



**Ombima v Impala Glass Industries Limited (Cause 1700 of 2015)
[2022] KEELRC 3879 (KLR) (2 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3879 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1700 OF 2015
SC RUTTO, J
SEPTEMBER 2, 2022**

BETWEEN

FRANCIS SHIEYO OMBIMA CLAIMANT

AND

IMPALA GLASS INDUSTRIES LIMITED RESPONDENT

JUDGMENT

1. The claimant brought the instant suit vide a memorandum of claim filed on September 24, 2015, through which he avers that he was employed by the respondent on December 1, 1999, as a casual employee. He avers that without due process, the respondent dismissed him from employment on February 23, 2013. He states that as a result of the respondent's actions which he terms as unfair and unjustifiable, he has suffered mental anguish and economic distress. It is for this reason that the claimant seeks against the respondent the sum of Kshs 131,469/= being one month's salary in lieu of notice and compensatory damages. He also prays for a certificate of service and costs of the suit.
2. The claim was opposed through the respondent's memorandum of defence dated January 18, 2016. The respondent avers through the memorandum of defence that the claimant was summarily dismissed for gross misconduct. That although he had shown good workmanship initially, his diligence deteriorated and was persistently marred with absenteeism and lateness for which he received persistent warnings. That on February 22, 2013, the respondent drew the last straw after the claimant confronted the human resource officer in a confrontational and abusive manner. That his summary dismissal was thus proper and in accordance with the *Employment Act, 2007*. The respondent has thus asked the court to dismiss the suit with costs.
3. Hearing of the matter commenced on November 1, 2021 when the court took the claimant's case. Subsequently, the defence hearing took off on April 25, 2022 whereupon trial closed.



Claimants' Case

4. To start with, the claimant adopted his witness statement and bundle of documents to constitute his evidence in chief. It was his testimony that on February 22, 2013, he went to the secretary of the respondent's human resource officer regarding some erroneous deductions on his pay slip. That the secretary referred him to the human resource manager who was very harsh to him. That the shop steward intervened and calculated his salary and roughly wrote the same at the back of his pay slip and asked him to leave the office of the human resource manager. He further testified that the human resource manager called him back, asked him to remove his work overall and leave the respondent's premises as he had been dismissed. That he went back the following day on February 23, 2013, for his compensation but was issued with a letter of termination. That he was paid salary for February and thereafter escorted by security and told never to go back to the respondent's premises.

Respondent's Case

5. The respondent called oral evidence through Mr Shabbir Hakimjee, who testified as RW1. He identified himself as the human resource manager of the respondent and proceeded to adopt his witness statement and the bundle of documents filed on behalf of the respondent, to constitute his evidence in chief.
6. It was RW1's testimony that the claimant had a drinking habit, was a habitual absentee and late comer. That on February 22, 2013, the claimant went to his office to complain about deductions from his pay slip. That he called in the shop steward who tried to talk to the claimant but he refused to listen. That the deductions from the claimant's salary was on account of his absenteeism from work. That the claimant was not willing to listen and wanted to create a disturbance. That the claimant continued in a vicious and aggressive manner to taunt him demanding for immediate payment of his dues as he was no longer interested in the job. That the respondent therefore had no choice but to summarily dismiss the claimant. That on February 23, 2013, the claimant's dues were processed and he duly received the same.

Submissions

7. It was submitted on behalf of the claimant that the respondent has not proved any valid reason for terminating his employment, hence his termination was unfair within the meaning of section 45 of the *Employment Act*. It was further submitted that the claimant was never issued with the warning letters produced by the respondent. In support of this argument, the cases of *Dr Joseph Maingi v Permanent Secretary of Medical Services and another* [2015] eKLR and *Banking Insurance & Finance Union (Kenya) v KCB Bank (Kenya) Limited* [2019] eKLR were cited.
8. The claimant further submitted that the respondent summarily dismissed him without following the correct procedure laid out in section 44(2) (sic) of the *Employment Act*. On this issue, the claimant placed reliance on the case of *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR.
9. The respondent did not file any submissions despite being given an opportunity to do so.

Analysis and Determination

10. Upon considering the pleadings by both parties, the evidentiary material placed before me and the submissions on record, it is apparent that this court is being called to resolve the following questions: -
 - a. Was the claimant's dismissal from employment unfair and unlawful?
 - b. Is the claimant entitled to the reliefs sought?



Unfair and Unlawful Dismissal?

11. The determination of this issue turns on the provisions of sections 43, 45 and 41 of the Employment Act (Act). In this regard, section 43(1), provides that an employer bears the burden of proving the reasons for termination and failure to do so, such termination is deemed to be unfair. Further and pursuant to subsection (2), such reasons are those it genuinely believed to exist at the time of the employee's termination.
12. Connected to the foregoing provision, is section 45 (2) (a) and (b) of the Act, which provides that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and relates to the employee's conduct, capacity or compatibility; or based on its operational requirements.
13. What I have enumerated above constitutes the legal parameters for establishing substantive justification.
14. As was held in the case of Walter Ogal Anuro v Teachers Service Commission [2013] eKLR, for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness.
15. It is for this reason that section 45 (2) (c) of the Act, provides for the requirement of fair procedure. Section 41(1) of the Act provides in an elaborate fashion the requirements of a fair process. In particular, it requires an employer to notify an employee of the intended termination. Accordingly, the employee is to be notified of the reasons thereof in a language he or she understands and in the presence of another employee or a shop floor union representative.
16. I will first deal with the limb of substantive justification. The reason for the claimant's dismissal can be discerned from his letter of summary dismissal dated February 23, 2013 and which is couched as follows: -

“Ref: Summary Dismissal

The management regrets to inform you that it has decided to summary (sic) dismiss you from your(sic) services under (sic) following misconduct reasons(sic) as per Labour Act 2007(sic) section S44, for using insulting language and behaving in a similar manner to the employer or a person place in authority over you by the employer.

1. You have a history of remaining(sic) absent without permission;
2. You were found two times in your employment period(sic) drunk;
3. You have also being (sic) found in some occasions reporting to work late;
4. You acted and approached the HR office in a disorderly manner and intention(sic) to create disturbances in presence of your chief shop steward who was trying to sort out your issue on February 22, 2013...”

17. What manifests from the reproduced letter of summary dismissal, though not drafted elegantly, is that the real reason for the claimant's dismissal was using insulting language to a person placed in authority over him by his employer. This is also taken in context of the oral testimonies rendered by each side as



regards the events of February 22, 2013 involving the claimant and RW1. It is therefore evident that the claimant was dismissed pursuant to the provisions of section 44(4) (d) of the Act which provides that: -

“[44](4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if—

.....

(d) an employee uses abusive or insulting language, or behaves in a manner insulting, to his employer or to a person placed in authority over him by his employer...”

18. From the totality of the evidence presented before court, the claimant is alleged to have used insulting and abusive language against RW1. Besides the testimony of RW1, it is notable that the respondent has not presented any evidence to confirm and substantiate its allegations against the claimant.
19. From the narration of the claimant and RW1, there were other parties present when the claimant went to complain about the deductions from his salary. With both parties presenting different versions as to what really transpired on February 22, 2013, between the claimant and RW1, the respondent being the party with the onus to prove the reason for termination, ought to have called another person who was present at the material time, to corroborate the version of RW1. This was not done, hence denting the credibility of the respondent’s case.
20. On this score, I will follow the holding by the Court of Appeal in the case of Jbpiego Kenya v Duncan Mwirigi Arithi [2017] eKLR, as regards the onus to prove, thus: -

“There was no assertion that the insulting words were used against the employer. The onus was on the employer to prove that they were uttered towards a person in authority over the employee.”
21. The net effect of the lapse on the part of the respondent to prove, is that the reason for the claimant’s dismissal was not proved in terms of section 43 and 45(2) (a) and (b) of the Act.
22. As regards the question of procedural fairness, it was the testimony of RW1 that the claimant was dismissed following his alleged insulting and abusive conduct. There was no suggestion from his end that he subjected the claimant to the process contemplated under section 41 of the Act. If indeed, the claimant had behaved the way he did in his presence and being the human resource manager, nothing stopped him from asking the claimant to explain his behaviour and show cause why his employment should not be terminated on that account.
23. Notably, during cross examination, RW1 admitted that he did not issue the claimant with a show cause letter. He further testified that the claimant had to be discharged immediately to avoid a confrontation and that it was on this basis that he summarily dismissed him. This admission by RW1 confirms the claimant’s assertions that he was not subjected to due process prior to being summarily dismissed.
24. The significance of the process contemplated under section 41 of the Act is that it allows the employer to consider the explanation of the employee in regards to the accusations levelled against him. With respect to this, the mandatory requirement of adherence to this process cannot be overemphasized. As



was held by the Court of Appeal the case of *Postal Corporation of Kenya v Andrew K Tanui* [2019] eKLR: -

“It is our further view that section 41 provides the minimum standards of a fair procedure that an employer ought to comply with...Four elements must thus 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 is made;
- (iv) hearing and considering any representations made by the employee and the person chosen by the employee...”

25. I fully concur with the position espoused by the Court of Appeal in the above precedent and hold that the standards set under section 41 of the *Act* are the minimum requirements that an employer ought to comply with prior to dismissing an employee. There ought to be nothing short of the same.

26. I must also emphasize that summary dismissal does not oust the requirements of a fair process. Indeed section 41(2) of the *Act* confirms this position as it provides that: -

“[41](2) Notwithstanding any other provision of this part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”

27. The upshot of the foregoing is that failure by the respondent to accord the claimant a hearing as demanded by section 41, fell outside the legal parameters and on that basis, his dismissal was unlawful and unprocedural.

28. In total sum, the respondent has failed to prove the reasons for the claimant’s termination and compliance with the requirements of a fair process, hence the resultant dismissal was unfair and unlawful in terms of sections 43(1) and 45(2) of the *Employment Act*.

29. Having so found, is the claimant therefore entitled to any of the reliefs sought?

Reliefs

30. As the court has found that the claimant’s termination was unfair and unlawful, I will award him eight (8) month’s gross salary as compensatory damages. This is noting the length of the employment relationship and failure by the respondent to prove reasons for the claimant’s termination and its failure to follow due process.

31. The claimant is further awarded one (1) month’s salary in lieu of notice as per the provisions of section 35 (1) (c) of the *Employment Act*.

Orders

32. To this end, judgment is entered in favour of the claimant against the respondent and he is awarded: -



- a. Compensatory damages in the sum of Kshs 97,704.00 which sum is equivalent to eight (8) months of his gross salary.
- b. One (1) month's salary in lieu of notice being Kshs 12,213.00.
- c. The total award is Kshs 109,917.00.
- d. Interest on the amount in (c) at court rates from the date of judgement until payment in full.
- e. The claimant shall also have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF SEPTEMBER, 2022.

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STELLA RUTTO

JUDGE

Appearance:

For the claimant Ms Mugo

For the respondent Ms Obonyo

Court Assistant Abdimalik Hussein

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 had 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.

STELLA RUTTO

JUDGE

