



**Lichoti & another v CRJE (EA) Limited (Cause 98, 96 & 97 of 2017
(Consolidated)) [2022] KEELRC 13131 (KLR) (1 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13131 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE 98, 96 & 97 OF 2017 (CONSOLIDATED)
NJ ABUODHA, J
NOVEMBER 1, 2022**

BETWEEN

GEOFFREY AMBOKO LICHOTI 1ST CLAIMANT

VINCENT JUMA WANJALA 2ND CLAIMANT

AND

CRJE (EA) LIMITED RESPONDENT

JUDGMENT

1. This judgment is in respect of two suits which were heard together. In the first suit, Geoffrey Amboko Lichoti, the Claimant vide a Statement of Claim dated 9th June 2017 and filed in court 12th June 2017 sought for the following reliefs;
 - a. Declaration that the Claimant's termination from employment was unlawful, unprocedural and unfair and in the circumstances, the Claimant is entitled to compensation as prayed for,
 - b. The sum of Kshs. 354,276.25 as set out hereinabove.
 - c. Costs of this suit and interests at courts rate from the time of filing suit until payment in full
 - d. A certificate of service as per Section 51 of the *Employment Act*
 - e. Any other relief, further better relief the Honourable court may deem just and fit to grant.
2. According to the Claimant, at all material times he was employed by the respondent as a mason on 29th May 2016, served the Respondent with loyalty, diligence and full dedication until 23rd April 2017 when the respondent unprocedurally, orally, unlawfully and unfairly terminated his services.
3. The Claimant averred that the Respondent terminated his service without following the right procedure laid down in the *Employment Act*.



4. According to the Claimant, the termination was unfair because the Respondent did not act in accordance with justice/equity(sic) and that the Respondent failed to prove that the reason for the termination was valid .
5. In the second suit, Vincent Juma Wanjala , seeks the reliefs as set out hereunder;
 - i. Declaration that the Claimant’s termination from employment was unlawful, unprocedural and unfair and in the circumstances, the Claimant is entitled to compensation as prayed for,
 - ii. The sum of Kshs. 313,706.25 as set out hereinabove.
 - iii. Costs of this suit and interests at courts rate from the time of filing suit until payment in full
 - iv. Any other relief , further better relief the Honourable court may deem just and fit to grant.
6. The 2nd Claimant averred that he was employed by the Respondent as a mason on 15th September 2016 and his services were terminated on 23rd April 2017 unprocedurally, orally, unlawfully and unfairly.
7. The 2nd Claimant averred that the Respondent terminated his services without following the right procedure laid down in the Employment Act.
8. The Respondent filed a Statement of Response on 7th August 2017 denying the claim and averred that the Claimants who was employed at the Respondent’s construction site within the County of Kakamega, in the company of his colleague, namely Moses Mudavadi Omedo, were dismissed from employment on the ground of stealing and attempting to sneak out the Respondent’s pieces of reinforcement steel metal bars.
9. The Respondent maintained that the Claimant and the said Moses Mudavadi Omedo were offered an opportunity to exonerate themselves from the charge of theft but failed to do so hence their dismissal.
10. According to the Respondent, the Claimant and his colleague Moses Mudavadi Omedo presented a complaint to the Kakamega Labour Office through the Kenya Building Construction, Timber and Furniture Industries Employees Union , where a joint conciliation meeting was convened for 22/6/2017 which meeting never materialised.
11. As regards the 2nd Claimant, the Respondent contended that he was dismissed from employment on the ground of insubordination following his threats to beat up his supervisor in the presence of his colleagues.
12. The suit was then set down for hearing on various dates.
13. CW1, Geoffrey Amboko Lichoti the Claimant , gave evidence on 20th January 2022. He adopted his witness statement dated 9th June 2017 as his evidence in chief. According to CW1, he was not given the reason for his termination and neither was he taken through the disciplinary process. He stated that he was not issued with a termination notice as he his services were terminated verbally. He further averred that he was not paid his dues.
14. On cross examination, he maintained that he was not involved in the alleged theft.
15. The 2nd Claimant, Vincent Wanjala Juma testified as CW2. CW2 adopted his witness statement dated 9th June 2017 as his evidence in chief. He also relied on his documents on record. He contended that he was not given a reason for the termination of his employment. On his part he stated that he was issued a certificate of service by the Respondent. He maintained that he did not threaten or fight his supervisor as alleged. He further stated that he was not paid his termination dues and that he has not been prosecuted for the alleged assault.



16. RW1 was Nicholas Maiyo testified on 17th May 2022. He stated that he used to work for the Respondent as an administrator. He adopted his witness statement dated 26th October 2020 as his evidence in chief and also relied on the documents filed with the response to the Claim.
17. On cross examination, RW1 conceded that the Claimants were not issued with show cause letters. He stated that disciplinary meetings were held although he did not tender the said minutes before the court. As regards the 1st Claimant's case, RW1 stated that they reported the theft issue to the police after the security firm conducted its investigations. However, he conceded that he was never called to give evidence in a criminal case with regards to the theft case. RW1 stated further that CW2 threatened to beat his supervisor and the issue was reported. He also admitted that he had no evidence to show that the Claimants were paid their dues.
18. With that evidence from the rival parties, the court directed parties to file their respective written submissions.
19. The claimants filed their submissions on 25th May 2022. I have perused the court record and I have noted that the Respondent had not filed his submissions by the time the court retired to write this judgment.

Determination

20. Upon analysing the pleadings, the evidence before me and the submissions on record, I find the main issues for determination to be;
 - a. Whether the termination was unfair
 - b. Whether the Claimants are entitled to the reliefs sought in the Claim.
21. In determining the first issue, it is worth noting that Section 45(2) of the *Employment Act* provides that an employer should not terminate contract of employment of an employee except where there are valid and fair reasons.
22. The burden of proof in employment related claims as stipulated by Section 43 of the *Employment Act* is on the employer to prove the reason for the termination as valid in any legal proceedings.
23. The Respondent in this case, maintained that the Claimant was summarily dismissed from employment on account of stealing the Respondent's goods namely 140 pieces of reinforcement bars.
24. It was contended that an investigation was conducted by the NewnHam Services International Limited and a report dated 28th March 2017 was produced as evidence. I have analysed the said report at length and I find that it was established that indeed the Claimant had been involved in the theft of the said goods.
25. The 2nd Claimant on the other hand was accused of threatening to beat up his supervisor. I find this to be gross misconduct and the CW2 did little to prove that the said allegation was false.
26. It is therefore clear that indeed the reasons for termination of the Claimants employment were justified.
27. The other issue in this case is whether due process was followed before the Claimants was terminated from service.

Section 41 of the *Employment Act* provides that:

- (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 on this part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under Section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance and the person, if any, chosen by the employee within subsection (1) make.
28. A reading of the above provision of the law shows that even when the reasons for termination of employment are justified, the law requires the employer to observe certain procedures in terminating the employee's employment. For instance, the employment is required to;
- i. Provide the employee with details of the accusations against him/her
 - ii. Allow the employee an opportunity to respond to the charges
 - iii. Allow the employee to be accompanied by a shop steward or co-employee of his choice during the process
 - iv. Provide the employee with a decision of the Respondent as regards the termination or otherwise of his/ her of service.
29. In the instant case, the Claimants averred that no warnings were given to them, no show cause letter was issued and that further no disciplinary meeting was conducted for them to defend themselves. This allegation was not denied by the Respondent. The Respondent witness admitted that no show cause letters were issued and also he did not provide minutes as evidence that a disciplinary meeting was conducted.
30. Based on the foregoing admission by the Respondent, I find that the termination of the Claimants employment was unfair because the Respondent did not prove that it upheld procedural fairness in processing the termination.
31. The next issue I need to address myself to is whether the Claimants are entitled to the remedies they are seeking.
32. The Claimants seeks payment of one months' salary in lieu of notice. Section 35 of the [Employment Act](#) states:
- “(1) A contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be?
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- (c) where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing.
- (2) Subsection (1) shall not apply in the case of a contract of service whose terms provide for the giving of a period of notice of termination in writing greater



than the period required by the provision of this subsection which would otherwise be applicable thereto.”

28. The Claimants are therefore each awarded a one-month salary in lieu of termination notice.
29. The Claimants did not adduce sufficient evidence to support the claim for unpaid rest days, and unpaid holidays and therefore this claims are not sustainable.
30. As regards the relief of service pay as sought by the 1st Claimant, in his Memorandum of Claim, averred that he was employed by the Respondent as a mason on 29th May 2016 and that his services were terminated on 23rd April 2017. The 2nd Claimant on the other hand was employed on 15th September 2016 and his services was terminated on 23rd April 2017. I do not think the Claimants are thus entitled to service pay because their termination, whether or not regularly executed, was on account of gross misconduct under Section 44 of the Employment Act.
31. The claimants also sought for compensation for unfair termination to a tune of Kshs. 250,000 and Kshs 243,000 respectively. However, as earlier stated, the Respondent was justified in terminating the claimants employment on account of theft and insubordination respectively and therefore this relief is not available to them
32. I now enter judgement as follows:-
 - a) A declaration that the termination on ground of stealing and insubordination respectively was lawful.
 - b) Payment of one-month lieu of notice to each of the Claimants at Kshs 20,850
 - c) I also order the Respondent to issue the 1st Claimant with a Certificate of Service.
33. As the claim is partially successful, each party shall bear their own costs.
34. It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 1ST DAY OF NOVEMBER, 2022.

ABUODHA NELSON JORUM

JUDGE ELRC

