



**Owuor v Brookside Dairy Company (Cause 9 of 2018)
[2022] KEELRC 3961 (KLR) (21 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3961 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 9 OF 2018
S RADIDO, J
SEPTEMBER 21, 2022**

BETWEEN

FREDRICK OUMA OWUOR CLAIMANT

AND

BROOKSIDE DAIRY COMPANY RESPONDENT

JUDGMENT

1. Fredrick Ouma Owuor (the claimant) sued Brookside Dairy Co Ltd (the respondent) on January 15, 2018, alleging unfair termination of employment.
2. The respondent filed a response on February 12, 2018.
3. The cause was heard on November 22, 2021, when the claimant testified and on May 17, 2022, when the respondent's general manager, human resources, testified.
4. The claimant filed his submissions on June 30, 2022, and the respondent on July 19, 2022.
5. The court has considered the pleadings, evidence, and submissions.

Unfair termination of employment

Procedural fairness

6. The claimant was a transport supervisor while working with the respondent, and he challenged the procedural fairness of the termination of his employment on or around October 18, 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 November 5, 2016. The show cause outlined the allegations against the claimant.
9. The claimant responded to the show cause on November 7, 2016.
10. The respondent, after that, invited the claimant to attend an oral hearing scheduled for November 14, 2016, but he did not attend the hearing. He was dismissed through a letter dated November 18, 2016.
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. The claimant made a written response but snubbed the opportunity to attend the oral hearing.
12. The court is satisfied that the termination of the claimant's employment met the 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 anomalies on the use of a fuel card and unaccounted fuel stocks.
15. As already stated, the respondent presented its General Manager to discharge the burden. The witness' written statement made a general statement:

The company received an incident report over the use of generator fuel cards between the months of January 2016 to August 2016 and the anomaly of unaccounted fuel stock at the Kisumu depot.
16. Save for the assertion in the witness statement, which was adopted as part of the evidence, the respondent did not place any direct evidence, either through documentation or otherwise, to show that the claimant was culpable.
17. Considering the claimant's explanations in the response to the show cause (the claimant had stated that an audit was conducted, but the report was not filed, nor was the auditor called to testify. He also explained that the Depot Senior Guard was responsible for physical fuelling and relied on his records to make payments). The respondent should have produced the records demonstrating falsification, forgery or misconduct.
18. Without any tangible evidence linking the claimant to the allegations, the court finds that the respondent did not discharge the burden imposed on it by the law.

Compensation

19. The claimant served the respondent for about 7 years, and it is asserted he disappeared before the formal conclusion of the disciplinary process.
20. Considering the above, the court is of the view that the equivalent of 3 months' salary as compensation would be appropriate (salary was Kshs 52,000/-).

Salary in lieu of notice

21. The claimant disappeared before the conclusion of the disciplinary hearing, and the court declines to award pay in lieu of notice.



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. The court finds and declares that though the termination of the claimant's employment was procedurally fair, it was not for valid and fair reasons.
24. The claimant is awarded:
- (i) Compensation Kshs 156,000/-
25. The respondent to issue a certificate of service within 21-days.
26. For the failure to cooperate with the respondent during the disciplinary process, the court orders each party to bear own 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 Ireri Advocates LLP

Court Assistant Chrispo Aura

