



**Kamau v Tusker Mattresses Limited (Cause 1217 of 2017)
[2022] KEELRC 12788 (KLR) (6 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12788 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1217 OF 2017
JK GAKERI, J
OCTOBER 6, 2022**

BETWEEN

JAMES KIUNE KAMAU CLAIMANT

AND

TUSKER MATTRESSES LIMITED RESPONDENT

JUDGMENT

1. The claimant commenced this suit by way of a memorandum of claim filed on June 29, 2017 alleging wrongful and unlawful termination of the contract of employment, non-payment of terminal dues and discrimination.
2. The Claimant avers that he was employed by the Respondent as a Shop Assistant from February 1, 2013 to February 6, 2015 as a Shop Assistant at Kshs 17,463/= per month.
3. That on February 6, 2015, the Respondent unlawfully terminated the Claimant's services for no reason without payment of terminal dues.
4. The Claimant avers that his employment was terminated on the basis of trumped up charges and fear of his involvement in union activities.
5. That he was not accorded due process before termination.
6. It is the claimant's case that the respondent's Human Resource Manager who was a critic of the shop stewards convened a meeting to crucify him.
7. That disciplinary proceedings were conducted on February 12, 2015 yet he was dismissed on February 9, 2015.
8. The claimant further avers that termination of his employment was unfair, unlawful and unprocedural.



9. That the respondent forced him to receive miscalculated terminal dues with threats that he would not receive anything.
10. That the claimant worked for 14 hours per day 6 days a week for 2 years including 20 public holidays and did not proceed on leave for the two (2) years.
11. The claimant prays for;
 - a. Compensation as calculated and specified in paragraph 16 as follows:
 - i. Holidays for 2 years Kshs 42,891.58
 - ii. Overtime pay 104 weekends Kshs 223,036.20
 - iii. Pay in lieu of leave (2 years) Kshs 28,209.46
 - iv. 12 months compensation Kshs 209,556.00

$$\frac{17,463}{2}$$

 - v. Gratuity (2 years x $\frac{17,463}{2}$) Kshs 17,463.00
 - vi. Pay in lieu of notice Kshs 17,463.00
 - vii. Severance pay Kshs 104,778.00
 - b. Costs of this suit.
 - c. Interest at 12% per annum from the date of service until payment.

Respondent's case

12. In its response filed on November 8, 2018, the respondent admits that the claimant was its employee at the salary alleged but states that his performance was wanting. It denies having terminated the claimant's employment unlawfully. That the termination was lawful and the claimant was given audience before termination of employment.
13. It is the respondent's case that notice to show cause letter dated December 10, 2014 was issued and a disciplinary hearing was held on February 12, 2015 and the Claimant was found guilty of gross misconduct and was terminated from employment.
14. The Respondent further denies having forced the Claimant to accept miscalculated terminal dues under threats.
15. It is the respondent's case that the claimant acknowledged receipt of his full and final dues on February 25, 2015.
16. The Respondent prays for dismissal of the suit with costs.

Claimant's evidence

17. The Claimant's written statement rehashes the contents of the Memorandum of Claim. The statement makes no reference to working hours, overtime, public holidays or leave. From the documents on record, the Claimant was paid for notice, leave as well as service and accepted the sum of Kshs 39,713/= paid through cheque No 00794 dated February 28, 2016 as full payment of terminal dues and had no further claims against the company.



18. The Claimant testified that by a letter dated December 10, 2014, the respondent accused the claimant of gross misconduct, that on December 10, 2014 he wilfully refused to perform his duties which slowed down delivery of merchandise ordered by various branches. The Claimant was given 2 days to respond and was suspended for 2 weeks on half pay. There is no evidence that the Claimant responded to the allegations in writing.
19. That by letter dated December 24, 2014, the claimant was invited for a disciplinary hearing scheduled for February 12, 2015 at 10.00 am and was notified of all the rights he is entitled to at the hearing and attended the hearing.

Respondent's evidence

20. The Respondent filed two statements by Frederick Ng'ang'a Muchiri, the Manager Employee Relations and Joshua Keli Wambua, the Human Resource Manager.
21. Mr. Wambua states that the Claimant was first employed as a Shop Assistant on January 1, 2002 a fact the Claimant has not addressed, but resigned on April 21, 2011 and was re-employed on January 28, 2013 and was paid overtime and for public holidays.
22. That on September 30, 2014, the Claimant refused to issue septic soap to one of the branches slowing down delivery of goods.
23. That the Claimant was terminated from employment effective February 9, 2015 and was paid terminal dues.
24. The statement of Frederick Ng'ang'a Muchiri mirrors that of Mr Wambua save for the date of the alleged misconduct.
25. That having been paid service pay, the claimant was not entitled to gratuity.

Claimant's submissions

26. The Claimant isolated four (4) issues for determination including termination procedure, reason(s) for termination, payment of dues and costs.
27. As regard termination procedure, the Claimant relied on the provisions of section 42 of the [*Employment Act, 2007*](#).
28. It is submitted that although the Claimant was invited to a disciplinary hearing slated for February 12, 2015, his employment was terminated effective February 6, 2015. The Claimant relies on the letter dated February 9, 2015.
29. That the Claimant appeared for the disciplinary hearing inspite of having been dismissed from employment on February 9, 2015.
30. The decision in [*Kenfreight \(EA\) Ltd v Benson K Nguti*](#) (2016) eKLR is relied upon to urge that the employee is entitled to be heard before termination of employment.
31. It is urged that termination of the Claimant's employment was contrary to Section 41 of the [*Employment Act, 2007*](#).
32. The decision in [*Walter Ogal Anuro v Teachers Service Commission*](#) (2013) eKLR is relied upon to urge that the provisions of the [*Employment Act*](#) were not complied with.



33. On the reason(s) for termination, reliance is made on the provisions of section 43 (1) and 45 (2) of the [Employment Act](#) to urge that the claimant's employment was terminated on trumped up charges.
34. That the alleged refusal to perform his work was not supported by evidence. It is urged that the termination does not pass muster.
35. The Court of Appeal decision in [Pius Machafu Isindu v Lavington Security Guards Ltd](#) (2017) eKLR is relied upon to underscore the burden of proof cast on the employer.
36. As regards the reliefs sought, the claimant submits that the Respondent approached and coerced him to acknowledge receipt of terminal dues under threats. It is the claimant's case that the sum on Kshs 39,713/= is not sufficient compensation for the unlawful and unprocedural termination of employment.
37. The decisions in [Lukas Samarwa Kundo v Njuca Consolidated Co Ltd](#) (2020) eKLR and [Jackson Amondi Anyango and another v G4S Security Services Ltd](#) (2017) eKLR are relied upon to submit that the Claimant is entitled to leave pay and public holidays respectively.
38. The court is urged to grant the remedies sought.

Respondent's Submissions

39. The Respondent identifies three issues for determination namely;
 - i. Whether the Claimant's employment was terminated wrongfully or unlawfully;
 - ii. Whether the Claimant is entitled to compensation;
 - iii. Whether the Claimant was discriminated for being a union member.
40. On the first issue, the Respondent contends that all procedural processes were complied with and termination of the claimant's employment was lawful. That a termination notice was issued on February 9, 2015 and final dues were paid.
41. It is submitted that the claimant's employment was terminated for gross misconduct in consonance with section 44(4)(c) of the [Employment Act, 2007](#) a valid reason under Section 45 of the Act.
42. The respondent relies on the Section 43 (2) of the Act to urge that it is the duty of the claimant to prove that the termination of employment was unlawful.
43. It is the respondent's submission a notice to show cause was issued dated December 10, 2014, inviting the claimant for a disciplinary hearing on February 12, 2015 and he was found culpable.
44. In a nutshell, the respondent urges that the provisions of section 41 of the [Employment Act](#) were complied with.
45. The decisions in [Walter Ogal Anuro v Teachers Service Commission \(Supra\) and Alphonse Machanga Mwachanya v Operation 680 Ltd](#) (2013) eKLR are relied upon to underline the procedural precepts in termination of employment.
46. As to whether the Claimant is entitled to compensation, the Respondent submits that the Claimant is not entitled to any as he was paid in full as the documents on record show. That the Claimant accepted the amount paid in full settlement of terminal dues.
47. The court is urged that if the termination is found unfair, the Claimant should not be awarded more than 6 months compensation, since he was dismissed for gross misconduct.



48. As to whether the Claimant was discriminated for being a union member, the Respondent submits that the Claimant was treated in a fair, just and lawful manner in accord with the rules, CBA and Constitutional provisions as documents on record show.

Determination

49. From the pleadings, documentary evidence on record and submissions, the issues for determination are;

- i. Whether termination of the Claimant's employment was fair;
- ii. Whether the Claimant was coerced or threatened to accept and sign for Kshs 39,713.00 as full payment of terminal dues;
- iii. Whether the Claimant was discriminated;
- iv. Whether the Claimant is entitled to the reliefs sought.

50. As regards termination of the Claimant's employment, the parties have adopted opposite sides of the plank. While the claimant urges that it was unfair, the respondent maintains that it acted in accordance with the law and the termination of employment was therefore fair.

51. Under the provisions of the *Employment Act*, for a termination of employment to pass muster, the employer must have had a valid and fair reason and the termination of employment must have been conducted in accordance with a fair procedure (see *Pius Machafu Isindu v Lavington Security Guards Ltd* (Supra).

52. In addition, in *Walter Ogal Anuro v Teachers Service Commission* (Supra), the court was emphatic that for a termination of employment to pass the test, it must be substantively justifiable and procedurally fair. A similar observation was made in *Naima Khamis v Oxford University Press (EA) Ltd* (2017) where the Court of Appeal expressed itself as follows;

“From the foregoing, termination of employment may be substantively and/or procedurally fair. A termination is also deemed substantively unfair where the employer fails to give valid reasons to support the termination. On the other hand, procedural technicalities arises where the employer fails to follow the laid down procedure as per contract, or fails to accord the employees an opportunity to be heard as by law required.”

53. The court is guided by these sentiments.

54. I will now proceed to apply the foregoing principles to the facts of the instant case.

Reasons for termination

55. Although the Claimant allege that his employment was terminated on trumped up charges, the Respondent maintains that it had a valid and fair reason to terminate the Claimant's employment.

56. In the letter dated December 10, 2014, the respondent accused the claimant for wilful refusal to perform his duties which slowed delivery of merchandise on December 10, 2014, which was characterised as a contravention of the terms of employment and amounted to gross misconduct.

57. Strangely, although the letter gave the claimant 2 days to provide a written explanation, the claimant did not respond at all.



58. It is unclear why the claimant who alleges that the charges against him were false found it unworthwhile to present his case or deny the allegations in writing.
59. He cannot allege in court that the reasons were trumped up yet he did not even deny or respond to them. Having failed to contest the reason given by the employer, his contestation in court is less convincing than it would have been.
60. The respondent submits that it relied on section 44 (4) (c) of the *Employment Act* which relates to “wilful neglect to perform any work which it was his duty to perform.”
61. In addition, the termination letter dated February 9, 2015 states in part
- “The committee took note of the following (1) during the hearing, you admitted having converged in a group with some of your colleagues away from your work station without seeking permission or informing the Distribution Manager or your supervisor.”
62. The claimant did not deny these allegations.
63. Section 43(2) of the Employment 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.
64. For the foregoing reasons, the court is satisfied that the Respondent had a justifiable reason(s) to terminate the Claimant’s employment on February 6, 2015 by which date the Claimant had not responded to the notice to show cause dated December 10, 2014.

Procedure

65. The mandatory termination process prescribed by section 41 of the *Employment Act, 2007* has been explained and the various requirements itemised by the Court in *Alphonse Magbanga Mwachanya v Operation (680) Ltd* (Supra) as well as the Court of Appeal in *Postal Corporation Kenya v Andrew K Tanui* (2019) eKLR.
66. The essential elements encompass;
- a. Explanation to the employee in a language the employee understands, the reason(s) why termination of employment is being considered.
 - b. Right of the employee to a representative who may be a fellow employee or shop floor representative of his choice during the explanation.
 - c. Hearing and considering any representations made by the employer and/or the representative.
67. Applying the foregoing to the facts of the instant case, provisions and propositions of law, it is evident that the Claimant was invited to a disciplinary hearing vide letter dated December 24, 2014 and was informed of all his rights including representation by fellow employee, call witnesses, cross-examine witnesses and present his case.
68. The claimant participated in the disciplinary hearing and signed the proceedings or transcript.
69. Regrettably, the claimant had already been terminated from employment on February 6, 2015.



70. It would appear that the disciplinary hearing conducted on February 12, 2015 was a mere formality. It is puzzling that only the Claimant signed the transcript and no deliberations of the Committee took place on that day. The meeting commenced at 11.35 am and concluded at 14.13 pm.
71. From the foregoing, it is the finding of the court the claimant's employment was terminated before the reason(s) for which termination was being considered had been explained to him and before he had made representations and the same on February 28, 2014 were considered.
72. It is the further finding of the court that termination of the claimant's employment was unfair for want of procedural propriety.
73. As to whether the claimant was coerced or threatened to accept Kshs 39,713.00, it is not in dispute that the Memo dated February 25, 2015 itemises the dues payable to the claimant and he signed the same in the presence of a witness.
74. The principles governing the effect of settlement agreement or discharge voucher have been articulated by the Court of Appeal in a catena of decisions. These decisions are instructive that employment contracts are generally governed by the general law of contract. This position finds support in the decision in *Krystalline Salt Ltd v Kwekwe Mwakele and 67 others* (2017) where the court expressed itself as follows;
- “... it is important to bear in mind that in Kenya, employment is governed by the general law of contract as much as by the principles of common law now enacted and regulated by the *Employment Act* and other related statutes. In that sense employment is seen as an individual relationship negotiated between the employee and the employer according to their needs.”
75. However, as explained in *Coastal Bottlers Ltd v Kimithi Mithika* (2018) eKLR
- “Whether or not, a settlement agreement or a discharge voucher bars a party thereto from making further claim depends on the circumstances of each case. A court faced with such an issue in our view, should address its mind firstly, on the import of such discharge/agreement; and secondly, whether the same was voluntarily executed by the concerned parties.”
76. Similar sentiments were expressed in *Thomas De La Rue (K) Ltd v David Opondo Omulelema* (2013) eKLR.
77. Applying the foregoing principles to the instant case, it is clear that the internal memo dated February 25, 2015 tabulated the Claimant's entitlements and deductions and also read in part;
- “In furtherance to our letter of February 9, 2015, your terminal dues have been computed as tabulated below:
-
- By signing below you hereby agree to and confirm acceptance of Kenya Shillings Thirty Nine Thousand, Seven Hundred Thirteen only (39,713.00) being in full payment of your terminal dues and that you have no further claims against the company.”
78. The memo is signed by the G M Finance, Human Resource Manager, the claimant and a witness.
79. Contrary to the claimant's counsel submissions that the Claimant was coerced to acknowledge receipt of terminal dues and was threatened that he would not receipt anything if he rejected the sum of Kshs 39,713/=, the claimant led no evidence of the coercion or threats. He did not sign the settlement



agreement under protest or refuse to sign. There is no evidence on record on who allegedly threatened the claimant. The document is signed by four persons including the claimant and reveal no evidence coercion.

80. But more significantly, the claimant's statement on record makes no reference to the alleged coercion, fraud or misrepresentation on the import of the agreement.
81. The related submission that the amount paid is not full compensation is of no moment as held in *Coastal Bottlers Ltd v Kimathi Mithika* (Supra) and *Trinity Prime Investment Limited v Lion of Kenya Insurance Company Limited* [2015] eKLR.
82. For the foregoing reasons, it is the finding of the court that the Claimant's acceptance of the sum of Kshs 39,713/= absolved the respondent from payments of terminal dues and other claims by the claimant. The claimant waived his right to pursue further claims against the Respondent.
83. This agreement was binding between the parties as explained in *Trinity Prime Investment Ltd v Lion of Kenya Insurance Company Ltd* (supra) thus;

“The execution of the discharge voucher, we agree with the learned judge constituted a complete contract. Even if payment by it was less than the total loss . . .”
84. These sentiments apply to the facts of this case on all fours.
85. Having found that the claimant received Kshs 39,713/= from the respondent in full settlement of his terminal dues and acknowledged that he had no further claims against the company and having further found that the memo dated February 25, 2015 was a binding agreement, the outstanding issue on discrimination and reliefs fall by the wayside.
86. In conclusion, the claimant's suit against the respondent is dismissed.
87. Parties to bear own costs.
88. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 6TH 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

