



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Malingu v Brookside Dairy Co Ltd (Cause 10 of 2018)  
[2022] KEELRC 3936 (KLR) (21 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3936 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE 10 OF 2018  
S RADIDO, J  
SEPTEMBER 21, 2022**

**BETWEEN**

**ELVIS KWADA MALINGU ..... CLAIMANT**

**AND**

**BROOKSIDE DAIRY CO LTD ..... RESPONDENT**

**JUDGMENT**

1. Elvis Kwada Malingu (the Claimant) was employed by Brookside Dairy Co Ltd (the Respondent) on 1 July 2012 as a Store Attendant.
2. On 11 September 2016, the Respondent issued a show-cause notice to the Claimant. The allegation was that on 9 September 2016, he had failed to obey a lawful instruction from the Stores Manager to disembark from a truck to be assigned other duties. The notice also alleged that he had pushed the Manager and threw up his hands at him.
3. The Claimant responded to the show-cause on 12 September 2016 and 20 September 2016. An oral disciplinary hearing was held on the same day, and on or around 26 September 2016, he was issued a letter terminating his employment.
4. The Claimant was dissatisfied, and he sued the Respondent on 15 January 2018, alleging unfair termination of employment.
5. The Respondent filed a Response on 12 February 2018.
6. 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.
7. The Claimant filed his submissions on 30 June 2022, and the Respondent on 19 July 2022.
8. The Court has considered the pleadings, evidence, and submissions.



## **Unfair termination of employment**

### **Procedural fairness**

9. The Claimant asserted that he was not heard before the decision to terminate his employment was made.
10. The Respondent's witness, however, countered that due process was followed before the termination of the contract.
11. The Claimant was issued a notice to show cause dated 11 September 2016, which set out the allegations, and he was requested to respond.
12. The Claimant responded to the show cause on 12 September 2016 and 20 September 2016. He was also allowed another opportunity to make oral representations on the latter date.
13. The Court is satisfied that the Respondent was in substantial compliance with the statutory procedural fairness elements as outlined in sections 35(1)(c) and 41 of the [Employment Act](#), 2007.

### **Substantive fairness**

14. 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.
15. The ground(s) for the termination of the Claimant's contract was insubordination and misconduct.
16. The Claimant denied the accusations levelled against him in the first written response. However, in the second written response dated 20 September 2016, he admitted that he took time to disembark from the truck after being requested by the Stores Manager, that he threw his hands up in the air because he was irritated and that he held the Manager's hand on the way to the office, but it was not motivated by ill will.
17. The Claimant sought for forgiveness in the second response.
18. With the state of the evidence on record, the Court cannot fault the Respondent's decision to terminate the Claimant's employment.

### **Compensation**

19. Considering the above, the Court is of the view that the Claimant is not entitled to compensation and pay in lieu of notice.

### **Certificate of Service**

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

### **Conclusion and Orders**

21. Save for a Certificate of Service to be issued within 21 days, the Court finds no merit in the Cause and is dismissed with no order on costs.

**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 21<sup>ST</sup> 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 Ireri Advocates LLP

Court Assistant Chrispo Aura

