



**Okanga v Delta Energy Systems (K) Limited (Cause 1569 of 2017)
[2022] KEELRC 13573 (KLR) (19 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13573 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1569 OF 2017
BOM MANANI, J
DECEMBER 19, 2022**

BETWEEN

RICKY OKANGA CLAIMANT

AND

DELTA ENERGY SYSTEMS (K) LIMITED RESPONDENT

JUDGMENT

Introduction.

1. The claimant was an employee of the respondent until September 26, 2016 when his services were terminated. He is accused of not accounting for some batteries which came into his possession by reason of his employment.
2. According to the respondent, the loss of the batteries was not explained by the claimant suggesting that he may have misappropriated them. On the other hand, the claimant maintains that he returned the batteries to the respondent's store. He denies having mislaid the batteries in question.

Claimant's Case

3. According to the claimant, he procured 120 batteries from the respondent's store for installation at Family Bank Towers. He claims to have delivered all the batteries to the respondent's client, Family Bank Ltd but 20 of them were returned by the client.
4. The claimant states that he collected the 20 batteries from the client and took them back to the respondent's store. However, he omitted to fill the forms evidencing the return of the goods to the store. Nevertheless, it is the claimant's position that the return of the batteries was witnessed by a co-employee who was with him at the time.
5. The claimant denies misappropriating the batteries. He states that his innocence can be affirmed by the workmate he was with when he delivered the batteries to the respondent's store.



6. It is the claimant's case that he was not afforded an opportunity to establish this fact through a disciplinary process that ought to ordinarily precede termination of employment on account of alleged misconduct by an employee. And hence his position that the termination of his employment was unlawful.

Respondent's Case

7. On the other hand, the respondent states that it appointed the claimant to be in charge of its sub contract for installation of batteries at Family Bank Ltd at its Family Bank Towers. That based on his position, the claimant was entrusted with the collection and delivery of the requisite materials, including batteries, to the project site.
8. The respondent states that the claimant collected 120 batteries from the respondent's store for delivery to the Family Bank Towers site. However, while reconciling records of materials delivered to the project to enable the handover of the project to another technician, the respondent's officers realized that some 40 batteries were missing. Although allegedly delivered to the client, the batteries were not on site.
9. Upon this realization, the respondent states that it demanded an explanation from the claimant about the whereabouts of the 40 batteries. Meanwhile, the claimant was suspended from duty to enable further investigations into the matter. The suspension was communicated by an email sent to the claimant on September 16, 2016.
10. The respondent avers that investigations into the incident pointed to the claimant not having accounted for the batteries. Consequently, it is alleged that the claimant was called upon to explain the loss of the batteries but failed to do so. Consequently, a decision was taken to terminate his employment.
11. The respondent confirms that the decision to terminate the contract of service of the claimant was communicated to the claimant through email on October 3, 2016. However, the letter of termination attached to the aforesaid email had been prepared on September 26, 2016.
12. The respondent contends that the process leading to termination of the claimant was guided by the requirements of due process. Further, it is the respondent's position that the fact of loss of the batteries in question by the claimant justified its decision to terminate him. Therefore, the respondent believes that it met the statutory requirements in sections 41, 43, 45 and 47 of the Employment Act (EA) in terminating the claimant.

Issues for Determination

13. After evaluating the pleadings and evidence on record, I consider that there are two issues for determination in the cause. These are:-
 - a. Whether termination of the contract of service between the claimant and the respondent was lawful.
 - b. Whether the parties are entitled to the remedies pleaded.

Analysis

14. Both parties gave oral evidence in the cause. They also adopted their respective witness statements and produced copies of the documents in their respective lists of documents as exhibits.



15. Perhaps just to restate the point, there is no dispute that there existed the employer-employee relation between the parties to this cause at the time that is material to the inquiry. As a result, the court need not belabour this fact.
16. On the first issue, where an employer proposes to terminate the services of an employee on grounds of gross misconduct or incapacity or incompetence, he must observe due process in terms of section 41 of the EA. This position has further been restated in several judicial pronouncements.
17. In *Matsesho v Newton* (Cause 9 of 2019) [2022] KEELRC 1554 (KLR) the court observed as follows on the issue:-

“Under section 41 of the *Employment Act*, if an employer proposes to terminate the services of an employee on grounds of gross misconduct, poor performance or physical incapacity, the employer must notify the employee of the ground for termination in a language that the employee understands. This information should be given to the employee in the presence of another employee of his choice or a trade union official if he elects. In addition, the employer is obligated to hear the employee’s representations in response to the accusations against him.”
18. The law places the obligation on the employer to prove that these requirements of law are met. In the *Matsesho v Newton* (*supra*) case, the court expressed itself as follows on the foregoing:-

“.....section 43 of the Act obligates the employer to prove the grounds for terminating an employee. Where the employer fails to do so, the law raises a presumption in favour of the unlawfulness of the termination. Of course the law expects an employee to provide *prima facie* evidence in terms of section 47 of the *Employment Act* to prove unfair termination before the presumption aforesaid comes into play.”
19. The respondent is duty bound to demonstrate that the above requirements of statute were met before terminating the claimant. Has this obligation been discharged?
20. The reason for terminating the claimant was the alleged loss of the respondent’s batteries while in the claimant’s possession. It is common ground that out of the 120 batteries that the claimant picked from the respondent’s store to deliver and install at Family Bank Towers, not all were in fact installed. It is however contested whether the batteries that were not installed were returned to the respondent.
21. The claimant alleges that he returned 20 batteries to the respondent’s store without filling the return of goods forms at the respondent’s store. Yet, he does not deny that he was aware that filling of these forms was part of the accounting procedures for the respondent whenever goods were returned to the store. It is therefore clear to me that the claimant acted contrary to the accepted business practice of his employer when he acted in the manner he suggests. He must have been aware that the return of goods form was a requisite accounting document to confirm that the goods had been returned to the store.
22. In the absence of filled return of goods form, it is impracticable to hold that the claimant returned the batteries to the respondent’s store. Consequently, it is not unreasonable to hold that there is no cogent evidence to support the claimant’s assertion that he indeed returned the batteries.
23. The credibility of the claimant’s assertion that he collected from Family Bank Ltd the 20 batteries and returned them to the respondent is further put to question by the records relating to delivery of the batteries to bank. According to the delivery notes dated June 14, 2016 and July 15, 2016, Family Bank Ltd acknowledged receipt of all the batteries by stamping on the documents. In the ordinary conduct of business, it is reasonably expected that if the bank were to return any of the batteries after



- acknowledging their receipt in writing, it will document such return. Yet, there is no document by the bank releasing the 20 batteries back to the claimant for onward transmission to the respondent.
24. This scenario raises a lot of questions. Is it likely that the claimant colluded with a rogue bank official to have the delivery documents stamped to evidence receipt of the batteries by the bank without their physical delivery? Could the claimant have been playing with the documentation process to cover up misappropriation of the batteries? Would a reasonable person standing by the side possibly reach the foregoing conclusion? With respect I think yes.
 25. It is therefore not unreasonable to accept the conclusion that the respondent had genuine grounds to believe that the claimant had misappropriated the batteries. Under section 43(2) of the EA, an employer is deemed to have a valid reason to terminate an employee if the decision to terminate is founded on a genuine belief about the existence of a valid ground to terminate. In my view, the circumstances that the respondent was operating under fall within what is contemplated under section 43(2) of the EA. Consequently, I find that the respondent had valid grounds to believe that the claimant was engaged in misconduct at work and therefore had a valid reason to consider terminating him.
 26. However and as has been alluded to earlier, an employer who has valid reason to terminate an employee's contract of service must nevertheless comply with the requirements of due process in discharging the employee. He must: notify the employee of the charge against him; allow the employee a chance to respond to the accusation; allow the employee the right to call witnesses in his defense; and promptly render his decision after taking into account the employee's defense.
 27. In the case before me, there is no evidence to demonstrate that the respondent complied with this latter requirement. All that the email correspondence between the parties demonstrates is that the respondent issued the claimant with a letter of suspension before terminating his services. There is no evidence that the respondent afforded the claimant the opportunity to defend himself and call witnesses in support of his case.
 28. Even though the respondent's witness stated that the claimant was offered a chance to defend himself before a disciplinary panel set up for this purpose, no evidence was tendered to prove that such panel was set up or if it was, that it sat to hear the claimant's case. No minutes of the proceedings before the alleged panel were produced in court.
 29. Noteworthy, the respondent's witness confirmed that he did not personally take part in the alleged disciplinary process against the claimant. Yet, not a single member of the alleged disciplinary panel testified to confirm that it was constituted and heard the case against the claimant.
 30. On the basis of the evidence on record, the court is not convinced that the respondent conducted a disciplinary hearing against the claimant as required under section 41 of the EA. On this account, the respondent's decision to terminate the claimant violated the law.
 31. The last issue for determination is whether the parties are entitled to the reliefs prayed for in their respective pleading. In this respect, I will take into account the principles under section 49 of the EA. While the law provides a plethora of remedies to an employee who has been wrongfully terminated, there is no obligation on the court to grant all of them. Indeed the court has discretion to determine which of the reliefs to grant as it deems just.
 32. Having regard to the fact that the claimant's conduct contributed to his termination, I am hesitant to grant him all the remedies that he has sought. Instead, I will grant him compensation for unfair termination equivalent to his gross salary for six months. In reaching this decision, I am guided by the Court of Appeal decision in *Ol Pejeta Ranching Limited v David Wanjau Muboro* [2017] eKLR. I also award him interest and costs of the suit. The award is subject to the applicable statutory deductions.



Summary of Award

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- a. Termination of the claimant's contract of employment is declared unlawful for want of compliance with the procedural requirements under section 41 of the EA.
- b. The claimant is awarded compensation equivalent to his gross salary for six months which is equivalent to Ksh 367,350/=.
- c. The claimant is awarded interest on the sum in (b) above at court rates from the date of the court's judgment.
- d. The claimant is awarded costs of the suit.
- e. The award in (b) above is subject to the applicable statutory deductions.

DATED, SIGNED AND DELIVERED ON THE 19TH DAY OF DECEMBER, 2022

B. O. M. MANANI

JUDGE

In the presence of:

.....for the claimant

.....for the respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

