



**Mulatya v Roto Moulders Ltd (Cause 2328 of 2017)  
[2022] KEELRC 12987 (KLR) (19 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12987 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 2328 OF 2017  
AN MWAURE, J  
OCTOBER 19, 2022**

**BETWEEN**

**JACKSON KISINI MULATYA ..... CLAIMANT**

**AND**

**ROTO MOULDERS LTD ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant filed his memorandum of claim dated August 30, 2017. The Respondent statement of response was filed on January 30, 2017 and is dated January 30, 2017.

**Claimant's case**

2. The Claimant avers he was employed by the Respondent on July 10, 2010. He says he was a machine operator. He further says he rose over the ranks to be a supervisor. He avers his last salary was Kshs 22,298/-.
3. The Claimant further says that on October 8, 2016 he applied for one month leave and his application was granted. He was to report to work on November 9, 2016.
4. The Claimant says on November 9, 2016 he was handed an unsigned letter of termination by the Human Resource Manager of the Respondent. He says he tried to seek an amicable solution but the Respondent's director Mr. Sonia Bangera dismissed him. He says the reason for his termination were unsubstantiated.
5. It is the Claimant's contention that he had never been called for hearing on his performance and he was pushed out of his employment.



6. The Claimant in the end avers he was unfairly and unlawfully terminated from his employment and prays for damages as per his claim.

### **Respondent's case**

7. The Respondent in his response says the Claimant contributed to unsatisfactory performance because he was unable to perform satisfactorily as a factory supervisor.
8. The Respondent says the Claimant was invited for a disciplinary hearing on November 9, 2016 and was given time to defend himself. He says the Claimant was therefore terminated as per procedure of Employment Act and his dues were paid in full.

### **Claimant's submissions.**

9. The Claimant articulates how he applied for one month leave and it was to run from October 8, 2016 to November 9, 2016 and same was approved by the Respondent's officer. He says that unfortunately when he resumed on duty he was issued an unsigned termination letter by the Respondent's Human Resource Manager one Regina Mutua.
10. The Claimant says he had done nothing wrong to warrant such dismissal from the Respondent. He says that he was unlawfully terminated and that the Respondent contravened section 41, 43 and 45 of the Employment Act 2007. He says his dismissal was therefore unlawful and the claim should be allowed and he should be awarded his terminal benefits.
11. The Respondent failed to file his written submissions within the period given by the Court.

### **Decision**

12. The Court interrogated whether the Claimant's termination was lawful and fair and secondly whether he is entitled to the remedies sought. The Claimant says that on November 9, 2016 he was served with a termination letter a day he resumed work from his annual leave.
13. The termination letter referred hereto stated that he was terminated due to unsatisfactory performance as per his job description as a factory supervisor.
14. The law is now clear that no employee shall be terminated from employment without a valid reason. Section 43(1) of the Employment Act 2007 provides as follows:-

“In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where an employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.”

15. Section 45(1) provides also that no employer shall terminate the employment of an employee unfairly. Section 45(2) further provides as follows:
  - (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 employees conduct, capacity or compatibility; or
      - (ii) based on the operational requirements of the employer; and



- (c) that the employment was terminated in The *Employment Act, 2007*, in accordance with fair procedure.
16. The reasons given by the Respondent for terminating the Claimants' employment was unsatisfactory performance of his duties as a factory supervisor. The Respondent did not present any evidence of the Claimant's job description and the evaluation tools to prove he had performed his job poorly. Even if the Respondent claims they had invited the Claimant to a disciplinary meeting they have produced no notice of invitation to the disciplinary meeting or minute of such meeting.
17. In the case of *Maina Mwangi vs Thika Coffee Mills Limited* [2013] eKLR provided that where the employee fails to meet the standards the first duty of the employer is to let the employee know his performance has fallen below set standards. The employer should then propose training, guidance and fresh instructions to the employee. The employer is required to give employee time to improve. If no improvement is noted after a reasonable passage of time, the employer should issue a formal warning to the employee and advise the employee that he may be separated from the employment on account of poor performance. If after all efforts are made dismissal of employment is the case that commends itself the employer then must follow the provision of Section 41 of the *Employment Act*.
18. Section 41 of the *Employment Act* provide as follows:-
41. (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, (2) Subject to the provisions of this section, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.
- (3) Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.
- (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:-
- (a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;
- (b) during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly;
- (c) an employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;
- (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;



- (e) an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer.
  - (f) in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or
  - (g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.
19. There is no evidence provided to prove that the Claimant was invited for disciplinary hearing by the Respondent and that he was informed he could present his defence in the presence of a fellow employee or a shop floor representative.
20. The Court is guided by the often cited case of *Walter Ogal Anuro vs Teachers Service* [2013] eKLR which provided that for termination of employment to pass the fairness test there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for termination while procedural fairness addresses the procedure adopted by the employer to effect termination.
21. In this case the Respondent did not prove how he came to conclude the poor performance by the claimant and neither did he follow the procedure well outlined in mandatory terms under Section 41 of the *Employment Act*.
22. The Court is satisfied that the Claimant's employment was unfairly and wrongfully conducted and so proceeds to enter judgment in his favour.
23. Remedies awarded:
- a. One month salary in lieu of notice Kshs. 22,298/-
  - b. The Claimant is also awarded of 5 months' salary equivalent as general damages 22298 x 5 Kshs. 111,490/-
  - c. He is also awarded costs plus interest at Court rates from date of judgment till final settlement.
- The total award will therefore be Kshs 133,788/- plus interest and costs.

Orders accordingly.

**DELIVERED, DATED AND SIGNED IN NAIROBI THIS 19<sup>TH</sup> OCTOBER, 2022**

**ANNA NGIBUINI MWAURE**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 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.

**ANNA NGIBUINI MWAURE**

**JUDGE**

