



**Makau & 3 others v Dinamu Agencies Limited (Cause 731 of 2017)
[2022] KEELRC 13023 (KLR) (28 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13023 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 731 OF 2017
SC RUTTO, J
OCTOBER 28, 2022**

BETWEEN

**PATRICKSON MUSEMBI MAKAU 1ST CLAIMANT
SHAULINE KHAEMBA BULLAE 2ND CLAIMANT
FADILI ELISHA MCHOMBO DZMOMBO 3RD CLAIMANT
STELLA MBESA MUASA 4TH CLAIMANT**

AND

DINAMU AGENCIES LIMITED RESPONDENT

JUDGMENT

1. The claimants filed a joint claim through which they aver that at all material times, they were employees of the respondent, having been employed on various dates. That the 1st, 2nd and 3rd claimants were employed as loaders while the 4th claimant was employed as a cleaner. The claimants aver that they were unfairly and unlawfully terminated from employment on various dates hence seek several reliefs against the respondent.
2. The respondent challenged the claim through its response, which was filed on April 11, 2018. The respondent contends that the claimants were terminated lawfully and procedurally. The respondent further states that the claimants were remunerated as per contract and were paid all their lawful dues at the time of termination. Consequently, the respondent has urged the Court to dismiss the claim with costs.
3. The trial took off on November 17, 2021 when the 1st, 3rd and 4th claimants testified. On that day, the 2nd claimant was absent hence his testimony was deferred to a later date. The matter was scheduled for further hearing on June 15, 2022 and yet again, the 2nd claimant was absent. Upon noting that the



2nd claimant was no longer interested in the suit, the Court dismissed his claim and directed that the matter proceeds for defence hearing.

4. At the start of the hearing, the parties notified the Court that they had agreed by consent to compromise the claim in regards to notice pay, service pay and leave pay, hence the only outstanding issue was in regards to compensatory damages.

1st Claimant's case

5. The 1st claimant was the first to go. He testified as CW1 and at the outset, sought to adopt his witness statement and bundle of documents filed together with the claim, to constitute his evidence in chief. He also produced the said documents as his exhibits before Court.
6. CW1 told Court that he was employed on February 5, 2012 as a loader. That he did not have a problem with the respondent and worked honestly and diligently. That on June 29, 2015, he was called by his supervisor by the name Mr Opicho who informed him that his work was not good. That he then directed him to go and see the manager by the name Mr Karanja who also told him that his work was bad. That the said Mr Karanja did not address any issue with him. That he was then referred back and forth and was not assigned duties on that day.
7. That on reporting back to work the following day, he was barred by the respondent's security personnel from accessing his work place. That the security guards informed him that they were under strict instructions from the manager not to allow him in. That he was then told to return all his work apparel and leave. That as a result of his dismissal, he had suffered abrupt loss of income. Concluding his testimony, he asked the Court to allow his claim as prayed.

3rd claimant's case

8. The 3rd claimant testified as CW2 and similarly proceeded to adopt his witness statement and bundle of documents filed together with the claim, to constitute his evidence in chief. He also produced the said documents as his exhibits before Court.
9. It was the testimony of CW2 that he was employed by the respondent on April 18, 2017 as a loader. That throughout his employment, he had never been disciplined on account of any misconduct. That on February 10, 2016, he reported to work as usual and upon completion of his duties, he shut down the machines as required and left for home at around 6:00 am. That he was later summoned by the respondent's supervisor who falsely accused him of shutting down the machines. That he then ordered him to leave the work premises immediately. That he was not given the reason for his termination. That as a result of his unfair dismissal, he had suffered abrupt loss of income. He asked the Court to allow his claim as prayed.

4th Claimant

10. The 4th claimant testified as CW3. She also adopted her witness statement and bundle of documents filed together with the claim, to constitute her evidence in chief. She also produced the said documents as her exhibits before Court.
11. CW3 testified that she was employed by the respondent on September 15, 2011 as a cleaner. That throughout her employment with the respondent, she worked diligently and did not have any problem at work. That on December 28, 2015, while at work, her supervisor by the name Ms Triza falsely accused her of failing to clean certain areas in the premises, which were not in her scope of duties. That the said supervisor ordered her to go home as her work was bad and await a call to resume her duties.



That she was never called back as she had been promised and was not invited to attend any disciplinary hearing. In summing up her testimony, she asked the Court to allow her claim as prayed.

Respondent's case

12. The respondent's oral evidence was presented through Mr Simon Opicho, who testified as RW1. He identified himself as the Assistant Human Resource Manager of the respondent. He adopted his witness statement and documents filed on behalf of the respondent to constitute his evidence in chief.
13. It was his testimony before Court that the respondent is a human resource consultancy and management firm that undertakes labour force resourcing recruiting and training and specifically provides loading labour force on contract temporary casual basis on behalf of its client, Mombasa Cement.
14. He further testified that the claimants were engaged in various capacities on temporary contracts. That the 1st Claimant who was engaged as a loader, was terminated on account of absenteeism and loading excess cement on customer's lorries. That he was given several warnings and a hearing prior to his termination.
15. That the 3rd claimant, who was also engaged as a loader, was terminated on account of absenteeism and loading excess cement on customer's lorries. That prior to his termination, he was given several warnings and a hearing.
16. With regard to the 4th claimant, RW1 testified that she was employed as a cleaner and was careless, negligent and regularly absent from work. That she promised to improve but failed to do so hence is a victim of her own actions.
17. He further informed the Court that all the claimants were lawfully and properly terminated. That as such, they are not owed by the respondent. He asked the Court to dismiss the suit with costs.

Submissions

18. The claimants filed joint submissions through which they submitted that their dismissal was capricious and against the law. That having served for 13 years, they are entitled to compensatory damages equivalent to 12 months of their respective gross salaries and as tabulated in the claim.
19. The respondent submitted that the claimants had not laid a basis to entitle them to compensatory damages. That having been paid service and notice pay, the claimants had been sufficiently compensated.

Analysis and Determination

20. Upon considering the pleadings on record as well as the evidence, it is evident that this Court is being called to determine the following twin issues:
 - i. Were the claimants unfairly and unlawfully terminated?
 - ii. Are the claimants entitled to compensatory damages?

Unfair and unlawful termination?

21. It is the claimants' case that they were unlawfully and unfairly terminated from employment. Under the *Employment Act*, 2007, an employer must prove that there was substantive justification to warrant the termination of an employee and that the same was undertaken procedurally. This is the guiding light in determining whether a termination from employment was fair.



22. Substantive justification relates to proof of reason and is addressed under section 43(1) of the *Employment Act* (Act), which requires an employer to prove reasons for termination, and in absence thereof, such termination is deemed to be unfair. Connected to this, section 45 (2) (a) and (b) of the *Act* provides that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and is related to the employee's conduct, capacity or compatibility; or based on its operational requirements.
23. The Court of Appeal aptly restated the above position in the case of *Chairman Board of Directors (National Water Conservation and Pipeline Corporation) v Meshack M Saboke & 2 others*, Nairobi Civil Appeal No 241 of 2015, as follows:
- “In light of the above provision, termination of employment will be unfair if the court finds that in all the circumstances of the case, it is based on invalid reasons or if the reason itself or the procedure of termination are themselves not fair. Section 43 of the *Employment Act* deals with proof of reasons for termination placing the burden on the employer to prove the reasons for termination failure to which termination is deemed unfair within the meaning of section 45.”
24. In the instant case, the respondent alleged that the 1st and 3rd claimants were terminated on account of absenteeism and loading excess cement to customers' lorries.
25. From the parties' pleadings and testimonies before Court, it is common ground that the 1st claimant and 3rd claimant worked upto June 29, 2015 and February 10, 2016 respectively. Notably, the muster roll exhibited by the respondent does not reveal much in this regard. Indeed, I note that the same is inconsistent with the respondent's case. For instance, it indicates that the 1st claimant was present at work in the month of August and September, 2015, whereas, it is not in dispute that he had been terminated by then. Therefore, the said muster roll does not aid the respondent's case in any way.
26. If anything, the 1st claimant alleged that he was barred from accessing the respondent's premises hence he was unable to attend work. The respondent did not lead evidence to discount his testimony in that regard. Thus, if at all, the 1st and 3rd claimants indeed absconded duty, then the respondent did not demonstrate what steps it took to ascertain their whereabouts, hence take appropriate action against them.
27. As regards abscondment of duty by employees vis a vis the employer's duty, the Court had this to say in the case of *Mary Mumbi Kariuki v Director, Pamoja Women Development Programme [2015] eKLR*:
- “...In the ordinary scheme of things, if an employee fails to report to work without any lawful cause or permission, an employer would give an ultimatum/show cause to the employee through known contacts to explain the absence.
- [24]. In the instant case, the Respondent has not disclosed any action it took, if its version that the Claimant absconded is to be believed. In fact, absence is a reason for disciplinary action which may result in summary dismissal.”
28. I reiterate the finding in the above case and apply the same herein and find that the respondent's version of events that the 1st and 3rd claimants absented themselves from duty, do not hold water.
29. Further the respondent alleged that the 1st and 3rd claimant's loaded excess cement on customer's lorries. Indeed, this is a serious offence and is a ground for summary dismissal under section 44(4) of the *Act*. Despite the respondent's assertions, it did not lead any evidence to substantiate the allegations against



the claimants, for instance, a report to that effect from a supervisor or such other person who was at the site and who may have witnessed the claimants loading the excess cement. Without any form of proof and evidence, the allegations were bare.

30. Similarly, with regards to the allegations of negligence against the 4th claimant, the same were not proved in any form or manner. There was no evidence from the supervisor who allegedly witnessed her negligence at work. Indeed, the particulars of the alleged negligence were not provided. Again, the allegation remained unsubstantiated.
31. In the premises, I arrive at the inescapable conclusion that the respondent did not have a valid and fair reason to dismiss the claimants from employment, hence the resultant dismissals were unfair.
32. Turning to the question of procedural fairness, the same is provided for under section 45(2) (c) of the Act. In this regard, section 41(1) requires an employer to accord an employee a hearing prior to termination. This procedure entails notifying the employee of the allegations he or she is required to respond to and thereafter granting him or her the opportunity to make representations in response to the said allegations.
33. It is notable that the respondent did not discount the claimants' assertion that they were not given an opportunity to be heard prior to being dismissed from employment. As a matter of fact, the respondent did not suggest or give any indication that it took the claimants through a disciplinary hearing prior to their dismissal.
34. In terms of section 45(2) (c) of the Act, the respondent had the burden of proving that it accorded the claimants a fair hearing prior to being terminated.
35. In absence of evidence to prove that the respondent commenced and concluded the process envisaged under section 41 of the Act, I am led to conclude that none was undertaken in the first place.
36. To this end, I arrive at the conclusion that the dismissal of the claimants from employment was not lawful.

Reliefs

37. As I have found that the dismissal of the claimants from employment was both unfair and unlawful, they are entitled to compensatory damages as follows; the 1st claimant and 3rd claimant are awarded damages equivalent to five (5) months of their respective gross salaries, while the 4th claimant is awarded damages equivalent to six (6) months of her gross salary. This award takes into account the respective length of the employment relationship between the claimants and the respondent.

Orders

38. In the end, I enter Judgment in favour of the claimants against the respondent and the Court makes the following award: -

- 1.

1st claimant

Compensatory damages in the sum of Kshs 49,200.00 which is equivalent to 5 months of his gross salary.

- 2.



3rd claimant

Compensatory damages in the sum of Kshs 50,000.00 which is equivalent to 5 months of his gross salary.

3.

4th claimant

Compensatory damages in the sum of Kshs 59,040.00 which is equivalent to 6 months of her gross salary.

39. Interest on the awards shall apply at court rates from the date of Judgement until payment in full.

40. The claimants shall have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF OCTOBER 2022.

STELLA RUTTO

JUDGE

Appearance:

For the Claimants Mr Namada

For the Respondent Mr Runo

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.

