unlawfully dismissed by the Respondent on September 9, 2014 on allegations of siphoning and selling fuel from a motor vehicle assigned to him.
11. In his testimony the Claimant denied misconduct and maintained that he was denied both substantive and procedural fairness hence the dismissal, according to him, was wrongful, unfair, and unlawful.
12. The Claimant alleged that he used to work overnight, from 5pm to 8am yet he was not paid for overtime. He also testified that he was not paid for house allowance and no housing was provided to him by the Respondent and hence he paid rent out of pocket.
13. Further, the Claimant testified that no disciplinary hearing was conducted as alleged by the Respondent and no show cause letter was issued to him.
14. While admitting that a sum of Kshs 69,911/= was paid to him as terminal dues, he maintained that this did not bar him from filing this cause as his claims in this cause are different from what was paid by the Respondent in the said sum.
15. The Claimant produced as exhibits a demand letter dated September 17, 2014 addressed by his Counsel to the Respondent, letter of termination dated September 9, 2014, and a certificate of service, among others.



16. In cross-examination the Claimant maintained his evidence as analysed above. He stated that the only leave he ever took was that of 21 days pending investigations into his alleged misconduct as per the leave application that he produced as an exhibit.
17. It is on basis of the foregoing that the Claimant prayed for the orders in the memorandum of claim as set out in an earlier part of this judgment.

III. Respondent's case

18. The Respondent's case and its position is found in the pleadings filed, the oral and documentary evidence through RW1, and the written submissions by its Counsel.
19. It is in public domain that the Respondent is a brewer and distributor of various alcoholic beverages based at Naivasha in Nakuru County.
20. The Respondent admits that it engaged the Claimant as a driver on June 7, 2012 at a monthly salary of Kshs 30,000/=. However, the Respondent denies that the Claimant was wrongfully, unfairly, and unlawfully dismissed on September 9, 2014
21. The Respondent takes the position that the Claimant was afforded both substantive and procedural fairness before the said summary dismissal.
22. The Respondent further posits that the Claimant was paid all his dues and hence the Respondent does not owe him as claimed in the memorandum of claim.
23. The Respondent testified through RW1, the head of operations. He testified that on July 30, 2014 at about 6.30pm he received information from the chairman of the Respondent, Mr Karanja, that the Claimant was at a certain location near the Respondent's brewery siphoning fuel from the vehicle allocated to him.
24. RW1 testified that as he approached the *locus* of the alleged crime he met a person carrying a container of fuel and stopped him to inquire where the said individual had obtained the fuel from. RW1 stated that the fuel in the container was diesel, the same type of fuel used by the Respondents truck allocated to the Claimant. The said person who was carrying the fuel, whose name RW1 could not recall, alleged that he had bought the fuel from a nearby fuel station.
25. While the Claimant denied siphoning and selling the said fuel, the fuel station where the person carrying the container alleged to have bought the fuel from did not sell diesel and they had no pump for diesel. In any event, RW1 testified, the attendants at the fuel station denied selling the diesel fuel to the said person.
26. RW1 stated that he subsequently reported the matter to the Respondent's security team and the human resources department. The Claimant was sent on a compulsory leave pending investigations and that the Claimant was invited for a hearing.
27. RW1 produced several documents as exhibits including unsigned hand written notes which he alleged were proceedings taken during the disciplinary hearing, terminal dues processing form for the Claimant in the sum of Kshs 61,911/= and a cheque for the said sum in favour of the Claimant, and Claimant's payslips for April and July, 2014.
28. RW1 testified that the monthly salary of Kshs 30,000/= paid to Claimant included house allowance and that the Claimant never worked overtime as the Respondent did not allow its employees to work overtime except with written authority from the management. No such requests, to work overtime, were ever made by the Claimant.



29. RW1 testified that the alleged crime by the Claimant and the other individual was reported to police and that the Claimant was subsequently dismissed on reasonable suspicion of having engaged in a crime against the Respondent (employer) and its property as a result of which gross-misconduct the Respondent lost trust in the Claimant.
30. In cross-examination RW1 maintained that the Claimant worked for only eight (8) hours for six (6) days a week between 6pm and 10pm and then from 5am to 8am He testified that the Claimant's work was to pick and drop workers and security officers and that he was free all the other times between the working shifts.
31. While RW1 admitted that there was no eye witness to the alleged siphoning and theft of fuel, he stated that the Respondent had reasonable grounds to suspect the Claimant of having committed the said gross misconduct. He admitted that no show cause letter was issued to the Claimant and that no evidence was availed to the Claimant before the alleged disciplinary hearing.
32. When questioned by the court as to what the Claimant used to do between 10pm and 5am between shifts, RW1 testified that the Claimant ordinarily rested in his house in-between shifts as his residence was next to the brewery.
33. On the basis of the foregoing, the Respondent prayed that the Claimant's cause be dismissed with costs. The Respondent's case was summoned up by its Counsel Regina Mwanzia, Advocate in her written submissions filed in court on March 9, 2022.

IV. Issues for determination

34. From the foregoing analysis of the evidence adduced and the positions taken by both parties, the following issues commend themselves to this court for determination:-
 - (a) Was the dismissal of the Claimant by the Respondent wrongful, unfair, and unlawful?
 - (b) if (a) above is in the affirmative, is the Claimant entitled to the reliefs sought?
 - (c) Costs.

V. Dismissal

35. Sections 35, 36, 40(redundancy), 41, 43, 44, 45, 46, and 47 of the *Employment Act* (the Act) provides that for an employer to fairly and lawfully terminate or dismiss any employee the employer must comply with both substantive and procedural requirements set out therein. While substantive fairness has to do with the reason(s) for termination or dismissal, which has to be reasonable and fair, procedural fairness is about due process or fair hearing. Article 47 of the *Constitution* and Section 4 of the *Fair Administrative Action Act* further firms up the importance and centrality of due process and fairness in all administrative actions.
36. This court (ELRC) has stressed the importance and mandatory requirement for both substantive and procedural fairness in disciplinary proceedings by an employer against an employee. Where and when an employer fails to avail both to an employee, any disciplinary proceedings and resultant action, may it be termination or dismissal, is amenable to be declared unfair and unlawful by the court - See *Mary Chemweno v Kenya Pipeline Company Limited* (2017) eKLR, *Loice Otieno v Kenya Commercial Bank Limited* (2013) eKLR, and *Walter Ogal Anuro v Teachers Service Commission* (2012) eKLR.
37. It is against the foregoing background that this court shall proceed in examining the actions taken by the Respondent against the Claimant in this cause as hereunder.



VI. Substantive fairness

38. Section 44(g) of the Act provides that an employer may summarily dismiss an employee if:-
- (g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed a criminal offence against or to the substantial detriment of his employer or his employer's property," (Emphasis added)
39. In the analysis of the evidence in an earlier part of this judgment, the Respondent suspected that the Claimant was engaged in criminal siphoning and sale of fuel from the truck assigned to him. The Respondent felt that since the alleged purchaser of the fuel was unable to offer reasonable or probable explanation on how he had obtained the fuel the Respondent concluded that it is the Claimant who had siphoned the fuel and sold the same to the said individual who was located by RW1 within 100 metres of the truck where the Claimant was located.
40. RW1 was not able to name the said individual who had allegedly purchased the siphoned fuel. There is no evidence as to how much fuel had been stolen by the Claimant. Although the matter was allegedly reported to the police no occurrence book (OB) reference was provided by the Respondent and no charges were filed in court against the Claimant and the other individual.
41. While the Respondent may have held suspicion that the Claimant had committed an offence against it or its property, this court finds that the said suspicion was not based on reasonable and sufficient grounds. There is also no evidence on how much fuel had been siphoned and or stolen by the Claimant and hence this court is not seized of the facts upon which to assess whether the loss was substantial to the detriment of the Respondent.
42. This court is not by any stretch of imagination suggesting that the Respondent had to have proof beyond reasonable doubts against the Claimant in order to take action. In any event, Section 43(2) of the Act provides as follows:-
- (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused he employer to terminate the services of the employee.
43. Although the test on the part of the employer as provided for above is subjective, Section 43(2) above ought to be read along with Section 44(g) of the Act. It is in the considered opinion of this court that although the test on the part of the employer as expressed above is subjective, the same ought to be founded on genuine, reasonable, and sufficient grounds.
44. It is the view and opinion of this court that while the Respondent may have been suspicious of the conduct of the Claimant, such suspicion was neither based on genuine, reasonable, nor sufficient grounds as to give rise to the disciplinary action taken and subsequent summary dismissal.
45. There is no evidence on record that the Claimant had a bad disciplinary record or had been suspected of siphoning or stealing fuel on any other occasion. As stated elsewhere in this judgment there is no value attached to the allegedly lost fuel and hence there is no way of assessing whether the loss was substantial to the detriment of the Respondent or not.
46. Put another way, was the suspicion on the part of the Respondent enough, genuine, reasonable, and sufficient to lead to the disciplinary action against the Claimant leading to summary dismissal? Was there no other disciplinary and remedial measures that the Respondent may have taken in the entire



circumstances that subsisted? Would it not have been adequate to warn, admonish, or surcharge the Claimant for the alleged misconduct instead of the summary dismissal?

47. RW1 testified that the Respondent lost trust in the Claimant following the alleged theft and hence took the drastic action of summarily dismissing the Claimant. However, it is the view and opinion of this court, and the court has said enough so far, that the suspicion on the part of the Respondent was not based on genuine, reasonable, and sufficient grounds leading to summary dismissal which in the circumstances was excessive, unreasonable, wrongful, unfair, and hence unlawful. The Respondent did not act in accordance with justice and equity in the entire circumstances that prevailed.
48. The above holding by this court is fortified by the very authorities cited by Counsel for the Respondent in the written submissions. Those decisions include *Kenya Revenue Authority v Rewel Waitbaka Gitabi & 2 Others* (2019) eKLR, *Bamburi Cement Limited v William Kilonzi* (2016) eKLR, and *Bamburi Cement v Farid Aboud Mohammed*(2016) EKLR, *inter alia*.

VII. Procedural fairness

49. There is no evidence that the Claimant was issued with a notice to show cause letter informing him that the Respondent intended to take disciplinary action against him and requiring him to respond to specific charges/allegations levelled against him. There is also no evidence that the Claimant was informed of his rights before, during, and after any disciplinary hearing or action against him.
50. The Claimant denied that he was invited or heard in any disciplinary proceedings. The Respondent (RW1) produced as an exhibit handwritten notes which are to a large extent illegible and or incomprehensible, as the proceedings of an alleged disciplinary hearing. The said notes are not signed by any person, especially those who allegedly attended the hearing, including the Claimant. The Claimant was categorical that he was never invited to such a hearing and that he attended none.
51. In the foregoing circumstances, this court concludes and holds that the Claimant was denied procedural fairness or due process in the build up to his dismissal. On this account again this court holds that the dismissal was unprocedural hence wrongful, unfair, and unlawful.

VIII. Reliefs

52. In the preceding two parts of this judgment this court has found that the summary dismissal of the Claimant by the Respondent was wrongful, unfair, and unlawful for lack of both substantive and procedural fairness.
53. In this part this court shall examine and determine whether the Claimant is entitled to the reliefs sought for as reproduced in the introductory part of this judgment. Each relief shall be examined as hereunder.
54. The first prayer is for a declaration that the dismissal of the Claimant was wrongful, unfair, and hence unlawful. This court has already held so in the preceding parts of this judgment and it is hereby so declared.
55. Item (a) is for overtime pay for the entire period that the Claimant worked for the Respondent being two (2) years, two (2) months, and nine (9) days. The Claimant did not adduce any evidence in support of this claim. It is highly unlikely that the Claimant worked overtime each day of the entire period that he worked for the Respondent. There is no evidence that the Claimant at any time during his employment claimed the overtime pay either orally or formally.



56. While it is the duty of the employer to keep employment records under Section 10 and 74 of the Act, it is equally the duty of he who alleges to prove his case unless the law provides otherwise – See Section 107 of the *Evidence Act* (Cap 80).
57. The Evidence by the Respondent through RW1 is that the Claimant did not work overtime and as such there were no records to be availed in that regard. RW1 testified that the Claimant worked for six (6) days a week from 5pm to 8am and that in between the night shift, from 10pm and 5am the Claimant rested in his residence which was situate nearby the brewery as there were no workers or security officers to be picked or dropped. That evidence by RW1 was not challenged by the Claimant in any way.
58. In the circumstances, this court holds that this claim on overtime pay by the Claimant is an afterthought intended to enrich himself unjustly and the same is hereby denied.
59. Prayer (b) is for house allowance for the entire period worked at the rate of 15% of the basic pay. RW1 alleged that the Claimant’s monthly salary of Kshs 30,000/= was all inclusive and that no allowances, including house allowance, was payable to the Claimant.
60. Both parties failed to avail to this court the letter of appointment or contract of employment between the Claimant and the Respondent. However, the Respondent availed Claimant’s payslips for the months of April and July, 2014. The two payslips indicate that the Claimant earned a basic monthly salary of Kshs 30,000/= which is also indicated as the gross monthly pay.
61. As indicated above the contract was not availed to this court. An employer is under legal obligation to either provide housing to an employee or pay house allowance - See Section 31 of the *Act*. The payslips produced as exhibits by the Respondent do not indicate that the Claimant was paid any house allowance. There is no evidence that he was provided with housing.
62. This cause is distinguishable from *Joseph Sani Orina v Hiprora Business Solution (EA) Limited* (2017) eKLR cited by the Respondent’s Counsel. Abuodha J in that decision was provided with the gross pay and not the basic pay. In the cause before this court the Respondent alleges that the basic pay was equivalent to the gross pay. That is not a logical or plausible preposition from the Respondent. There is no contract or a letter of appointment availed to confirm that indeed the monthly salary of Kshs 30,000/= was all inclusive.
63. In the circumstances, this court takes the view that the Respondent failed to either pay house allowance to the Claimant or in the alternative to provide him with housing. If any house allowance was paid to the Claimant nothing would have been easier than for the Respondent to indicate and provide for the same in the payslips produced and the breakdown thereof. As it now stands, there is no contract of service or a letter of appointment produced by either party, and moreso the Respondent who is the legal custodian of employment records.
64. This court has said enough to demonstrate that the claim for house allowance is merited and the same is awarded in the sum of Kshs 117,000/= as prayed.
65. The other Claim (c) is for gratuity/severance pay for two (2) years at 15 days per year worked totalling to Kshs 30,000/=. This court (ELRC) has held severally that gratuity is neither automatically payable to an employee upon termination nor is it a right. As the word implies, gratuity is a gratuitous payment by an employer to an employee who has served well as a “thank you” gesture if you may.
66. Gratuity is payable in two scenarios, and Counsel for the Respondent has correctly cited the decision in *Pathfinder International Kenya Limited v Stephen Ndegwa Mwangi* (2019) eKLR as one of the leading authorities on this issue.



67. Firstly, an employer may pay gratuity to an employee as a way of thanking an employee who, in the eyes of the employer, has rendered exemplary services upon such an employee leaving employment in whatever circumstances. Secondly, payment of gratuity may be based on an express term in the contract of employment whereby the employee has met the conditions of such payment as set out in the contract.
68. In this cause, the Respondent has not offered to voluntarily pay gratuity to the Claimant. No contract was availed to court to prove that gratuity is payable to the Claimant and on what conditions.
69. To state what should by now be rather obvious to all and sundry, and after 10 years of this court's (ELRC) existence, decisions on this issue, and the law applicable, there is a world of difference between gratuity and severance pay. While gratuity entails what has been described above and is payable as delineated above, severance pay is payable to an employee on redundancy under Section 40 (1) (g) of the *Act*.
70. The difference between gratuity and severance pay, and Counsel for the Respondent has done a great job in the written submission on this issue, has been stated and restated in many decisions including the *Pathfinder case* (Supra), *H Young & Company EA Limited v Jaram Were Mbago* (2016) eKLR, *Central Bank of Kenya v Davis Kivieko Muteti* (2009) eKLR, *Bamburi Cement Ltd case* (Supra), *inter alia*.
71. In the circumstances, and for all the foregoing reasons, the claim for gratuity and or severance pay must fail and is hereby dismissed.
72. This court shall not spend much time on prayer (d) for expenses in the sum of Kshs 6,500/=. The Claimant's pleadings do not disclose how this sum was incurred and on what expenses and on whose behalf. It is not enough for a party to make a claim and throw the same on the face of the court to make a finding on the same and expectedly award the same. Section 107 of the *Evidence Act* (Cap 80) places a burden of proof on he who alleges, unless the law otherwise provides. The Claimant offered no evidence in support of that claim and the same is hereby denied and dismissed.
73. Prayer (c) is for compensation for wrongful, unfair, and unlawful dismissal. This court has already made a declaration in favour of the Claimant in this regard. The Claimant is seeking the maximum compensation of 12 months of gross salary in the sum of Kshs 360,000/=.
74. This court has found that the Claimant was denied both substantive and procedural fairness. The suspicion held by the Respondent against the Claimant which, as per RW1, led to erosion of trust and subsequent summary dismissal was found to have been based on unreasonable and insufficient grounds. Whether the Claimant was just lucky not to have been caught in the act of siphoning and selling fuel from the truck allocated to him or the circumstances conspired in his favour, this court is unable to fault the Claimant for the dismissal based on the evidence on record.
75. By the very act of filing this claim in court the Claimant has expressed that he does not wish to be re-engaged and an order for reinstatement is already time barred in law.
76. This court has noted that the Respondent paid to the Claimant some dues upon dismissal in the sum of Kshs 61,911/=. The Claimant has returned the favour by not claiming under the heads that were settled in the said sum being leave days pay, one month's salary *in lieu* of notice, and full pay for the last month of working. The Respondent also issued the Claimant with a certificate of service.
77. The Claimant worked as a driver which is a semi-skilled job that does not require a long period of training or refreshment. Jobs for good, professional, honest, and trustworthy drivers are generally available in the job market although the Claimant alleged that he has not found another job without elaborating as to whether he has been seeking a driver's job.



78. Taking into account the factors provided for in Section 49(4) of the Act and the peculiar circumstances of this cause (each case on its own merits), further considering that the Claimant served the Respondent for a short period of slightly over two years, this court is of the considered view that an award of ten (10) months gross salary is fair compensation in this cause calculated as Kshs 30,000 x 10 = 300,000/=. It is so awarded and this amount is subject to statutory deductions.

IX. Costs

79. Costs follow event and the Claimant is awarded costs of this cause to be agreed on or taxed in the usual manner.

X. Orders

80. In disposal of this matter this court issues the following orders:-

- (a) A declaration be and is hereby issued that the summary dismissal of the Claimant by the Respondent was wrongful, unfair, and unlawful.
- (b) The Claimant is awarded the following:-
 - (i) House allowance in arrears - Kshs 117,000.00
 - (ii) Compensation for wrongful, unfair, and unlawful dismissal -Kshs 300,000.00Total - Kshs 417,000.00

This amount shall earn interest at court rates from the date of this judgment till payment in full.

- (c) Costs of the cause to the Claimant.

Except what is specifically granted herein above the other claims are dismissed.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 22ND DAY OF SEPTEMBER 2022.

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DAVID NDERITU

JUDGE

