



**Ochiel v Krish Trading Company Limited (Cause 953 of 2016)
[2022] KEELRC 13149 (KLR) (2 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13149 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 953 OF 2016
AN MWAURE, J
NOVEMBER 2, 2022**

BETWEEN

THOMAS ADERO OCHIEL CLAIMANT

AND

KRISH TRADING COMPANY LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed the amended memorandum of claim dated May 2, 2018 on the May 15, 2018. He says that he was employed by the Respondent Company on the October 4, 2004 as a sales person and at the time of unfair termination he was earning Kshs 17,060. The Claimant states that the Respondent kept his employment as a casual employee for three years which was more than allowed time under the law. That the Respondent discriminately kept a sore relationship with disrespect and constant abusive languages on daily basis.
2. The Claimant alleges that on the April 22, 2016 when at work place, the Respondent brought a machine and demanded that he should assemble the machine which he had never assembled before. He says that the Respondent proceeded and dismissed him from employment without notice when he could to assemble the same. The Claimant added that there was no time he was never given any notice for any misconduct at work place. The Claimant is of the view that this caused damages to him and loss of employment without following due process.
3. The Claimant as a result prays for the following remedies;
 - a. A declaration that the Respondent's conduct is irregular and in breach of the *Employment Act 2007*.
 - b. Special damages of
 - i. The leave allowance of Kshs $12 \times 17,060 = 200,472$



- ii. Loss of job expectations Kshs $12 \times 17,060 = 200,472$
 - iii. House allowance of Kshs $30/100 \times 17,060/ 12 \times 12 \times 12 = 736,992$
 - iv. Termination without notice= Kshs 17, 060
 - v. Fare Kshs $160 \times 6 \times 4 \times 12 \times 12 = \text{Kshs } 552, 960$
 - vi. Overtime Kshs $17,060/ 20 \times 4 \times 12 \times 12 = \text{Kshs } 491,328$
 - vii. NHIF & NSSF Kshs $400 \times 2 \times 12 \times 4 = \text{Kshs } 38,400$
 - viii. Hardship allowance /severance Kshs $17,060 \times 1 = \text{Kshs } 200,476$
- Total Amount = 2, 438, 160=

- c. General Damages
 - d. Costs of the claim.
 - e. Any other reward the Honourable Court deems fit and just to grant.
4. The Respondent filed his memorandum of appearance through the firm of Gachie Mwanza and Co Advocates on the June 14, 2016. He then filed the defence on the June 23, 2016.
 5. The Respondent in the statement of defence filed on the 23rd of June 2016 says that the Claimant was assigned a duty outside his normal daily work and out of fit of anger and arrogance, he downed his tools and absconded work indicating that he could not do anything else at his place of work other than his daily chores.
 6. Claimant says on the same day the Claimant left his place of work with arrogance, he returned at around 2 pm with a lawyer's demand letter of the same day to the effect that he had been unfairly terminated demanding all manner of claims never heard of and which demand letter was promptly responded to shortly after.
 7. The Respondent further says that he is aware that the Claimant is a man of quick anger and on many occasions, he would emotionally burst out over petty issues and his conduct of the April 22, 2016 was not entirely unexpected from him. He also denies that he caused any damage to the Claimant or was in breach of the Employment Act or at all. The Respondent allege that the Claimant absconded duty without lawful cause or justification and has constructively terminated his employment with the Krish Trading Company and which firm has at all times paid him his salary in full and all other entitlement lawfully as required by the law.
 8. The Respondent further alleges that all employees of the Krish Trading Co Ltd do obtain loans and advances from the Company every now and then and for which they sign against their names. He says that the Claimant at the time he left employment had a loan with the Company of Kshs 185,446/= and for which he had acknowledged as the amount the company will be claiming from him.

Claimant's Case

9. Thomas Adero Ochiel the Claimant gave sworn testimony. He adopted the witness statement dated the 2nd of May 2018 as part of his evidence in chief. He also produced the list of documents undated but filed on the May 18, 2018 together with the bundles of the memorandum of claim as his exhibits to support this case.



10. The Claimant testified that there is a machine he told the Respondent he could not put together after being told to do so. He says that he was then told that he will walk back to Kisumu on foot if he could not do so. He alleges that he was then told to pay the loan which he had not taken. The Claimant testified that he is not short tempered and further he said he never went on leave all the time he was employed. He says staff would go away from 24th to 27th December every year. He added that he never went on leave as indicated on the forms but got salary advance. He further said that he was being underpaid and never got paid on Saturdays. He says that they were supposed to leave work on Saturdays by 1.00 pm but would normally leave at 5.45 pm.
11. Claimant further says that it was from the year 2010 that they would rest on Sundays and nothing was paid to him when he was told to match to Kisumu.
12. Upon cross-examination, he said that he was on permanent employment in 2016. He also says he was earning Kshs 16000/= but when he started working he was earning Kshs 200 per day. He stated that the salary would be paid in cash and the salary did not include all his allowances when he was terminated. He said that he was asked to assemble machine which he could not assemble as he had never assembled the machine before and nobody used to assemble it.
13. The Claimant alleged that his boss used to mistreat him but never reported anywhere as he did not want to lose his job. He added that he never deserted the work.
14. The Respondent according to the Claimant started paying NHIF in the year 2008 and NSSF in the year 2009 but said he did not have the evidence in Court. He further said that he was not educated and that he was forced to sign for some papers. He said that he did not sign for overtime or anything else and the Respondent never explained to him what he was signing and did not see his signature on the documents.
15. It is the Claimant's evidence that he saw the Muster Roll at the trial for first time and stated the signature is not his and he was also not paid overtime. He also testified that he never absconded from work and nobody informed him to go for the certificate of service.
16. On re-examination he said that he was never given leave during the period that he worked and never saw the Muster Roll before the hearing. He said that they used to be paid about the 15th of every month and balance at the end of the month. He said that they used to sign but in small book not the muster roll in Court. He further mentioned that they were to close work at 5 pm but they used to work till 5.30 pm and used to work on Saturdays until 1 pm. He said that one would not be paid if on sick leave. He denied ever taking a loan from the Respondent of Kshs 185,426/-.
17. Pramud Shah is the Respondent witness who gave sworn testimony and stated that he is the manager of Krish Trading Company. He adopted the witness statement dated the October 4, 2019 as his evidence in chief in Court. He also adopted the list of documents dated the October 4, 2019 as exhibits as well as the supplementary list of documents dated the 9th November/2021.
18. It is Respondent's further evidence that the Claimant used to be called 'jaluo' and that he absconded work. He says that the Claimant used to mend fodder cutter which he told them he could not repair that particular day. The Claimant according to him was told to help as they had a client but he answered that it was not his work. He testified that following this the Claimant left and later sent them a demand letter from the advocate. He was asked to come back to work but never did so. He said that the Claimant used to be paid cash on the 15th of every month and end month and there was a muster roll. He said the Claimant used to sign official book all the years he worked for them and the salary was consolidated with transport and house allowance.



19. The Respondent further testified that the Claimant was given a loan which they had agreed would be deducted from payslip and is an exhibit in this case. The payslip, he said, shows balance of Kshs 149,847/= which remained pending as at the time of trial. He testified that the Claimant was paid all his dues and the Respondent owes him nothing.
20. Upon cross-examination, he said that he was educated up to form 6 and that the company had about 30 employees. He said that he started working in the year 2014 when the Claimant was already employed. He said that he had no contract to show that the Claimant took loan but there are documents that he took the loan. The Respondent says that the Claimant took leave even before the witness joined the firm. Respondent says that leave would be given for 21 days which the Claimant would sign for. On being referred to the Muster Roll Respondent said that there is no indication that Claimant went on leave. He added that they have proof of payment of NSSF and NHIF but is not in Court.
21. He also in answer to the question posed by the Claimant's advocate said that the work of repairing machine was not work of a sales person and that on the material day they had many clients and machine needed to be repaired hence the request for Claimant to repair it. The witness maintained that the Claimant knew how to repair machine and that it was a simple repair job but also mentioned that they had not trained the Claimant to do the work.
22. On re-examination Respondent said that they had not trained the Claimant to do the repair of machine but was to assemble the machine and it was a simple job. He said that leave days are recorded elsewhere rather than on the Muster Roll. He also testified that they used to pay NHIF and NSSF dues and the breakdown is in the payslip. The Muster Roll, he added, was being signed by the employee at the time of receiving salary.

Claimant's Written Submissions

23. The Claimant submitted that the Respondent in the case has omitted and failed to give its reasons for terminating the Claimant and thus the Claimant's allegations stand. The Claimant relied on the case of *Consolata Kemunto Amingo versus Milimani High School*, Civil Appeal No 199 of 2013 where the Court held that 'unfair termination involves breach of statutory law. Where there is a fair reason for terminating an employee's service but the employer does it in a procedure that does not conform with the provisions of a statute, this still amounts to unfair termination. On the other hand, wrongful dismissal involves breach of employment of contract like where an employer dismisses an employee without notice or without the right amount of notice contrary to the employment contract.
24. The Claimant further submitted that the Claimant had discharged the burden of proof that a wrongful dismissal and unfair termination had occurred and that the same has not been challenged satisfactorily by the Respondent on a balance of probability. He submits that there were no justifiable reasons to terminate his employment and the law was also not followed as per the *Employment Act*, thus denying the Claimant fair hearing.

Respondent's Submissions

25. The Respondent submission is that the Claimant having left his place of employment without leave or other lawful excuse, declined to perform a duty assigned to him, wilfully neglecting to perform work which ordinarily was his duty to perform, failing to obey lawful and proper command within the scope of his duty as an employee, had conducted himself unsatisfactorily and brought himself within the realm of summary dismissal under Section 44(4) of the *Employment Act 2007*.



26. The Respondent further stated that it complied with Section 41 (2) of the [Employment Act](#) on the procedure used to bring about the termination saying that the Claimant was given an opportunity to explain himself arising out of the accusations against him but he chose to ignore the same. He said that based on his chosen mode of operation and having a fixed mind on the strength of the lawyer's demand letter as to being unfairly terminated, he willingly and deliberately refused to respond adequately or at all. Having refused to cooperate, he left the demand letter and walked away in protest and has never set foot in the Respondent's premises again. The Respondent maintained that the Claimant voluntarily left his place of work essentially terminating his own employment.
27. The Respondent says that the Claimant was given an opportunity of being heard orally but the response relating to the queries against him was not forthcoming and instead took it upon himself to demand payment of damages for unfair termination. The Respondent having been left with no option after the non-cooperation and continued absenteeism of the Claimant which all actions amounted to gross misconduct, a decision was reached to terminate the Claimant.
28. The Respondent argued that the decision to terminate the Claimant's employment was just and fair as provided for under Section 47(5) of the [Employment Act 2007](#) and relied on, *inter alia*, the case of [George Ogoma Ochieng versus Kenjap Motors Limited](#) (2020) where the Court in making a finding as to the Claimant's case on merits and dismissal of the claim took into consideration the Claimant's lack of diligence in undertaking his duties and the attitude applied despite still being in employment which actions were wrong and amounted to gross misconduct under Section 44(4) of the [Employment Act](#).
29. The Respondent submitted that the Court should take into account the reasonableness of the employer's conduct vis-à-vis whether a reasonable employer could have decided to dismiss the employee based on the said conduct. The Respondent says that the Claimant was granted an opportunity to respond to the accusations of absenteeism without leave from workplace, failure to perform his duties, failure to obey lawful command of the employer and absconding duty. The Respondent was thus left with no option but to terminate him from employment as the only justified way. The dismissal was thus fair, just and proper in the circumstances.

Determination

30. Section 41(1) of the [Employment Act 2007](#) provides as follows: -

“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.”

31. Section 43 provides as follows:

“(1) 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 the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of the Section. Section 43(2) enacts 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.”



32. Section 45 of the Act provides in part as follows: -

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: - Related to the employees conduct, capacity or compatibility; or -Based on the operational requirements of the employer; and -That the employment was terminated in accordance with fair procedure."

33. Section 47(5) of the Act provides as follows: -

"For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer."

34. There are rival statements as to what transpired on the 22nd of April 2016 leading to the Claimant stopping work at the Respondent's organisation. The Claimant says there is a machine called self-cutter for cutting fodder that he was told to assemble but could not do so as it was unfamiliar to him. This according to him prompted the Respondent to ask him to walk away. The Respondent's witness Mr Pramud Shah disagreed saying Claimant was told to help with some assignment of repairing a machine but he said could not repair the machine and left. It is unclear whether Respondent witness as the Manager is the one who specifically told the Claimant to assemble the machine by saying 'they told the Claimant'. Be that as it may, the Claimant asserted that he was not familiar with the machine in question whilst RW1 maintained that the Claimant was told to help but left protesting that it was not his work to repair the said machine.
35. On cross-examination, Respondent witness said that they had not trained the Claimant to repair machines. There was no employment contract or letter of appointment exhibited from which the Court could know what was the job description of the Claimant and the related responsibilities of the Claimant. It was the responsibility of the Respondent to have safe custody of these under Section 74 of the [EA, 2007](#). This is particularly important as the Respondent in the response to the claim in paragraph 5 made an assertion quite different from the evidence led in Court on the circumstances leading to the departure of the Claimant. It said that the Claimant was given work which was outside his normal daily chore but out of anger and arrogance downed his tools stating he could not do anything else other than his daily chore.
36. And this is also what Respondent witness in cross-examination appeared to be admitting. The burden of proof shifted to the Respondent to demonstrate that the work was attendant to or for the most part in line with the terms and responsibilities of the Claimant's engagement before the issue whether the Claimant walked away could arise. This could have only been done by the production of the contract of employment or letter of appointment. It is not fitting for an employer to assign an employee work which he or she has not been assigned or trained to perform by virtue of the contract of employment or job description.
37. It is uncontested that the Claimant worked for the Respondent for 12 years before the incident, albeit with complaints of short temper which seemingly never led to a major issue for the 12 years he worked



for the respondent. The Respondent is not found to have given a valid reason to have terminated the Claimant employment. The Respondent in his response says Claimant was assigned a duty outside his normal daily work and out of arrogance and anger he downed his tools and left. He says Claimant returned with an advocate's demand letter that afternoon.

38. The Claimant avers he was dismissed from work without notice for stating he was unable to repair a machine. The Court finds it contradictory that the Claimant who had worked for the Respondent from October 4, 2004 up to April 22, 2016 could just have downed his tools as claimed by the Respondent without any reason save for being given a job outside his normal chores. The Court is more inclined to the fact that the Claimant was terminated from his employment when he voiced his inability to repair a machine. He says he was told to "walk to Kisumu".
39. In the case of *Eunice Odhiambo Okumbo vs Pharmakem Limited* (2016) eKLR seems closest to this case before me. The Claimant was accused of being unable to work with her workmates. Similarly in this case at hand the client was accused of downing his tools and walking out in arrogance out of his employment when he was asked to do some work out of his normal daily chores. The Court in the above case found this was not a valid reason as Claimant had worked well from 2009 till termination and issue of incompatibility was raised as related to one staff member only and not other workers.
40. Similarly in this case the Claimant had worked with the Respondent for 12 years and issue of arrogance just seem to have arisen only this one time and he was terminated without following the due procedure laid down in employment laws.
41. In the circumstances the Court finds the Respondent terminated the Claimant at the heat of the moment and without according to him a valid reason for the said termination or even following the procedure provided in mandatory terms under Section 41 of the *Employment Act 2007*. Respondent says he asked Claimant to go back to work but there is no evidence to that effect.
42. The Court finds the Claimant has proved his case on the balance of probability that he was unfairly and wrongfully terminated and enters judgment in his favour.
43. In the premise and having found the Claimant has succeeded in his claim the Court proceeds to award him the following reliefs:-
 - a. Leave allowance: the Respondent has produced documents to support some leave was granted and Claimant has not proved he requested for leave and was not granted. This claim is not tenable and is declined.
 - b. Loss of job expectation is also not tenable and is declined and again there is no specifics.
 - c. House allowance is declined as the Claimant accepted his salary for the years worked as consolidated salary as also testified by the Respondent in Court.
 - d. Salary in lieu of notice is granted Kshs 17,060/-
 - e. Fare is declined as is too general and not proved.
 - f. Overtime no specific dates and time where overtime is claimed and so is not proved.
 - g. NHIF & NSSF dues also no evidence from relevant statutory bodies that the same were deducted and not remitted and so are declined.
 - h. Hardship allowance/severance pay is not clear what is the prayer not proved so is declined.
 - i. General damages at 6 months equivalent of salary are awarded Kshs 17060x6 Kshs 102,360/-



Costs are awarded to the Claimant.

43. The Court finds no evidence except the allegation in the Respondent's response and oral evidence in Court that Claimant took a loan of Kshs 185,446/-. The Court would find it incredulous that the Respondent gave a loan of such a fairly big amount and yet did not put it in proper writing for the Claimant to sign. The documents the Respondent has annexed hereto are not related to such loan and so the Court declines to order Claimant to pay the said money. The total award therefore to the Claimant is Kshs 119,420/-.

Interest at Court rates from date of judgment till full payment.

Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 2ND 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

