



**Ogutu v Harley's Limited (Cause 1924 of 2017)  
[2022] KEELRC 3896 (KLR) (19 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3896 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1924 OF 2017  
JK GAKERI, J  
SEPTEMBER 19, 2022**

**BETWEEN**

**MARCELLUS OGUTU ..... CLAIMANT**

**AND**

**HARLEY'S LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant initiated this claim by a memorandum of claim filed on September 27, 2017 alleging unfair and wrongful termination by the respondent for insubordination.
2. The claimant avers that he was employed by the respondent as a driver on December 2, 2010 at a monthly salary of Kshs 10,769/= and was later promoted to an office assistant at Kshs 27,000/= per month and served the respondent diligently and his performance was appreciated by the respondent.
3. The claimant avers that on July 19, 2017, unsigned cheques were forwarded to his desk for onward transmission to Directors for signature and presentation to the bank.
4. That on that day, directors had a meeting and even after waiting for them to conclude the meeting, they did not until 5.30 pm long after the banks were closed.
5. The claimant further avers that on July 20, 2017 at 8 am he had the cheques signed and taken to the bank immediately.
6. That when the manager learnt that the cheques were banked in the morning, he sought an explanation but still insisted that the claimant would bear the costs of late payment and a warning was issued.
7. Further, the claimant avers that a notice to show cause was issued on July 26, 2017 to which he responded but was terminated on July 31, 2017.
8. The claimant denies having been insubordinate.



9. That at the time of termination of employment, the claimant had a SACCO loan of which he had contribution of Kshs 130,000/= which was used to re-pay the loan as well as other dues.
10. That he had served the respondent for 7 years and left an outstanding debt of Kshs 131,142/=.
11. The claimant prays for;
  - i. A declaration that the respondent's dismissal of the claimant from employment was unprocedural and improper and the claimant is entitled to payment of his terminal dues and compensatory damages as pleaded.
  - ii. An order for payment of the claimant's terminal dues and compensatory damages totalling Kshs 338,000/= as pleaded in paragraph 16.
  - iii. Costs of this suit plus interest thereon.

### **Respondent's Case**

12. The respondent filed a memorandum of reply on October 19, 2017.
13. The respondent denies that the claimant's performance was as claimed and aver that complaints had been made regarding his performance.
14. The respondent avers that it was the claimant's responsibility to make deliveries and pay on time.
15. The respondent denies knowledge of the job description attached to the claimant's contract dated April 11, 2011.
16. It is the respondent's case on July 20, 2017, the claimant refused to obey proper command and when questioned he spoke in an insulting manner to one Meerna Shah and Elimius Ambani who had authority over him.
17. The respondent avers that when the claimant was questioned about his failure to have cheques signed by his superior, he responded rudely "Don't talk to me I will pay cash".
18. The respondent further avers that at a departmental meeting on July 22, 2017, the claimant was unremorseful and engaged in a verbal confrontation with Meerna Shah, his Manager.
19. It is further avered that the claimant went out of the office during working hours on July 24, 2017 without notifying his superiors.
20. Finally, the respondent avers that the claimant was fervently insubordinate which culminated in the issuance of a notice to show cause and a hearing was held in accordance with the provisions of section 41 of the [Employment Act](#) and the claimant was paid all terminal dues.

### **Claimant's Evidence**

21. On cross-examination, the witness confirmed that he was denied terminal dues and had given notice to proceed on paternity leave but had no evidence to show he sought leave. He confirmed that the cheque given to him on July 19, 2017 was not paid on the same day. That it was unsigned.
22. The witness further confirmed that he signed the job description on February 23, 2017 which stated that deliveries and payments had to be done on time as per process requirements as well as file and maintain the register records and ensure they were to update and perform any other duties that may be assigned by the management.



23. It was his testimony that it was his duty to pay once given a cheque by finance and the cheques were given but he could not take them for encashment because they were unsigned.
24. He testified that he was given the cheques to keep until the signatories were available and when asked about the delay he did not raise his voice against the Manager. This evidence contradicts his response to the notice to show cause dated July 27, 2017.
25. The witness testified that he signed the warning letter dated July 20, 2017 and was aware of the consequences of the signature.
26. That on 24<sup>th</sup> and July 25, 2017, he left the office and did not return and had no evidence of authority to do so.
27. It was his testimony that he received the letter to show cause on July 27, 2017, acknowledged receipt and responded, and attended a meeting on July 31, 2017 and explained himself.
28. CWI stated that the comments by Parth and Meerna that the claimant behaved badly in front of the manager were personal opinions.
29. On re-examination, the witness stated that he could not encash the cheque until July 20, 2017 and the entry was not paid for on July 19, 2017.
30. RWI, Mr Elmius Ambani, testified that he was the immediate supervisor of the claimant having worked at the respondent's for 3 years.
31. On cross-examination, the witness told the court that the letter dated July 20, 2017 was a warning letter from the respondent's Human Resource Office.
32. That the termination letter made no reference to the incidences on 23<sup>rd</sup> and July 24, 2017.
33. He confirmed that the cheques given to the claimant was unsigned. That the claimant did nothing wrong by going to the National Bank, Kimathi Street, in town as he was supposed to.
34. On re-examination, the witness stated that the cheque given to the claimant on 19<sup>th</sup> was signed on July 20, 2017.
35. He also confirmed that the claimant had in his own words admitted raising his voice at a department meeting and confirmed that the claimant's employment was terminated on the ground of insubordination.

### **Claimant's Submissions**

36. The claimant's counsel submitted that the claimant's employment was terminated for reasons other than those for which he had been called upon to respond to in the notice to show cause.
37. Reliance is made on the decision in *Zephania O Nyambane & another v Nakuru Water & Sanitation Services Co Ltd* [2013] eKLR where the court held that whether the reasons in the notice to show cause and those in the termination are substantially at variance, the reasons for termination are invalid.
38. As to whether the claimant is entitled to the reliefs sought, it is submitted he is entitled to payment for paternity leave as he was blessed with a child in March, 2017 and has provided a birth certificate. The date of issue of the certificate is unclear.
39. It is further submitted that since the claimant worked for the respondent for 7 years, he qualifies for 12 month's salary compensation and costs of this suit.



## Respondent's Submissions

40. As to whether the respondent had a valid and fair grounds to terminate the claimant's employment, the respondent relies on the provisions of section 47(5) of the *Employment Act* and the decisions in *Pius Machafu Isindu v Lavington Security Guards Ltd* [2017] eKLR, *Kenya Power & Lighting Company Ltd v Aggrey Lukorito Wasike* [2017] eKLR, *Evans Kamadi Misango v Barclays Bank of Kenya Ltd* [2015] eKLR and others to urge that justice is a two way highway, that the court should not substitute its views to those of the employer but should be guided by the reasonable employer test and the standard of proof is on a balance of probability not otherwise.
41. It was submitted that insubordination is embodied in section 44(4)(e) and (f) of the *Employment Act* and the claimant had admitted to having raised his voice against the manager during a departmental meeting. That the conduct amounted to insubordination which amounted to gross misconduct.
42. Reliance was made on the decision in *Abraham Gumba v Kenya Medical Supplies Authority* [2014] eKLR where Rika, J held that insubordination could take forms other than disobeying direct or indirect orders of a supervisor.
43. Section 44(1)(3) of the *Act* is cited to underscore the essence of the conduct of the employee in a summary dismissal. Section 43(2) of the *Act* is also relied upon to reinforce the submission.
44. It is urged that the claimant's conduct which led to termination of employment was a valid reason within the meaning of section 45(2) of the *Employment Act*.
45. The decision in *James Epusy v Petrol Plus Kenya Ltd* [2020] eKLR is relied upon to urge that the raising of voice by the claimant against the manager was a form of insubordination which entitled the respondent to terminate the claimant's employment.
46. Reliance was also made on the decision in *Consolata Kemunto Aming'a v Milimani High School* [2019] eKLR to urge the submission.
47. As regards the procedure employed by the respondent, the Court of Appeal decision in *Postal Corporation of Kenya v Andrew K Tanui* [2019] eKLR is relied upon to demonstrate the essential elements for a termination of employment procedure to pass muster as provided by section 41 of the *Employment Act*.
48. The decision in *Standard Grop Ltd v Jenny Luesby* [2018] eKLR was also relied upon to underline the essence of a hearing.
49. It was urged that the claimant was afforded an opportunity to respond to the allegations in the show cause letter and was taken through a hearing as the minutes dated July 31, 2017 show.

## Analysis And Determination

50. The issues for determination are;
  - i. Whether termination of the claimant's employment by the respondent was unfair.
  - ii. Whether the claimant is entitled to the reliefs sought.
51. As to whether termination of the claimant's employment was fair, the starting point is the legal architecture on termination of employment.
52. The *Employment Act, 2007* has elaborated provisions on termination of employment which courts have interpreted and applied consistently.



53. Courts have been unambiguous that for a termination of employment to pass muster, it must be substantively justifiable and procedurally fair. This was clearly articulated in *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR as well as *CMC Aviation Ltd v Mobammed* [2017] eKLR, *Naima Khamis v Oxford University Press (EA) Ltd* [2017] eKLR among others.
54. As explained by Ndolo, J in *Walter Ogal Anuro v Teachers Service Commission* (*supra*), while substantive justification relates to the reasons and justification for the termination, procedural fairness implicates the procedure employed by the employer.
55. More significantly, however, section 45(2) of the *Employment Act* provides;  
A termination of employment by an employer is unfair if the employer fails to prove-
- a. that the reasons for the termination is valid;
  - b. that the reason for the termination is a fair reason;
    - i. related to the employee’s conduct, capacity or compatibility or
    - ii. based on the operational requirements of the employer; and
  - c. that the employment was terminated in accordance with fair procedure.
56. In *Pius Machafu Isindu v Lavington Security Guards Ltd* [2017] eKLR, the Court of Appeal stated as follows;

“There can be doubt that the Act which was enacted in 2007 places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47)(5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”

### **Reason For Termination**

57. The respondent submitted that the claimant’s employment was terminated for insubordination.
58. The termination letter dated January 31, 2017 states *inter alia*:

“Termination For Employment

The above subject refers. In reference to the show cause meeting held on July 31, 2017, management has made the decision to terminate your services with immediate effect on grounds of insubordination. A warning letter was issued to you on July 21, 2017 in regard to your behaviour with your manager as well as the CFO.

You were given a chance to improve on the same. However, unfortunately, on the same day you were rude to your manager in front of the entire team which is disrespectful and totally unacceptable.”

This is a case of insubordination, hence has left us with no other alternative but to relieve you of your services . . .”



59. In a similar vein, the warning letter dated July 20, 2017 characterised the claimant's conduct on July 20, 2017 as insubordination. That, when he was questioned about the non-payment on July 19, 2017, he spoke rudely to his seniors an allegation the claimant did not rebut in writing or by word of mouth.
60. Finally, the show cause letter dated July 26, 2017 itemised three points which it required the claimant to respond to and all adverted to insubordination by the claimant as follows:
- i. You had been issued with a warning letter in regard to insubordination and having poor attitude with your manager after which you were expected to improve. However, this has not been the case.
  - ii. On July 22, 2017 when you had a short departmental meeting to discuss a miscommunication issue, you once again raised your voice and spoke with disrespect to all present there including your manager.
  - iii. Since then you fail to report to your manager on your daily where about, you left the office going out to official work on Monday July 24, 2017 and 25<sup>th</sup> of July at 2.00 pm after which you did not return back to the office and also did not report back to your manager of the delays, the reasons you did not come back. This shows poor reporting and a disrespectful attitude towards your manager.

This conduct is totally unacceptable and in case of insubordination and poor attitude . . .”

61. In his response to the notice to show cause, the claimant states that the manager had not been cordial to him that he used the words “*Mimi ni mbaya hali ikishinda mbindi.*”
62. That on July 22, 2017 during the departmental meeting
- “my manager again started to me disrespectfully by telling me that I can tender in my resignation letter since the gate is opened for anyone who wants to resign from the organization . . . therefore he said that he will give me a letter firing me. That is the reason I raised my voice . . .”
63. It is unclear why the claimant had not reported the non-cordial attitude of the manager for attention and action but appear to have opted to confront him in the presence of other officers which did not endear him to other staff.
64. In the penultimate paragraph of his response to the notice to show cause, the claimant sounds apologetic and beseeches the management to be lenient to him in light of the environment he was working in.
65. Contrary to the claimant's submission that there was incongruence between the reasons set out in the notice to show cause and the reasons in the letter of termination, this was not the case.
66. The thread of being insubordinate and disrespectfulness to the managers cuts across the three reasons set forth in the notice to show cause and it is the sole ground or reason for termination of employment.
67. The decision in *Zephania O Nyambane & another v Nakuru Water & Sanitation Services Co Ltd* (*supra*) is relied upon by the claimant is distinguishable to the extent that in that case, the notice to show cause alleged that the claimant's actively participated in coordinating an illegal strike that paralysed operations at the head office by instructing guards not to open the main door, manning the main door obstructing customers and gathering staff at the banking hall.



68. The termination letter on the other hand accused the claimant for having participated in the strike by paralyzing operations at the head office.
69. In the court's view, co-ordinating and participating in strike are different activities as one leads to the other.
70. The court expressed itself as follows;
- “The court holds that where the particulars of the alleged misconduct keep on varying during the employer's administrative disciplinary process, the employee is thereby hindered and disadvantaged from preparing for his or her effective defense towards self-exculpation . . .
- The court holds such to be unfair disciplinary process falling short of due process of justice. Further, where the reasons alleged in the notice or show cause letter are substantially at variance with the reasons for termination as was the case in the present dispute, the court holds that the reasons for the termination must be found to have been invalid and the termination therefore unfair.”
71. The same cannot be said of the circumstances of the instant case where the theme of insubordination and disrespect runs through the notice to show cause and the letter of termination of employment.
72. For the above reasons, the court is satisfied that the respondent has on a balance of probability demonstrated that it had a valid and fair reason to terminate the claimant's employment.
73. The claimant did not deny having been disrespectful to the manager or raising his voice during a departmental meeting. He did not deny having engaged in a verbal confrontation with the manager but attempted to justify his conduct.
74. The minutes of the disciplinary hearing dated July 31, 2017 lay bare the claimant's conduct during the departmental meeting.
75. Those present at the meeting, Meerna Shah, Anastacia and Mr Ambani were unanimous that the claimant's conduct was unprofessional as he was rude to the manager, disrespectful and humiliated him in the presence of his juniors. On 24<sup>th</sup> and July 25, 2017, the claimant left the office on official duty but left for home without notifying the manager which is a sign of disrespect.
76. Section 43(2) of the *Employment Act* states that,;
- “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 the employer to terminate the services of the employee”
77. The court is satisfied that the Respondent has discharged the burden of proof under section 43 of the *Employment Act*.

### **Procedure**

78. As explained by the Court of Appeal in Pius Machafu Isindu v Lavington Security Guards Ltd (*supra*), section 41 of the *Employment Act* provides the mandatory process an employer must comply with in effecting a lawful termination of employment.



79. The specific elements involved were highlighted by the Court of Appeal in *Postal Corporation of Kenya v Andrew K Tanui* (supra) as follows;

“Four elements must be discernible for the procedure to pass muster.

- i. an explanation of the grounds of termination in a language understood by the employee;
- ii. the reason for which the employer is considering termination;
- iii. entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination are made;
- iv. hearing and considering any representations made by the employee and the person chosen by the employee.”

80. The court is guided by these sentiments.

81. In the instant case, the notice to show cause sets out the grounds on which the respondent was considering termination of the claimant’s employment contract and the claimant received the letter and acknowledged receipt on July 26, 2017.

82. In addition to providing a written explanation by July 29, 2017 why disciplinary action should not be taken against him, the letter invited the claimant to a disciplinary hearing on July 31, 2017 at 10.00 am.

83. On cross-examination, the claimant confirmed that he responded to the notice to show cause and attended the disciplinary hearing and explained himself.

84. The claimant further stated that the comments by Parth and Anastacia at the meeting was their opinion.

85. Worthy of note, the claimant did no fault the procedure employed by the respondent in any respect and did not submit on it.

86. Although the notice to show cause, which invited the claimant for the disciplinary hearing neither notified him about his entitlement to the presence of another employee of his choice during the explanation of the grounds on which termination of employment was being considered nor the right of appeal, the court, in the totality of the evidence satisfied that the respondent accorded the claimant the opportunity to respond to the allegations made in writing and at the oral hearing.

87. This court has previously held that absence of a representative does not of itself render a disciplinary process unfair, not even the absence of an invitation. What is elemental is whether having regarded to all the circumstances of the case, the claimant was taken through a credible and fair process and had sufficient time and facilitation necessary to prepare for his defence and reasonably participated in the process.

88. In this case, the claimant was afforded the opportunity to rebut the allegations made against him.

89. For the foregoing reasons, it is the finding of the court that the claimant had on a balance of probability failed to demonstrate that termination of his employment was procedurally unfair.

## Reliefs

90. Having found that the respondent had a valid and fair reason to terminate the claimant’s employment and conducted the process in accordance with a fair procedure as ordained by the provisions of the



Employment Act, the claimant is not entitled to relief provided by section 49(1)(c) of the Employment Act.

91. As regards paternity leave, the claimant led no evidence of having applied for leave and the same was denied by the respondent in 2014. More significantly, the suit herein was filed on September 27, 2017. The prayer is declined.
92. Consequently, the suit herein is dismissed for want of proof.
93. Parties to bear own costs.
94. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 19<sup>TH</sup> DAY OF SEPTEMBER, 2022**

**DR JACOB GAKERI**

**JUDGE**

**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.

**DR JACOB GAKERI**

**JUDGE**

