



Agai v Brookside (Cause 12 of 2018)
[2022] KEELRC 3960 (KLR) (21 September 2022) (Judgment)

Neutral citation: [2022] KEELRC 3960 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 12 OF 2018
S RADIDO, J
SEPTEMBER 21, 2022

BETWEEN

WALLACE ODHIAMBO AGAI CLAIMANT

AND

BROOKSIDE DAIRY COMPANY RESPONDENT

JUDGMENT

1. Wallace Odhiambo Agai (the Claimant) sued Brookside Dairy Co Ltd (the Respondent) on 15 January 2018, alleging unfair termination of employment.
2. The Respondent filed a Response on 12 February 2018.
3. The Cause was heard on 15 March 2022 when the Claimant testified and on 17 May 2022 when the Respondent's General Manager, Human Resources, testified.
4. The Claimant filed his submissions on 30 June 2022, and the Respondent on 19 July 2022.
5. The Court has considered the pleadings, evidence, and submissions.

Unfair termination of employment

Procedural fairness

6. The Claimant was a Stores Attendant with the Respondent. He challenged the procedural fairness of the termination of his employment on or around 24 August 2016 on the ground that he was not afforded an opportunity to be heard.
7. The Respondent's witness, however, countered that due process was followed before the termination of the Claimant's contract.



8. According to the witness, the Claimant was issued a notice to show cause dated 22 August 2016. The show cause outlined the allegation against the Claimant.
9. The Claimant responded to the show cause on 22 August 2016 and 23 August 2016.
10. The Respondent, after that, invited the Claimant to attend an oral hearing which he did on 27 August 2016, and the hearing was followed by summary dismissal.
11. It is not in doubt that the Claimant was notified of the allegations to confront, and he was allowed to make written and oral representations.
12. The Court is satisfied that the termination of the Claimant's employment met the statutory procedural fairness threshold.

Substantive fairness

13. Sections 43 and 45 of the *Employment Act*, 2007, require the employer to prove that the reasons that precipitated the termination of an employment contract were valid and fair.
14. The reasons for the summary dismissal of the Claimant were an attempt to defraud (involvement in excess loading of 56 cartons of dairy milk product).
15. The Claimant admitted during the disciplinary process that together with a colleague called Amos Maranga Bonuke, they were tasked with loading a truck with milk on a Sunday and that when a Clerk came to verify whether the loading was according to the requisite sales order, he established excess 56 cartons of milk.
16. The Claimant also conceded that they used the sales orders to load and that the colleague had a copy of the sales order.
17. The Claimant had asked for forgiveness in his written response.
18. Before the Court, the Claimant asserted that he was forced/coached to write the statement of 23 August 2016.
19. It is not in dispute that the Claimant was aware of the loading protocol. The Claimant and a colleague disregarded the protocol and loaded excess milk cartons. The act was one of dishonesty which would have led to loss of revenue by the Respondent.
20. The Court is satisfied that the Respondent proved valid and fair reasons to dismiss the Claimant.

Compensation and Pay in lieu of notice

21. With the above conclusions, compensation and pay in lieu of notice are not available remedies to the Claimant.

Certificate of Service

22. A Certificate of Service is a statutory entitlement, and if the Respondent did not issue one to the Claimant, it should.

Conclusion and Orders

23. Save for a Certificate of Service to be issued to the Claimant within 21-days, the Cause is dismissed with costs.



**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS
21ST DAY OF SEPTEMBER 2022.**

RADIDO STEPHEN, MCI Arb

JUDGE

Appearances

For Claimant Mr Nyanga instructed by Nyanga & Co. Advocates

For Respondent Mr Njuguna instructed by Wainaina Ileri Advocates LLP

Court Assistant Chrispo Aura

