



**Kitua v Kenwan Services Limited (Cause 1753 of 2016)
[2022] KEELRC 13524 (KLR) (9 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13524 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1753 OF 2016
SC RUTTO, J
DECEMBER 9, 2022**

BETWEEN

RAPHAEL MUTISO KITUA CLAIMANT

AND

KENWAN SERVICES LIMITED RESPONDENT

JUDGMENT

1. The claimant instituted the instant suit *vide* a statement of claim dated August 30, 2017, through which he avers that he was employed by the respondent with effect from April, 2012 as a technician. That he was terminated from employment on October 23, 2015, on grounds of insubordination. The claimant has termed his dismissal as unfair and unlawful hence seeks against the respondent, the sum of Kshs 560,000.00 being one months salary in lieu of notice, payment in lieu of untaken leave days and compensatory damages for unfair termination.
2. The respondent filed a statement of response dated May 10, 2022 through which it denied the claimant's assertions and put him to strict proof. Consequently, the respondent has asked the court to dismiss the claim with costs.
3. On June 15, 2022, the matter proceeded for hearing and both sides tendered oral evidence.

Claimant's Case

4. The claimant started off by adopting her witness statement and documents filed together with the statement of claim to constitute his evidence in chief. He further produced the said documents as his exhibits before court.
5. In his evidence before court, the claimant stated that sometimes in September, 2015, he was sent by the respondent to install a generator at its site in Athi River. That he did as instructed but due to shortage of the requisite spare parts necessary to complete the repairs, he could not complete the installation



on that day. That on September 21, 2015, the client's in-house technician notified him that they had secured the spare parts and that he could go and complete the installation.

6. That he proceeded to Athi River and completed the installation of the generator. That while at the client's premises, the respondent's Logistics Manager arrived at the site and left without saying a word to him. That when he resumed duty on September 23, 2015, he was surprised and shocked to receive a letter of summary dismissal, through which he was accused of insubordination.
7. It was his testimony that he had done nothing wrong to warrant being summarily dismissed from employment. That he was never issued with a notice to show cause or accorded a hearing prior to his dismissal.

Respondent's Case

8. The respondent called oral evidence through Mr Eliud Ngugi who described himself as its director.
9. Mr Ngugi told court that the claimant was his employee from 2012 to 2015. That he sent him to undertake a survey for installation work of a plant in one of the respondent's client's warehouses. That the claimant went back with the requirements, whereafter the respondent issued the client with an invoice. That thereafter, the claimant and one Abednego went behind his back and gave the said client a lower quote and performed the work themselves.
10. It was his further testimony that the respondent's Logistics Manager went and found the claimant performing the job at the client's premises. That he left the claimant there and that was the last time the claimant was seen at the respondent's workshop.

Submissions

11. It was submitted on behalf of the claimant that his narration of events was plausible and believable. That he was summarily dismissed without notice and due process was totally ignored.
12. The respondent did not file any submissions as the same were not on the court's physical record and could not be traced on the online portal.

Analysis And Determination

13. Upon considering the pleadings and evidence on record, the Court singles out the following issues for determination:
 - a. Whether the claimant's termination was unfair and unlawful.
 - b. Is the claimant entitled to the reliefs sought?

Whether The Claimant's Termination Was Unfair And Unlawful

14. For termination to pass muster, the employer is required to prove that the same was fair and lawful. This entails substantive and procedural fairness. Substantive fairness has everything to do with proof of reasons for which the employee was terminated, while procedural fairness relates to the process applied in terminating the employee.
15. I will start by considering substantive fairness.
16. Pursuant to section 43 of the Employment Act (Act), an employer is required to prove the reasons for an employee's termination, and in default, such termination is deemed to be unfair. In terms of section 45 (2) (a) and (b) of the Act, a termination of employment is deemed to be unfair where the employer



fails to prove that the reason for the termination is valid, fair and related to the employee's conduct, capacity or compatibility; or based on its operational requirements.

17. As for the case at hand, I must say that the reasons for which the claimant was dismissed from employment are unknown. For starters, there is no letter of summary dismissal on record, from which such reasons can be ascertained. Further, the claimant testified that his dismissal was on the basis of insubordination while RW1 stated that the claimant went behind his back and performed work belonging to the respondent company, as a quote had been issued, and upon being discovered by the Logistics Manager, went away never to be seen.
18. Essentially, the parties have different versions as to why the employment relationship was severed.
19. In view of the above, it is imperative to revisit the evidential burden under sections 43 and 45(2) (a) and (b) of the Employment Act. The import of these statutory provisions is that the employer bears the burden of proving the reasons for termination and justifying the same.
20. In this regard, it is instructive to note that the employer did not tender any evidence to prove the reasons that led to the claimant's exit from employment. For instance, RW1 stated in his testimony, that the respondent's Logistics Manager caught the claimant red handed, performing work at the respondent's client's premises, which was work was meant for the respondent. No doubt, this allegation if proved, amounts to gross misconduct as the claimant was in the real sense, being accused of diverting the company's business thereby occasioning it potential loss of revenue.
21. Despite this assertion, the respondent did not call the said Logistics Manager as a witness, to testify and prove the said assertion.
22. At the end of the day, the respondent failed to discharge its evidential burden, hence the reasons leading to the claimant's termination from employment were not proved to have been fair, valid and related to his conduct and performance.
23. This fell short of the legal parameters established under sections 43 and 45(2) (a) and (b) of the Act, hence the claimant's termination was unfair.
24. Turning to the second limb of procedural fairness, it is evident from the record that the respondent did not prove, let alone, suggest that it subjected the claimant to procedural fairness prior to his termination.
25. Let me revisit the relevant statutory provisions. Section 45 (2) (c) of the Act, requires an employer to prove that it accorded an employee a fair hearing prior to termination from employment.
26. The specific requirements of a fair process are provided for under section 41 of the Act. In this regard, an employer is required to notify an employee of the intended termination, the reasons thereof in a language he or she understands and in the presence of another employee or a shop floor union representative.
27. As stated herein, there is no evidence emanating from the respondent's end to prove that it undertook the process contemplated under section 41 of the Act. In absence of such evidence, I can only conclude that the claimant was not accorded a fair hearing before being let go by the respondent. Therefore, his termination was unlawful within the meaning of sections 45(2) (c) and section 41 of the Act.
28. To this end, I arrive at the inescapable conclusion that the claimant's dismissal was unfair and unlawful.



Appropriate Reliefs

29. As I have found that the claimant's termination from employment was unfair and unlawful, the court awards him compensatory damages equivalent to four (4) months of his gross salary. This award takes into account the length of the employment relationship and the fact that the respondent has not laid out the basis for the claimant's termination.
30. Further, and in accordance with clause 14 of his employment contract, the claimant is awarded one month's salary in lieu of notice.

Orders

31. In the end, I enter judgment in favour of the claimant against the respondent as follows:
- a. The claimant is awarded compensatory damages equivalent to four (4) months of his gross salary being Kshs 140,000.00.
 - b. The claimant is awarded one month's salary in lieu of notice being the sum of Kshs 35,000.00.
 - c. The total award is Kshs 175,000.00.
 - d. Interest on the amount in (c) at court rates from the date of judgment until payment in full.
 - e. The respondent shall also bear the costs of this claim.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF DECEMBER, 2022.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr Namada

For the respondent in person

Court Assistant Abdimalik Hussein

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 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.

STELLA RUTTO

JUDGE

