



REPUBLIC OF KENYA



KENYA LAW
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**Njiru v Uzuri Foods Limited (Cause 352 of 2017)
[2022] KEELRC 12980 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12980 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 352 OF 2017
JK GAKERI, J
OCTOBER 27, 2022**

BETWEEN

NDATHI ZAKAYO NJIRU CLAIMANT

AND

UZURI FOODS LIMITED RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Memorandum of Claim alleging unfair/unlawful dismissal from employment and non-payment of terminal dues and compensatory damages.

Claimant's case

2. The Claimant avers that he was employed by the Respondent as a loader in 2007 at Kshs.14,000/= per month and served the Respondent continuously and diligently.
3. That in the course of loading goods into a trailer on March 10, 2016, the conveyor belt overwhelmed the loaders due to its speed which occasioned confusion and the Supervisor, one Mr. Ibrahim Saidi thought loaders were stealing goods and the Manager was notified who called the police and the loaders were arrested and detained at the police station and subsequently released without being charged.
4. The Claimant further avers that when he reported on March 14, 2016, the Personnel Manager Mr. Nyagaka instructed him to report the following day when he was issued with a dismissal letter and Kshs.4,700/= which he declined and reported the matter to the Labour Office who asked for the dismissal letter which the Respondent declined to issue.
5. That eventually, the Labour Office forwarded the dismissal letter with Kshs.47,000/= which the Claimant declined to sign.



6. It is the Claimant's case that the Respondent violated his constitutional right to fair labour practice and the principles of natural justice as no notice to show cause was issued and no disciplinary hearing took place.
7. The Claimant prays for;
 - i. A declaration that the Claimant's dismissals from employment by the Respondent was unlawful/unfair and unjustified.
 - ii. A declaration that the Claimant is entitled to payment of his terminal dues and compensatory damages as pleaded.
 - iii. An order for the Respondent to pay the Claimant his terminal benefits totalling to Kshs.366,000/= comprising; One months salary in lieu of notice Kshs.14,000/= Unpaid leave for the entire duration Kshs.126,000/= Service pay for the period when NSSF deductions was not being remitted Kshs.58,800/= 12 months gross salary as compensation Kshs.168,000/=
 - iv. Interest on (iii) above from date of judgement till payment in full.
 - v. Costs of this suit plus interest thereon.

Respondent's case

8. The Respondent filed its Reply to the Memorandum of Claim on March 13, 2019. The Respondent acknowledges that the Claimant was employed by the Respondent as a loader but denies that he was a diligent employee.
9. The Respondent avers that on January 14, 2016, the Claimant was caught stealing home baking flour while loading motor vehicle Reg. No. KBZ XXXH (trailer) and the incident was reported at the Industrial Area Police Station. That although the Claimant was given a notice to show cause, he was given a second chance by the Respondent.
10. It is the Respondent's case that on March 10, 2016, the Claimant was involved in a similar incident and was reported to the police and a notice to show cause was issued.
11. That from March 10, 2016, the Claimant did not report for duty for 2 weeks and efforts to reach out to him failed as no one had knowledge of his whereabouts and was dismissed by letter dated March 30, 2016 for stealing flour and absconding duty.
12. That the reasons for dismissal were explained but the Claimant did not respond to the dismissal letter nor appear to offer an oral explanation why he should not be dismissed.
13. As a consequence, the Claimant's terminal dues were paid.
14. The Respondent avers that the claimant was a member of the NSSF and any accrued overtime was paid at the end of every month.
15. That the demand letter was not served upon the Respondent.

Claimant's evidence

16. On cross-examination, the Claimant confirmed that when employed in January 2007, he was a casual employee paid per day as evidenced by the payslip dated April 4, 2014 which was the first.
17. The witness further confirmed that he was a loader of trailers and there was a method of how bales of flour were arranged in trailers.



18. That on January 16, 2016, Ibrahim found them arranging bales of flour in a trailer and the letter dated January 15, 2016 was not given to him. However, the witness subsequently admitted that the signature was his and he received the letter but did not respond and no further action was taken against him.
19. The Claimant confirmed that on March 10, 2016, Ibrahim found them packing bales of flour in a trailer, called the police and they were arrested and released after 4 days and when reported to work, the guard refused to let him in on the ground that he had been instructed by personnel not to allow him in. That he did not go back thereafter. The witness testified that he was given a dismissal letter on March 30, 2016 dated on even date.
20. The witness further testified that he prays for leave pay because he worked over one (1) year on permanent terms and proceeded on leave in November 2015.
21. He confirmed that the employer was making NSSF contributions and had obtained a statement for April 2014 to March 2016.
22. On re-examination, the Claimant testified that there were fewer employees and the conveyor belt was faster and they could not arrange the bales properly.
23. He denied that they intended to steal bales of flour and were mere suspects.
24. He testified that he was not given a notice to show cause or taken through a disciplinary process.
25. That after arrest by the police, he was not charged in court.

Respondent's evidence

26. RWI, Mr. Douglas Nyagaka testified that leave encashment was a company policy for those who did not take leave to ensure that no leave days were carried forward and took place in November, 2015.
27. That by March 30, 2016, the Claimant had not reported to the workplace and a dismissal letter was written.
28. On cross-examination, RWI stated that in March 2016, he did not issue a notice to show cause to the Claimant because he was unavailable and had no postal address on record.
29. It was his testimony that the Claimant was aware of how bales of flour were arranged in the trailer and this was not the first time that it had taken place as he had done it before.
30. The witness confirmed that the Claimant was not taken through any disciplinary proceedings as he was unavailable after the arrest. That he was not at the office on March 14, 2016.
31. It was his testimony that the Claimant had left his previous residence and his whereabouts was unknown. The Respondent notified the Claimant's disappearance to the Labour Office in Kiambu.
32. On re-examination, the witness testified that in the first incident, 4 employees were involved and in the second case, the Respondent reasonably believed that theft took place.
33. That the Claimant accepted Kshs.4,700/= as terminal dues.
34. RWII, Mr. Saidi Ibrahim confirmed on cross-examination that he did not issue the notice to show cause dated January 15, 2016. That for the incident that occurred in March, 2016, a notice to show cause was issued but none had been filed in court.
35. That no disciplinary hearing took place and no investigation was conducted as the evidence was available. It was his testimony that employee would change the arrangement of bales of flour for



purposes of stealing and the Claimant was the one in charge of the loading. That although he reported the incident to the management, no investigation was conducted.

36. The witness confirmed that he did not terminate the Claimant's employment.
37. On re-examination, the witness testified that corrupt dealings meant theft and he was the supervisor. That on March 10, 2016, they had loaded 1103 bales in place of 1100 as instructed. That the bales had been squeezed in and it was collusion between loaders and drivers for extra cash. The extra bales were not supposed to be loaded and were being stolen. That his investigation implicated the Claimant and 3 others. Finally, the witness testified that the three bales of flour would have been stolen.

Claimant's submissions

38. The Claimant identifies three issues for determination on whether the Claimant was guilty of any gross misconduct, procedure employed by the Respondent and entitlement to reliefs.
39. As to whether the Claimant was guilty of misconduct, reliance is made on the provisions of section 43 of the *Employment Act* to urge that the employer is required to prove the reason or reasons for termination failing which the termination is deemed to be unfair.
40. It is urged that on March 10, 2016, the Claimant did not do anything wrong as the problem was the conveyor belt which was too fast and was thus falsely accused and the Respondent did not conduct any investigations of the alleged theft of flour. That RWI could not substantiate the allegations made against the Claimant.
41. It is submitted that the Respondent tendered no evidence of desertion or demonstrate the efforts made to trace him.
42. Reliance is made on the decision in *Felistas Acheha Ikatwa V Charles Peter Otieno* (2018) eKLR on the duty of the employer who pleads desertion.
43. It is further urged that even if the Claimant was guilty of misconduct, the Respondent did not take him through a disciplinary process provided by section 41 of the *Employment Act*, 2007.
44. The decisions in *Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR and *Donald Odeke V Fidelity Security Ltd* (2011) are relied upon to urge that procedural fairness is an integral part of termination of employment.
45. As regards prayers, it is urged that the Claimant has proved his case to the required standard and is therefore entitled to terminal dues and compensation.

Respondent's submissions

46. The Respondent identifies two issues for determination namely; whether termination of the Claimant's employment was unfair and entitlement to benefits and damages.
47. As regards termination, reliance is made on section 45 of the *Employment Act*, 2007 to urge the requirements of a fair termination of employment.
48. Reliance is also made on the decision in *Walter Ogal Anuro V Teachers Service Commission* (*Supra*) to urge that termination of employment should be substantively justifiable and procedurally fair, as is the decision in *Mary Chemweno Kiptui V Kenya Pipeline Co. Ltd* (2014) eKLR to urge that the Respondent had met the threshold prescribed by section 45 of the *Employment Act* as it had demonstrated that the Claimant and others attempted to steal 3 bales of flour and thus had a valid reason.



49. On procedural fairness, it is urged that this was a case of summary dismissal and the Claimant was unavailable to be taken through a disciplinary process.
50. Reliance is made on the provisions of section 44(4)(a) and (g) of the *Employment Act*.
51. The decision in *Thomas Nzivo V Bamburi Cement Ltd* (2014) eKLR is relied upon to urge that the Respondent had sufficient ground to suspect that the Claimant acted to the substantial detriment of the company and the employer is not required to have conclusive evidence of the Claimant's involvement.
52. It is submitted that Respondent justifiably invoked the provisions of section 44 of the *Employment Act*.
53. As regards terminal dues and damages, it is submitted that the prayer for pay in lieu of notice is unavailable in cases of summary dismissal. On leave it is urged that the Claimant served for only one year and was compensated.
54. That NSSF deductions were remitted for the duration the Claimant was permanently employed.
55. Finally, it is submitted that the Respondent terminated the Claimant's employment fairly.

Determination

56. After careful consideration of the pleadings, evidence on record and submissions by counsel, 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 prayers sought.
57. As to whether termination of the Claimant's employment was fair, the starting point is the legal framework on termination of employment as encapsulated by the provisions of the *Employment Act* and applied by courts.
58. Section 45(2) of the *Employment Act* provides that;
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.
59. In addition and as explained in *Pius Machafu Isindu V Lavington Security Guards Ltd* (2017) eKLR, Section 41 of the *Employment Act* provides a mandatory process to be complied with in carrying out a termination of employment.
60. In *Postal Corporation Kenya V Andrew K. Tanui* (2019) eKLR, the Court of Appeal itemised the specific requirements of section 41 of the *Employment Act*.



61. As explained in Ndolo J. in *Walter Ogal Anuro V Teachers Service Commission* (Supra),
“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.”
62. The dual requirement was elaborated upon by the Court of Appeal in *Naima Khamis V Oxford University Press (EA) Ltd* (2017) eKLR as well as *Jenny Luesby V Standard Group Ltd* (2017) eKLR.
63. I will now proceed to apply the foregoing provisions and propositions of law to the facts of the instant case.

Reason for termination

64. Section 43(1) of the *Employment Act* requires the employer to prove the reason or reasons for the termination of employment.
65. In this case, it is alleged that the Claimant and his colleagues were implicated in a scheme to steal bales of flour by reconfiguring the arrangement of bales in the trailer.
66. The notice to show cause dated January 15, 2016 indicates that on January 14, 2016 at 4.30 pm when loading KBU XXXL, the Claimant and others are accused of having started to arrange bales in a different way for purposes of stealing some bales. The Claimant was inside the trailer at the time. The Claimant was required to show cause within 24 hours.
67. The Claimant testified that he did not respond to this letter which he had initially denied receipt of but changed his mind since he had signed it.
68. The dismissal letter dated March 30, 2016, which the Claimant received states that on March 10, 2016, the Claimant and others were loading motor vehicle Reg. No. KBZ XXXH, when the Supervisor, Mr. Saidi Ibrahim found that they had loaded 1103 bales of flour as opposed to 1100 as instructed.
69. It is puzzling that the Claimant did not respond to the notice to show cause dated January 15, 2016 to exonerate himself from the allegations or explain that the speed of the conveyor belt was the problem, an issue not raised with the Supervisor Mr. Saidi Ibrahim. RWI confirmed that the Respondent had on its own motion decided to accord the Claimant a second chance even after he ignored the notice to show cause.
70. Significantly, the Claimant admitted on cross-examination that the Respondent had a formula of arranging bales of flour in trailers and on January 14, 2016, Mr. Saidi Ibrahim found the Claimant and his colleagues arranging bales of flour in a trailer and called the police.
71. RWI testified that the Respondent did not conduct investigations of the incident since the evidence was “before us”. As the Supervisor, he had given orders that a particular number of bales be loaded but the Claimant and his colleagues loaded more bales and RWI found them in the act, reported the incident to management and the Claimants were arrested and subsequently released without charge.
72. The fact that the Claimant was not charged after arrest does not exculpate him from the gross misconduct allegedly committed.
73. Section 43(2) of the *Employment Act* provides 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.



74. The court is further guided by the sentiments of the court in *Thomas Sila Nzivo V Bamburi Cement Ltd (Supra)* as follows;

“The Respondent had reasonable and sufficient grounds to suspect the Claimant of having acted to the substantial detriment of the Respondent and its property . . . The employer was not required to have conclusive proof of the Claimant’s involvement; it was only expected to have reasonable and sufficient grounds.”

75. Weighing the evidence adduced by the Claimant against that of the Respondent, the court is persuaded that the Respondent’s evidence outweighs that of the Claimant. For the foregoing reasons, it is the finding of the court that the Respondent has on a balance of probability established that it had a valid and fair reason to terminate the Claimant’s employment.

Procedure of termination

76. As regards compliance with the provisions of section 41 of the *Employment Act*, 2007, it is clear that the Respondent did not subject the Claimant to a fair disciplinary process.

77. On cross-examination, RWI confirmed that no notice to show cause was issued to the Claimant in March 2016 before dismissal on March 30, 2016. The witness was emphatic that the Respondent did not take the Claimant through any disciplinary hearing allegedly because he did not present himself after he was released by the police.

78. This fact was also confirmed by RWII, Mr. Saidi Ibrahim on cross-examination.

79. The totality of the evidence before the court is that the Respondent has on a balance of probability failed to show that it conducted the termination of the Claimant’s employment in accordance with fair procedure.

80. For the above stated reasons, the court finds and holds that termination of the Claimant’s employment by the Respondent on March 30, 2016 was unfair for want of procedural propriety.

81. Having found that termination of the Claimant’s employment was unfair, I will now proceed to examine the prayers sought.

i. A declaration is hereby issued that termination of the Claimant’s employment by the Respondent was unfair.

ii. One month’s salary in lieu of notice

82. The Respondent terminated the Claimant’s employment without notice contrary to the provisions of section 35(1) of the *Employment Act*, 2007.

The Claimant is awarded Kshs.14,000/= as notice pay.

iii. Unpaid leave for the entire duration Kshs.126,000/=

83. RWI testified that the Respondent had a leave encashment policy for those who had not taken leave to ensure that no leave days were carried forward and the same was effected once in November. A copy of the payslip on record attest to this. In November 2015, the Claimant was paid Kshs.11,308/= as leave encashment.

84. The Claimant did not controvert this evidence. In addition, the payslip for March, 2016, the last month the Claimant worked for the Respondent shows that the Claimant was paid a leave encashment of Kshs.1,885/= ostensibly for the outstanding leave days for between November, 2015 and March 2016.



85. Finally, the prayer for leave pay lacks particulars of the number of days claimed, year they were not taken and how the amount is computed.

The claim is declined.

iv. Service Pay for the period when NSSF contributions were not remitted Kshs.58,000/=

86. Records reveal that the Claimant was a registered member of the National Social Security Fund (NSSF). The Statement on record show that contributions were made from April, 2014 to March, 2016.

87. NSSF contributions are mandatory under the provisions of the National Social Security Fund Act. The Act confer upon the board powers to ensure compliance with the provisions of the Act.

The prayer is declined.

v. Compensation for unlawful and unfair dismissal

88. Having found that termination of the Claimant's employment was unfair for lack of procedural fairness, the Claimant is entitled to the discretionary relief under Section 49 (1) (c) of the Employment Act. As enjoined by the Act, the court has taken into consideration the following factors;

i. The Claimant was an employee of the Respondent from 2007 to March 2014 and confirmed that he was a casual employee for most of the duration in question. The Respondent led no evidence that the claimant's employment was not continuous. The Claimant was thus an employee of the Respondent for about 7 years. However, there is no evidence on record that he wished to continue, having absented himself from the date he was arrested to March 30, 2016.

ii. The Claimant had one previous notice to show cause whose contents he never rebutted in writing or by word of mouth as the notice required.

iii. The Claimant did not appeal the decision to terminate his employment.

89. In light of the foregoing, the court is satisfied that the equivalent of four (4) months salary is fair.

90. In conclusion, judgement is entered for the Claimant against the Respondent in the following terms:

a. One month salary in lieu of notice Kshs.14,000/=.

b. Equivalent of 4 months salary.

c. Costs of this suit.

d. Interest at court rates from date of judgement till payment in full.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 27TH DAY OF OCTOBER 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 15th March 2020 and subsequent directions of 21st April 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

