



**Edward v Afro-American Food Company Limited (Cause 931 of 2018)  
[2022] KEELRC 12789 (KLR) (5 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12789 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 931 OF 2018  
MA ONYANGO, J  
OCTOBER 5, 2022**

**BETWEEN**

**DANIEL MAKAU EDWARD ..... CLAIMANT**

**AND**

**AFRO-AMERICAN FOOD COMPANY LIMITED ..... RESPONDENT**

**JUDGMENT**

1. *Vide* his statement of claim dated June 11, 2018 and filed in court on June 12, 2018, the claimant herein avers that his employment was wrongfully and unfairly terminated by the respondent. The claimant further avers that the respondent has wrongfully and unfairly withheld his dues.
2. The claimant avers that he was employed by the respondent on or about November 17, 2016 in the position of supervisor. That he was confirmed to the position upon successful completion of his probation and was earning a monthly salary of Kshs 25,000/-.
3. The claimant avers that during the subsistence of his employment contract with the respondent he performed his duties diligently and to the respondent's satisfaction until February 16, 2018 when he was issued with a notice to show cause letter dated February 16, 2018.
4. The said letter alleged that he had on the February 15, 2018 colluded with a cashier to balance the sales and cash and in the process the respondent lost revenue.
5. The claimant avers that he was thereafter issued with a letter of suspension dated February 16, 2018 indefinitely suspending his services pending further investigations on the issue.
6. That on the February 21, 2018 the claimant was called by the respondent's human resource department and handed a letter of summary dismissal which letter makes reference to a purported disciplinary hearing that allegedly took place on February 16, 2018.



7. The claimant denied being accorded any hearing or chance to make his representations to the allegations levelled against him prior the termination contrary to the provisions of the *Employment Act*, 2007.
8. He argues that his termination was unlawful, unfair and wrongful insisting that there was no just reason for the same.
9. In his memorandum of claim, the claimant seeks the following reliefs: -
  - a. A declaration that the respondent's action of terminating the claimant from employment was unfair, unlawful and unprocedural.
  - b. One month's pay in lieu of notice Kshs 25,000
  - c. Unpaid salary (21 days) Kshs 17,500
  - d. Accrued leave days not taken (35 days) Kshs 43,750
  - e. Overtime pay (10 days) Kshs 10,000
  - f. 12 months compensation for unfair termination Kshs 300,000
  - g. Certificate of Service
  - h. Costs of this claim
  - i. Interest on (b), (c), (d) and (e) above
10. The respondent upon being served with the summons to enter appearance and claim filed its notice of appointment dated October 23, 2018 and filed in court on October 26, 2018. It however, failed to file any response to the claim herein. The suit therefore proceeded for hearing as an undefended claim.

#### **Claimant's Case**

11. At the hearing on May 18, 2022, the claimant adopted his witness statement dated June 11, 2018 as his evidence in chief. He adopted his list and bundle of documents dated on even date.
12. On cross examination the claimant testified that he received a letter of dismissal from the respondent which indicated the reason for his termination as gross misconduct. He however maintained he was not aware of the gross misconduct.
13. The claimant testified that he did not lodge an appeal to the respondent's decision to terminate his employment because he was not accorded that opportunity to do so.

#### **Claimant's Submissions**

14. In his submissions that claimant maintains that the termination of his employment was unlawful and unfair, that fair procedure was not followed in contravention of the mandatory provisions of Sections 41, 43 and 45 of the *Employment Act*, 2007. To buttress this argument the claimant relied on the Court of Appeal decision in the case of *Kenfright (EA) Limited v Benson K Nguti* (2016) eKLR.
15. The claimant further submitted that he had proved his case on a balance of probabilities as against the Respondent and urged the court to allow his claim.



## **Analysis and Determination**

16. Having considered the facts of this cause, evidence, submissions and authorities cited by the parties. The issues for determination therefore are:
- i. Whether the termination of the claimant's employment was valid both procedurally and substantively;
  - ii. Whether the claimant is entitled to the reliefs sought.

### **Was the Claimant employment unfairly terminated?**

17. The reason cited for terminating the claimants' employment was gross misconduct as a result of the alleged loss of integrity, dishonesty and negligence on the claimant's part. The claimant's letter of summary dismissal dated February 21, 2018 reads as follows: -

“February 21, 2018

Daniel Makau Edward

Payroll No Pxxxx

danielmakau969@gmail.com

Dear Daniel,

RE: SUMMARY DISMISSAL

We refer to the disciplinary hearing held on February 16, 2018 between yourself and the disciplinary committee at the head office and your written and oral responses to the charges detailed in the show cause letter.

The same was found to be unsatisfactory because in your presence, your subordinate staff withheld cash in an open till and failed to submit to you the physical counting during your spot check on February 15, 2018 at 1900 hours as evidenced by the CCTV footage. Ordinarily, as the supervisor you should have asked for the cash since you are required to count all the cash in the till at any one time during the spot check. You went on to provide a report that was substandard since it excluded the amount withheld. This amounts to gross misconduct and will not be tolerated.

Your actions display lack of integrity, dishonesty and negligence on your part and have negatively affected business profitability. It is for this reason that the company has decided to summarily dismiss you with immediate effect.

In accordance with your contract, the company will compute your final dues as follows: -  
21 days worked in February 2018  
Any pending off days  
Any accrued leave days  
Less any unsurrendered imprest.

Your final dues will be computed upon satisfactory clearance and hand over of any company property that is in your possession.

Please be advised that any information you acquired during employment remains private and confidential.

Yours sincerely,

(Signed)



Irene Toweett

HR Manager”

18. In his pleadings and evidence the claimant denied any wrong doing as alleged maintaining that the respondent failed to follow due process.
19. The claimant further submitted that there was no just cause for his summary dismissal as alleged by the respondent.
20. The respondent on the other hand neither filed its response nor called any witness to rebut the claimant’s position.
21. The court in the case of *Samuel Kalomit Murkomen v Telkom Kenya Limited* (2017) eKLR held as follows with regard to validity of reasons for termination of an employee: -

“In determining whether termination of an employee was fair, a court ought not to substitute its decision for that of an employer. Its duty is to determine whether the decision to dismiss was valid and fair within the circumstances of the employer. See *Alfred Mutuku Muindi v Rift Valley Railways (Limited)* [2015] eKLR .... The Canadian Supreme Court decision in *Mc Kinley v BC Tel* (2001) 2 SCR 161 in its own words articulated that-

“Whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More Specifically the test is whether the employee’s dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee’s obligations to his or her employer.”

22. Further in the case of *Sarah Wanyaga Muchiri v Henry Kathii & another* (2014) eKLR the court held as follows with regard to validity of reasons giving rise to termination

“In order to elaborate on the understanding of what unfair termination of employment as stated by statute means Lord Denning in the case of *British Leyland UK Ltd v Swift* [1981] IRLR 91 stated as follows:

“The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which an employer might reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him.”

23. From the foregoing and considering the evidence before this court, it is not clear that the respondent had a valid reason to terminate the employment of the claimant. This is because there was no evidence adduced by the respondent to prove the reasons for dismissal as stated in the dismissal letter.



### **Procedure followed**

24. The procedure to be followed is provided under section 41 of the [Employment Act](#), 2007 which provides that before an employee is terminated on grounds of gross misconduct or poor performance, he ought to be given an opportunity to present his case.
25. No evidence was availed to this court to prove that the claimant had been accorded a fair hearing prior to the termination of his employment. In the circumstances, I find that the respondent has failed to prove that a fair procedure was followed before termination of the claimant's employment on account of gross misconduct contrary to the mandatory provisions of section 41 of the [Employment Act](#), 2007.
26. For these reasons, I find the termination was procedurally flawed and thus the termination of the claimant's employment was unfair in terms of section 45(2) of the [Employment Act](#), 2007.

### **What reliefs is the Claimant entitled to**

27. Having found the termination of the claimant's employment unlawful and unfair, the claimant is entitled to one month's salary in lieu of notice by dint of the provisions of section 35 of the [Employment Act](#), 2007.
28. The claimant is also entitled to unpaid salary for 21 days worked in February 2018 as no evidence was adduced by the respondent to prove payment of the same.
29. The claimant prayed for accrued leave not taken of 35 days. No evidence was adduced by the respondent to rebut this. In the circumstances, I allow the same as prayed.
30. The claim for overtime is however declined as the claimant did not adduce any evidence in support thereof.
31. On damages for unfair termination the claimant prayed for the maximum 12 months' salary as compensation. Taking into account all relevant factors as provided in section 49(4) of the Act, compensation equivalent to five (5) months' salary is reasonable in the circumstances of this suit and I award the claimant the same.
32. The claimant is also entitled to issuance of a certificate of service by dint of the provisions of section 51 of the [Employment Act](#), 2007.
33. He is further awarded costs of this suit. Interest shall accrue on decretal sum from the date of judgment until settlement in full.
34. In conclusion judgment is entered in favour of the claimant against the respondent as follows:-
  - i. One month's notice Kshs 25,000
  - ii. Unpaid Salary Kshs 17,500
  - iii. Accrued Leave days Kshs 43,750
  - iv. Five (5) months' salary as compensation for unfair termination Kshs 125,000Total award is Kshs.211,250
  - v. Certificate of Service.
  - vi. Costs of the suit.
  - vii. Interest at court rates from date judgment until settlement in full.



35. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 5<sup>TH</sup> DAY OF OCTOBER 2022**

**MAUREEN ONYANGO**

**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 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 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.

**MAUREEN ONYANGO**

**JUDGE**

