



**Kibet v Kobel Tea Factory Company Ltd (Cause E005 of 2022)
[2022] KEELRC 13000 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13000 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
CAUSE E005 OF 2022
ON MAKAU, J
OCTOBER 27, 2022**

BETWEEN

PETER KIBET CLAIMANT

AND

KOBEL TEA FACTORY COMPANY LTD RESPONDENT

JUDGMENT

1. The claimant brought this suit on February 7, 2022 alleging that he was unlawfully dismissed from employment by the respondent on January 18, 2022. The suit seeks the following reliefs:-
 - a. Declaration that dismissal of the claimant was unjustified, unfair and unlawful.
 - b. Declaration that the respondent's acts violated claimant's rights as enshrined under article 28 and 41 of the constitution.
 - c. Reinstatement with back pay or re-engagement to comparable work and salary and other benefits.
 - d. Maximum compensation for unlawful dismissal.
 - e. General damages for the violation of claimant's constitutional rights.
 - f. Costs of this suit plus interest at court rates.
2. The respondent filed defence on 7/3/2022 denying the alleged unfair dismissal of the claimant from employment and averred that the termination was fairly done in accordance with the law. It further denied that the claimant is entitled to the reliefs sought contending that his dismissal was justified because he absented himself from work without permission. Consequently, the respondent prayed for the suit to be dismissed with costs.
3. The suit went to full hearing and both parties gave evidence followed by filing of written submissions.



Summary of the evidence

4. The claimant testified as CW1 and stated that he was employed by the respondent as a driver in May 2020 earning a monthly salary of Kshs 44,180. He stated that in May 2020 he was given a contract of three months and after the period lapsed, he continued working without signing any other contract. He produced NHIF and NSSF statements as proof of his continuous service.
5. On July 21, 2021, the respondent advertised vacancies for more drivers to handle the increased workload. He then continued working until January 18, 2022 when the employer dismissed him from employment without any justifiable reason. He stated that after the new drivers were appointed he was told that there was no vacancy for him yet when the advertisement was made, he was told that the respondent was hiring extra drivers.
6. In his view the dismissal amounted to a fundamental breach of his contract of employment by the respondent because there was no prior notice or hearing accorded to him under section 41 of the Employment Act. Therefore he contended that the dismissal was unfair.
7. He denied ever being served with the show cause letter dated 22nd January 2022 and the dismissal letter dated January 28, 2022. He maintained that from May 2020 he worked continuously until the said date when he was dismissed.
8. On cross examination, he reiterated that he was employed as a driver in May 2020 and signed a contract for three months but thereafter he continued working without any written contract. He contended that the company directors promised him that he was going to be confirmed but then he was dismissed verbally on 18th January, 2022 by the Factory Unit Manager Mr. Makori and the field Service Coordinator Mr. Stanley Korir after recruitment of new drivers.
9. He testified that when the vacancies for 3 drivers and 12 logistics Assistants were advertised, he applied for the position of Logistics Assistant but he was not appointed after passing the interview. He contended that he passed the interview going by the results contained in a paper in his possession. He contended that on 18th January 2022, Mr. Makori called him for tea in his office and told him that the directors had terminated his employment. Mr. Makori also advised to go to court for assistance. He was then paid for the days worked and was further given a letter to get advance from the bank to ship his belongings.
10. He contended that from the start of January 2022, the truck he was driving was assigned to another driver. He maintained that the show cause letter dated 22nd January 2022 and the termination letter dated 28th January 2022 were never served on him.
11. In re-exam, he contended that he was already a driver working before he applied for the senior position of Logistics Assistance whose role is both driving and clerical. He testified that he continued reporting to work until 18th January 2022, when Mr Makori told him that his employment had been terminated. He contended that his dismissal was unfair because he was not served with a prior notice.
12. The respondent's Factory Unit Manager, Mr. Samuel Makori testified as RW1 and stated that he worked for the respondent for six months from October 2021. His role included human resources function and he confirmed that the claimant was employed by the respondent under Employee Roll No.803. He contended that his predecessor had offered the claimant a seasonal contract of three months from 1st September 2021 but after the lapse of that contract, the claimant was never issued with another seasonal contract. He further contended that his predecessor had renewed the claimant's



- contract after every three months verbally without reducing it into writing. He stated that the last three months contract from 1st January 2022 to 31st March 2022 was also renewed verbally.
13. Rw1 further testified that on 21st July 2021, there arose 15 vacancies for permanent jobs, including three for drivers, and an advert was published to the employees and public at large. The claimant was qualified and he applied for the position among other 400 candidates but after the interview, he was not picked and therefore he retained his seasonal contract which was to end on 31st March 2022. The three drivers who were given permanent appointments were previously serving under seasonal contracts with the claimant and they started work on 1st January 2022.
 14. He contended that sometimes in January, 2022 the claimant confronted him in the office claiming that he had been unfairly excluded from employment and threatened to report his area director to the police for rigging the recruitment process. Rw1 advised him to sober up and see the director but he refused and instead, he requested for an advance payment which was approved. Thereafter, Rw1 learned from the claimant's supervisor, Mr. Stanley Korir that the claimant had absconded work from 20th January 2022 without notice or good reason
 15. Rw1 further testified that on 22nd January 2022, he issued the claimant with show cause letter to explain his absence from work but he did not respond. As a result, he wrote a termination notice dated 28th January 2022 and the Board of directors ratified the termination on 22nd February 2022. He denied ever refusing to allocate duties or vehicle to the claimant to ferry tea.
 16. On cross examination Rw1 confirmed that the claimant joined the respondent in May 2020. He further confirmed that the only contract for the claimant he found in the records he took possession, in October when he joined the company, was the one dated 1st September 2020. He contended that all the other employees signed similar contracts on that day with Mr. Ruto William. He further contended that the claimant's contract was renewed but it was never reduced into writing. He admitted that the contract ought to have been renewed in writing. He maintained that the claimant was never a permanent employee. He also denied authenticity of the letter dated 22nd July 2021 written by Ruto William.
 17. Rw1 admitted that the show cause letter dated 22nd January 2022 was never collected by the claimant and there is no evidence that he received it. He contended that the claimant was called by the Secretary to go for the letter but he refused to go for it. He maintained that the claimant absconded duty from 20th January 2022 and his dismissal required Board's approval which was given on 22nd February 2022.
 18. In re-examination, he contended that the claimant was allocated work upto 19th January 2022 after which he never reported back. Further, the claimant was given salary advance in honest believe that he would continue working.
 19. The respondent's Field Service Manager, Stanley Korir testified as Rw2 and confirmed that he joined the respondent in September 2021. His role includes offering extension services and allocation of vehicles for leave collection as the fleet boss. He confirmed that the claimant was employed as a driver and was assigned a leave carrier registration number KBR 994 P. He was also the claimant's supervisor.
 20. He testified that from 20th January 2022, the claimant absconded from his work and the vehicle allocated to him number KBR 994 P was left at the parking lot unattended. He then informed Rw1 and a show cause letter was issued to the claimant because his absence was without leave or good cause.
 21. On cross examination, Rw1 contended that the claimant started working for the respondent in September 2020 as a seasonal employee and denied ever seeing his salary slips for May 2020. He further contended that the claimant served under three months renewable contracts. Referring to Duty



Allocation Roll (exhibit D.7), he contended that on 21st January 2022, the entry was ‘not attending work’ and on 23rd January 2022 the Line Factory Manager stated ‘existed’ after the claimant failed to respond to the show cause letter.

22. He reiterated that the claimant absconded work from 20th January 2022 and the vehicle assigned to him remained parked.

Submissions

23. The claimant submitted that he was employed as a driver by the respondent through a verbal contract. He dismissed the written contract produced by the respondent as exhibit “KTFCL 1” as forgery and contended that the signature thereon differs from the one on his Verifying Affidavit herein.
24. He further submitted that in January 2022, he was not assigned any vehicle to drive despite him reporting to work. Therefore he contended that the respondent was in repudiatory breach of the contract of service and thereby constructively terminated it. For emphasis, he relied on *Milton M Isanua v Aga Khan Hospital Kisumu* [2017] eKLR where the court held that constructive dismissal occurs where an employee resigns as a result of hostile working environment or treatment by the employer. He further relied on *Nathan Ogada Atiagaga v David Engineering Limited* [2015] eKLR and *Hebert Wafula Wafwa v Kenya Wildlife Services* [2020] eKLR where the courts were of similar view.
25. In addition the claimant urged that the dismissal was unfair because there was no justifiable reason and he was not accorded a fair hearing as required under section 41, 43 and 45 of the *Employment Act*. Further, he was not served with any prior notice as required under section 35 of the Act. For emphasis, he relied on *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR where the court held that the procedure for termination of employment under section 41 of the Act is couched in mandatory terms.
26. The claimant further submitted that the failure by the respondent to absorb him into permanent employment after serving continuously for one year without any fault, violated his constitutional rights to legitimate expectation. According to the claimant, the employer had been promised to appointment on permanent basis if he worked continuously for one year but to his surprise he was dismissed verbally. For emphasis he relied on *Teresa Carlo Omondi v Transparency International Kenya* [2017] eKLR and prayed the reliefs sought in his suit plus costs.
27. On the other hand, the respondent submitted that the termination of the claimant’s employment was substantively and procedurally fair. It contended that section 45 of the Employment was fully complied with. It maintained that the claimant absconded from duty without permission or reason from 20th January 2022. It further submitted that the claimant refused to attend the office of RW1 to collect a show cause letter after being called to do so by the Secretary. For emphasis, it relied on the case of *Daniel Mueke v Bhogas AutoWorld* [2014] eKLR where the court held that the claimant breached and repudiated his contract by leaving his work station.
28. As regards the procedure followed, it was submitted that the claimant was issued with a show cause letter and declined to collect the same. It was observed that an employee who rescinds his contract of service without prior notice and fails to respond to correspondences from the employer cannot come to court seeking relief on ground that he was not subjected to disciplinary process. For emphasis, reliance was placed on the case of *Naran Vekariya v Krystalline Salt Limited* [2019] eKLR where similar facts obtained.



29. For the foregoing reasons, the respondent submitted that the claimant is not entitled to the reliefs sought since he has not proved that he was unfairly dismissed as required by section 47(5) of the Employment Act. Consequently, the court was urged to dismiss the suit with costs.

Issues for determination and analysis

30. There is no dispute that the claimant was employed by the respondent from May 2020 up to January 2022 when he was dismissed for absconding work. The issues in contest are:-
- a. Whether the claimant was employed on seasonal contract basis or permanent employment.
 - b. Whether the claimant was unlawfully and unfairly dismissed.
 - c. Whether the claimant is entitled to the reliefs sought.

Seasonal or permanent employment

31. The claimant alleges that despite having joined the respondent as a seasonal employee for a three months contract, he continued working after the contract period lapsed. He contends further that the directors of the company promised to confirm him for permanent employment if he completed one year of continuous service. He maintains that he never signed any other seasonal contract including the one dated 1st September 2020 produced by the respondent. Therefore, he considered his employment as continuous until his verbal dismissal by RW1 and RW2.
32. The respondent's case is that the claimant continued being hired on three months contract basis until he was dismissed for absconding work vide the letter dated 28th January 2022. It is further respondent's case that after the claimant failed the interview for permanent employment after the advertisement on 21st July 2021, he retained to his seasonal employment which was to lapse on 31st March 2022.
33. In his rejoinder the claimant contends that he was already a permanent employee and that he never applied for the position of driver but the senior position of Logistics Assistant. He maintained that when he failed to clinch it, he continued with his earlier position of driver but he was told that his employment had been terminated by the directors.
34. Having considered the evidence and the submissions, the court finds that the respondent has not made any effort to prove that the signature in the contract of employment dated 1st September 2020 was appended by the claimant. The authenticity was not validated by expert witness nor did the respondent avail any other documents signed by the claimant for the court to compare.
35. The above notwithstanding, the burden of proving continuous service is on the claimant who alleges that he worked as such. He has not done so. He produced a statement of NSSF contributions to support his allegation of continuous service but the same shows otherwise. Although he served continuously from May 2020 to March 2021, he never worked in April 2021. He served again for three months from May to July 2021 and rested in August. He then served continuously from September 2021 to December 2021. It is common ground that the service continued to 20th January 2022 when he allegedly stopped reporting to work. It follows that he did not serve continuously from May 2020 to January 2022 and the directors did not breach their promise to confirm as permanent employee. His service was broken into three periods punctuated by a break in April and August 2021.
36. The court is satisfied that the engagement of the claimant from September 2021 was without a written contract or any agreement for a fixed term. The claimant was therefore serving for an indefinite period



terminable by notice or some other cause and not automatically on 31st March 2022 as alleged. If that was not the intention of the parties, there would have been express agreement to that effect.

Unfair termination.

37. Section 45 of the [Employment Act](#) makes the following provisions regarding unfair termination of employment—

- “(1) No employer shall terminate the employment of an employee unfairly.
- (2) A termination of employment by an employer is unfair if the employer fails to prove—
- (a) that the reason 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.”

38. The above burden of proof does not crystalize until the employee discharges his burden under sections 47(5) of the Act, of proving that the separation was a unilateral decision by the employer and that it was unfair or wrongfully termination. In other words the employee must establish that he was dismissed without any, or any justifiable reason, or without being accorded a fair opportunity to defend himself. It is only after establishing a prima facie case that the termination was not substantively and procedurally fair that the burden of proof shifts to the employer under section 43 and 45 of the Act.

39. In this case, the claimant was dismissed for absenting himself from work without permission or good cause from 20th January 2022. However, the claimant has denied that he absented himself from work and maintained that he was dismissed from work on 18th January 2022 by the RW1 and RW2 when they told him that the directors had terminated his services. The employer produced a duty allocation register for 1st to 22nd day of an unknown month and the year. The document is also tampered with by deleting some entries. It was not produced by the author to confirm that it was for January 2022, and say who tampered with the document and for what reason.

40. Having considered the evidence before the court, I am of the view that the employer has failed to prove by evidence that the claimant absconded work. It did not produce attendance register to prove when the claimant stopped reporting to work. There is no evidence to rebut the claimant’s evidence that he was not allocated any vehicle from the start of January 2022 after the one he was driving was allocated to another driver. Even if the court was to assume that the duty allocation register produced as exhibit was for January 2022, it is not clear when the claimant stopped attending and why.

41. All that the court was treated to is tampered entries and then the word “exited” below the entries. Consequently, I find that the employer has not rebutted the claimant’s evidence that he stopped attending work for a good cause, namely, after RW1 and RW2 told him that the directors had terminated his services. The said termination was without any valid reason because none was given.

42. As regards the procedural fairness, Section 6 of the respondent’s HR Manual provides for the right to be heard before dismissal for misconduct. Sub section (b) provides that the supervisor shall serve of a show cause letter to the employee informing him of the offence and requiring a response in writing, within 48 hours. Sub section (c) then provides for a hearing within 3 days after receipt of the response



to the show cause letter. The hearing shall be done before an ad hoc committee consisting of the Factory Unit Manager (FUM), employee's immediate supervisor and a union representative. The employee has the right to accompanied during the hearing by another fellow employee and to call any witness of his choice. The decision by the committee is to be communicated to the employee within five days.

43. The foregoing is in consonance with Section 41 of the *employment Act* which provides that:

“(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(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.”

44. In this case, the claimant alleged that he was never afforded a chance to defend himself before the termination. He was just told by RW1 and RW2 that the directors have ended his employment after new drivers were recruited. He was then paid salary for the days worked and was given a letter to take to the bank to get advance to transport his belongings.

45. Rw1 denied the foregoing allegations and contended that the claimant went to the office complaining that he had been rigged out of the advertised recruitments even after his victory. The claimant further threatened to report the matter to the police. He then took his salary advance and disappeared. Rw1 did not specify the date when the claimant went to the office to protest.

46. Having considered the evidence on record, I would say that the termination of the claimant's contract, whether on 18th January 2022 as he alleges or 28th January 2022 as alleged by the Rw1, fair procedure was not followed. Going by what the claimant says, he was informed by the RW1 and RW2 that the Board had terminated his contract without any prior notice, justifiable reason and without prior hearing.

47. On the other hand, Rw1 stated that after the claimant absented himself from work, a show cause letter was issued to him followed by a dismissal letter. However he admitted that the said show cause letter was never served on the claimant and he was never accorded any hearing before the dismissal. Therefore the court finds that the respondent has failed to prove that the termination of the claimant's contract of service was done in accordance with a fair procedure.

48. Having found that the respondent has failed to prove on a balance of probability that there was valid, and fair reason for dismissing the claimant and that a fair procedure was followed, I must hold that the dismissal was unfair and unlawful within the meaning of section 45 of the *Employment Act*.

Reliefs Sought

49. In view of the foregoing conclusion, the court is satisfied that the claimant is entitled to relief under section 49 of the Act. The prayer for reinstatement is, however, not allowed because the claimant confirmed that new drivers were employed on permanent basis and the vehicle he was driving was



allocated to another driver. Further, the claimant has not demonstrated any special circumstances that would warrant an order for specific performance.

50. Consequently, I award him damages including one month salary in lieu of notice and two months gross salary as compensation for unfair termination considering that he served for only two years. The award is assessed based on the pleaded salary of Kshs. 44,180.
51. The claim for damages for breach of constitutional rights is declined because the same is remedied by the above award.
52. In the end I enter judgment for the claimant for the sum of Kshs 132,540 plus costs.

Dated, signed and delivered at Nyeri this 27 day of October, 2022.

onesmus n makau

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 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE

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