



REPUBLIC OF KENYA



KENYA LAW
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**Owuor v Excel Packaging Ltd (Cause 1091 of 2016)
[2022] KEELRC 13392 (KLR) (3 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13392 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1091 OF 2016
AN MWAURE, J
NOVEMBER 3, 2022**

BETWEEN

TOBIAS OPIYO OWUOR CLAIMANT

AND

EXCEL PACKAGING LTD RESPONDENT

JUDGMENT

Introduction

1. By a Statement of Claim dated 23rd May 2016 and filed on 8th June 2016, the Claimant brought an action against the Respondent seeking the following orders:
 - a. A declaration that the Respondent's action in dismissing the Claimant from employment was unlawful, unfair and un procedural.
 - b. A cumulative sum of Kshs. 1,864,900/- being inter alia one month salary in lieu of notice, unpaid leave allowance, salary for unfair dismissal, severance pay, exemplary damages, damages for loss of salaries and allowances, travelling allowance and house allowance as itemized in the Claimant's statement of claim.
 - c. Damages for loss of salaries from 23rd March ,2016 until date of determination being 7th April 2016 of the claim herein at Claimant's gross salary of Kshs. 47,300/- per month
 - d. Certificate of service
 - e. Cost of the suit
 - f. Interest on damages at court rates
 - g. Any other relief that the court may deem just and expedient to grant.



Claimant's Case

2. The Claimant, CW1 Tobias Opiyo Owuor, adduced sworn evidence in Court wherein he adopted his witness statement and list of documents dated 23rd May 2016, in their entirety.
3. It was the Claimant's case that at all material times before the suit he was employed by the Respondent on 1st August 2012 as an Assistant Accountant earning a salary of Kshs. 39,000 per month which was later raised to Kshs. 47,300 per month. The Claimant further stated that he was unfairly, illegally and unprocedurally terminated on 23rd March 2016 by the Managing Director, Mr. A.B. Raman and that he was not subjected to any disciplinary hearing prior to his termination.
4. The Claimant's alleged malice and/or breach of contract/breach of statutory duty of care by the Respondent in terminating his employment and claimed to have suffered loss and damages amounting to Kshs. 1,864,900/-.
5. It was the Claimant's averment that the Respondent maliciously terminated his services, and was in breach of contract as well as its statutory breach of care in failing to issue the Claimant with a warning letter, failing to convene a disciplinary hearing affording the Claimant an opportunity to defend himself before dismissal, and failing to pay the Claimant's terminal dues which was in violation of the employment contract.
6. He further stated his family suffered emotionally and financially as he was the sole breadwinner citing the case Nairobi Civil Case No. 1139 of 2002 Menginya Salim Murgani versus Kenya Revenue Authority where the court awarded exemplary damages to a tune of Kshs. 1,000,000 payable with interests at court rates for general damages.

Respondent's Case

7. The Respondent filed its Statement of Defence dated and filed on 28th June 2016. The Respondent averred that the Claimant's employment was lawfully terminated under the *employment act*. The Respondent avers that the Claimant who was the Assistant Accountant at the time was dismissed from the service owing to improper conduct and poor performance, and was first terminated sometimes in July 2015 as his work was way below the acceptable accounting practice. Upon this termination, the Claimant was remorseful and was reinstated to his job having written an apology letter dated 23rd July 2015.
8. The Respondent further stated that on 29th February 2016, while the Claimant was due to take his annual leave commencing 1st March 2016, the Claimant deliberately sabotaged the Respondent's Computer System, which action led to the damage of the Computer's Hard Disk containing the Respondent's financial records and crucial information including payroll, which sabotage led to the delays in staff salaries thereby causing distress to the staff and the Respondent.
9. Having found the Claimant's conduct to have been unlawful and also criminal in nature, the Respondent having reported the same to Industrial Area Police Station vide Occurrence Book No. OB/30/15/03/2016, the Respondent summarily dismissed the Claimant from the service by a letter dated 23rd March 2016, and there was no malice towards the Claimant.
10. The Respondent further stated that the Claimant, having reported the matter to the Kenya Union of Printers and Publishers and Allied Workers Union, was afforded a hearing where he was accompanied by the Union Officials Richard Onyango and John Bingo to the Respondent's premises, and that a settlement agreement was reached between the parties in which a cheque of Kshs. 35,521/- was



prepared in favour of the Claimant which he refused to Collect. The Respondent also stated that the Claimant was issued with a certificate of Service letter dated 25th May 2016, duly signed by him.

11. The Respondent averred that the Claimant was lawfully and procedurally terminated and prayed that the Claimant's case be dismissed with Costs awarded to the Respondent.

Claimant's Submissions

12. The Claimant filed written submissions dated 12th July 2022 wherein the Claimant prayed for judgment against the Respondent as follows:
 - a. A declaration that the Respondent's action in dismissing the Claimant from employment was unlawful, unfair and unprocedural.
 - b. A cumulative sum of Kshs. 1,864,900 particularized as follows:
 - i. One Month Salary in lieu of Notice Kshs. 47,300.00
 - ii. Unpaid leave allowance not taken for 1 year Kshs. 47,300.00
 - iii. 12 months' salary for unfair dismissal Kshs. 567,600.00
 - iv. Severance pay for 4 years Kshs. 189,200.00
 - v. Exemplary Damages Kshs. 1,000,000.
 - vi. Damages for loss of salaries from 23rd March ,2016 until determination of the claim herein at Claimant's gross salary of Kshs. 47,300 per month
 - c. Damages for loss of salaries from 23rd March ,2016 until determination of the claim herein at Claimant's gross salary of Kshs. 47,300 per month
 - d. Certificate of service
 - e. Cost of the suit
 - f. Interest on a), b) and c) above at court rates
 - g. Any other relief that the court may deem just and expedient to grant
13. The Claimant submitted that the Respondent did not subject him to any disciplinary process before termination contrary to the principles of natural Justice. Further, no cogent reasons for termination was issued by the Respondent, neither was there any disciplinary committee convened to arbitrate over the termination of the Claimant's services.

While relying on the case Nairobi Civil Case No. 1139 of 2002 Menginya Salim Murgani vs Kenya Revenue Authority and the case of Chirau Ali Mwakwere vs Royal Media Services Ltd Nairobi HCCNo. 47 of 2004 among other cases, the Claimant prayed for the award of general damages for unfair termination as well as exemplary damages of Kshs. 1,000,000 against the Respondent.

Respondent's Submissions

14. The Respondent did not file their submissions within the stipulated Court timelines and were thus served with a Notice of the Judgment Date of 17th November 2022.
15. Issues for Determination



- a. Whether the Claimant was unfairly, illegally and unprocedurally terminated from employment
 - b. Whether the Claimant is entitled to reliefs sought
 - c. Who should pay the costs of the suit
16. Determination
- Although the Respondent alleges misconduct on the part of the Claimant it has not proved its case regarding the same and has absconded from court proceedings on numerous occasions. The Respondent merely gave the Claimant a termination letter received on 7th April 2016 whereby he explained to the Claimant that the Claimant had tampered with the computer and caused it to crash. The reason given on the face of it seems valid.
17. Section 45 of *Employment Act* provide:-
45. (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 employees conduct, capacity or compatibility; or
 - ii. (ii) based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure.
18. However there is no evidence to clearly demonstrate how the Respondent came to the conclusion that the Claimant is the one who crashed the computer. He says that one Anne Njeri Njahi assistant accountant had informed him that the Claimant is the one who had dropped the computer. He said Anne Njeri did not write a statement and did not give evidence in Court to clarify how she witnessed that action. In fact the Respondent did not call viva voce evidence during the hearing to clarify what exactly took place. The only evidence presented by the Respondent was in the response where the Respondent wrote that on that particular day the Claimant tampered with and sabotaged the Respondent’s computer system without informing the Respondent. This is where the court is having difficulties as to how the Respondent identified the Claimant as the one who tampered with the system. The Court wonders if the Claimant was the only one who was working in that office and was he the only one who could have spoilt the computer. There are many grey areas in this allegation which need to have been substantiated.
19. The Court in relying inter alia in the case of *Nicholus Muasya Kyula vs Farmchem Limited Industrial Cause No. 1992 of 2011; (2012) LLR 235 (ICK)* where the Court held that:-
- “It is not sufficient for the employer to make allegations of misconduct against the employee. The employer is required to have internal systems and processes of undertaking administrative investigations and verifying the occurrence of the misconduct before a decision to terminate is arrived at.”



20. In the case of *Walter Ogal Anuro Vs Teachers Service Commission* (2013) eKLR where the Court held that:
- “... for a 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 the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”
21. The Respondent furthermore did not subject the Claimant to a hearing to give him an opportunity to defend himself in the presence of a fellow worker of his choice or a shop floor union representative of his choice. In fact going by the termination letter the Claimant was not even given a chance to defend himself and neither was he served with a notice.
22. Section 41 of the *Employment Act* 2007 provides 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.
23. Also the authority of *Alphonse Machanga Mwachanya vs operation 680 Limited* (2013) eKLR the Court summarised the legal fairness requirement for termination of employment on grounds of misconduct including (gross misconduct) poor performance or physical incapacity as set out in section 41 of *Employment Act*. In other words where employer fails to explain to the employee the reason for termination in a language he understands and is also allowed a representative of his choice during the hearing then the employer is held to have failed the requirements of procedural fairness.
24. By now it is clear that the Court has found the Respondent did not produce sufficient evidence to establish there was both substantial justification (in terms of reasons given for the termination of Claimant’s employment) as well as procedural fairness which the law provides is mandatory. The Court is satisfied the Claimant has proved on a balance of probability that his employment was terminated unlawfully and unfairly. Judgment is therefore entered in his favour.

Remedies awarded:

1. one month salary in lieu of notice Kshs 47,300/50.
2. Leave not taken for one year is not proved is declined.
3. 4 months equivalent of salary being compensation for general damages Kshs.189,200/-.
4. Severance pay is not payable unless is specifically proved so is declined.
5. Exemplarily damages is covered under general damages.
6. Damages for loss of salaries and allowances from 23rd March to date of determination is also not clear and specific will have to decline it.
7. Travel allowance for two years not proved and declined.
8. House allowance for 1 month not clear where this is from is declined.
9. The total award to the Claimant is Kshs 236,502/50- he is awarded costs and interest at court rates from date of judgment till full payment.



10. Claimant seems to have been given his certificate but if not he should be availed the same within 30 days from today's date.

Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 3RD NOVEMBER, 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 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 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

