



REPUBLIC OF KENYA



KENYA LAW
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**Muriunga v Riara Group of Schools Limited (Claim 178 of 2016)
[2022] KEELRC 13466 (KLR) (8 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13466 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CLAIM 178 OF 2016
AN MWAURE, J
DECEMBER 8, 2022**

BETWEEN

HARUN GITONGA MURIUNGA CLAIMANT

AND

RIARA GROUP OF SCHOOLS LIMITED RESPONDENT

JUDGMENT

1. The claimant by the memorandum of claim dated the February 8, 2016 seeks the following remedies from court;
 - a. The respondent be ordered to pay the claimant the benefits amounting to a sum of Ksh 7, 145, 816
 - b. General damages.
 - c. The respondent be ordered to issue the claimant with a certificate of service
 - d. Costs of the suit
 - e. Interest in (1) and (2) above at court rates

Claimant's Case

2. The claimant avers that at all material times relevant to the suit, he was an employee of the respondent as a driver from September 6, 2005 to November 6, 2015 when his services were unlawfully terminated and was earning monthly salary of Ksh 25,764/=. The claimant avers that on or about the November 6, 2015 he was summarily dismissed from employment by the respondent for no valid reason and without due regard to the laid down procedures for lawful termination of employment.



3. The claimant says that termination of his employment was unlawful and illegal as he was not afforded a hearing over the alleged misdoing and was not issued with a warning letter or given a chance to defend himself against the allegations raised. The claimant avers that he is entitled to benefits from the respondent being unpaid salary of Ksh 25,764/=, one month salary in lieu of notice Ksh 25,764/=, leave earned and not taken Ksh 8588, gratuity pay Ksh 257,640/=, loss of earnings Ksh 6,828,060/= and general damages for wrongful and unfair dismissal.
4. The claimant asserts that the respondent has refused to pay the said benefits amounting to Ksh.7,145,816/= and general damages for wrongful termination of employment.

Respondent's Claim

5. The respondent filed the memorandum of response dated the March 18, 2016 on the March 21, 2016. The respondent whilst admitting the claimant was its employee from September 6, 2005 to November 6, 2015 denies the claimant was unlawfully terminated and in particular that the claimant was summarily dismissed from employment for no valid reasons and without due regard to the laid down procedure of lawful termination of employment.
6. The respondent says that the claimant was dismissed for unsatisfactory performance of his duties as a driver for the group which led to the accident involving the respondent's company vehicle no KAU 298J on November 3, 2015 which hit and badly injured a pedestrian while being driven by the claimant. The respondent states that investigations carried out by the traffic police revealed that the claimant was to blame for the accident and the claimant was subsequently charged with the offense of careless driving.
7. The respondent says that before the claimant was issued with the summary dismissal letter after the accident occurred on November 3, 2015, the claimant was summoned to the respondent's office and asked to give his account of what transpired. The respondent says the claimant gave a self-written statement on November 6, 2015 which was received by the respondent on the same day. The claimant on the same day was then asked to attend a meeting with the Human Resource Department of the respondent in the company of a representative of his choice
8. The claimant then attended the meeting with the Group Human Resource Manager on the afternoon of November 6, 2015 but failed to bring along a representative. The respondent then had a discussion with the claimant over the matters set out in the statement regarding the accident.
9. The respondent also says that the claimant had previous incidents where he had been cited for misconduct. The respondent says that the claimant had been given a warning that any other unsatisfactory performance would lead to disciplinary action which may include dismissal.
10. The respondent states that by another letter dated the August 18, 2015, the claimant was issued with a suspension letter which suspended him from employment after it had been reported to the human resource of the respondent that the claimant had been soliciting for money from the respondent directors' children. The claimant was subsequently relieved of his duties as a driver. The respondent argued that the claim be dismissed with costs as the dismissal was merited.

Claimant's Evidence

11. CW1 Harun Gitonga Muriungi gave sworn testimony and said he lives in Nairobi. He testified that he is a driver and the respondent was his employer. He adopted his witness statement dated the February 8, 2016 as his evidence in chief. He also adopted the documents in list dated the February 8, 2016 as his exhibits in the case



12. The claimant testified that he worked for the respondent for ten years and was permanent employee, his salary being Ksh 25,764 at the termination. He told court that on the November 6, 2015 he went to work as usual and was called to the office where he got the letter of termination which letter was given without any prior warning letter or notice. He states that he was not invited for a disciplinary hearing and that whilst his salary for that month was paid, there was a deduction for bail paid to the police
13. The respondent says that the offence he was informed of was causing accident but he was not charged in court. The claimant says that in his letter of appointment he was not told how he would be dismissed summarily and that causing an accident can cause one to be terminated. The claimant testified that he was not told to defend himself for that offence and has never gone back to the respondent premises. The claimant was of the view that his termination was unfair and that he was not given notice or payment in lieu of notice which he was entitled to. The claimant added that he never borrowed money from the respondent's children.
14. On cross-examination the claimant said he was employed on permanent terms though the letter of appointment does not show he was employed on permanent basis. The claimant said that he was never called for a discussion as claimed in paragraph 1 of his letter of termination and that it is only the HR that gave him a letter but there was no disciplinary meeting. He added that he was not terminated for asking for money from the directors' children.
15. On re-examination he said that he was not called to a disciplinary meeting after the accident and was not terminated for borrowing money from the directors' children. He reiterated that he has not been asked to return any items.

Respondent's Evidence

16. RW1 Milton Ugaba Milimu gave sworn testimony and said that he works with the respondent as a HR officer. He said that he is familiar with the case and adopted the witness statement dated the October 28, 2021 as his evidence in chief. The documents contained in the list dated the August 12, 2021 were adopted as exhibits 1-13 in the case by the respondent.
17. He testified that the claimant was given a show cause letter of July 21, 2014 which is in writing followed by the warning letter of July 24, 2014 which warned him he could have been suspended and he responded on the August 18, 2015 which was in regard to money he had tried to borrow from the directors' children. He said that the claimant was suspended to investigate the case further. He testified that the claimant was re-assigned to drive school buses and not to drive directors. He said the claimant got a notice of intention to prosecute and was arrested and he paid cash bail
18. Upon cross-examination he said that he is HR officer and was employed by the respondent on November 6, 2016. He admitted he did not know the claimant as he was no longer an employee of the company when he (the witness) came in but knows what transpired from the records kept by the institution. He said he had not tabled any documents to show that the claimant was summoned by the HR office and the letter of appointment does not state the terms of employment. He however told court the said letter of appointment alludes that the claimant was on permanent employment.
19. The witness also told court that when a complaint is lodged the HR calls for the employee and such discussions should be recorded. The witness said that there are no minutes in the case to show there was a meeting between the claimant and the former HR officer. The witness said that the employee should be given a chance to defend himself and after the claimant had defended himself, he was re-employed and allocated other duties.



20. He said that there is no evidence the claimant borrowed money from the children of the directors. The witness upon being referred to the letter of appointment said that it was not provided what would cause summary dismissal but said that it was a fair decision to terminate the claimant for causing an accident by careless driving. He added that the claimant has not been paid his dues because he has not cleared with the respondent as he was yet to return company assets and clear with other departments.
21. On re-examination he said that in the letter of July 21, 2015 they called the claimant to defend himself and there was opportunity given to the claimant to defend himself. He said that the termination was not purely because of the accident but also unsatisfactory performance of his duties as a driver and he had other performance issues. The witness said that the claimant had two previous warning letters and it is the employee to initiate clearance process as there are other external parties like Saccos and banks involved. He said the claimant did not do the clearance.

Claimant's Submissions

22. The claimant submitted that the respondent did not prove that they had a valid reason for terminating the claimant's employment. He further said the claimant's termination according to the letter of termination was on the basis that he had been involved in an accident allegedly caused by careless driving. The claimant submits that DW1, however, admitted in cross examination that the claimant was not at all charged for the offence of careless driving, hence there is no evidence that he caused the accident. Further, that the claimant testified that being involved in an accident is not listed as a ground for termination of services in the letter of employment, which evidence was unchallenged by the respondent whilst the other charge of misconduct levelled against the claimant was denied.
23. The claimant also argues that his termination was not in accordance with fair procedure. It is argued that the claimant testified that he was not accorded a hearing prior to the termination and there was no notice of termination of services hence he was summarily dismissed unfairly. Claimant further says he did not take a witness to the hearing as none was available. The claimant says that whilst the respondent witness said that there was a hearing, he admitted that there is no evidence by way of minutes of the meeting.
24. The claimant relied on the case of *Kennedy Mutuku Mwove v Mkopa Kenya Limited* [2021] eKLR where it is said the court held that:

‘On procedural fairness, although the respondent’s witness confirmed on cross-examination that the claimant was taken through the disciplinary process, no tangible evidence was furnished. The respondent tendered neither notice of invitation of the claimant to the hearing, no record of the proceedings or minutes. The notice to show cause was silent on the course of events after the claimant had responded. It makes no mention of a disciplinary process and finally the termination letter dated the January 7, 2016 makes no reference to a disciplinary hearing or findings of any meeting. In the absence of the evidence to the contrary, the court is satisfied that the claimant has on balance of probabilities established that he was dismissed without being afforded an opportunity to confront the allegations against him in the presence of a representative of his choice. It is the finding of the court that the claimant’s summary dismissal on the January 7, 2016 was procedurally flawed for non-compliance with the provisions of section 41 of the *Employment Act*.’
25. The claimant also submitted on the remedies he is claiming.



Respondent's Written Submissions

26. The respondent submits that there was evidence adduced that the claimant was terminated for reasons of misconduct which was well within the knowledge of the claimant herein. The respondent says that on the November 3, 2015 at around 8 pm while driving the respondent's school bus registration number KAU 298J, the claimant hit and seriously injured a pedestrian who was rushed to Nairobi Hospital for treatment. The respondent relied on the case of *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR where the court held that:
- “for a termination to pass the fairness test there must be both substantive 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.”
27. The respondent submits that the particulars of gross misconduct as stated in paragraph 12 of its submissions led to issuance of two warning letters and one suspension letter prior to the final issuance of the letter of termination. The respondent argues that the claimant was involved in continuous misconduct all of which were brought to his attention.
28. The respondent argues that from a reading of section 44(4) (e), (f) and (g) of the *Employment Act, 2007* several acts of insubordination and the eventual accident which necessitated the payment of cash bail amounting to ten thousand Ksh are sufficient grounds under the aforesaid clauses to warrant a summary dismissal from employment.
29. The respondent further argued that the claimant was given an opportunity to be heard and that DW1 produced 'DEX-12' which is the claimant's handwritten statement giving his account of the events of the accident. The respondent says that the claimant was eventually invited to the discussions which led to the termination of employment contract. It argues that the claimant has in no way demonstrated that his employment contract was terminated without due regard to section 41 of the employment contract.

Determination

30. The *Employment Act 2007* stipulates on how a fair termination should be carried out. sections 35, 40, 41, 43, 44 and 45 *inter alia* has the statutory provisions on termination of employment. As has been held by the courts, for a termination to be deemed fair, it must be substantively and procedurally fair. The reason(s) for termination must not only be valid but fair as must be the procedure employed by the employer. (See *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR).
31. Section 43(1) provides that –
- (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 section 45.
- Section 43(2) provides that –
- (2) 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. In the termination letter dated the November 6, 2015 the dismissal of the claimant is said to have been based on what was said to be his unsatisfactory performance of his duties as a driver taking into account his recent accident with the company vehicle on the November 3, 2015. That the report mentions that after investigations following report of the accident to Langata Police Station, the claimant was blamed for causing the accident through careless driving.
33. The claimant says that it was not stated in his appointment letter what would constitute summary dismissal and further that he was not charged in court as a result of the accident. The court has seen the respondent's attached certificate of examination and test of the motor vehicle which shows the subject motor vehicle was in good condition prior to the accident and there was no pre-accident defect noted in the vehicle. There is also the attached notice of the intention to prosecute dated the November 21, 2015. This report has not been challenged in anyway by the claimant. And whilst the claimant denies having been charged before a court of law in relation to the accident, he says that he was released upon payment of cash bail which was deducted from his salary and copy of receipt of cash bail is produced in court. This could only mean he had been charged or the decision to charge him had been made.
34. The court accordingly finds that there was basis upon which the respondent could have inferred negligence on the part of the claimant at the time of termination. Driving with due care and attention was in my view intrinsic part of the claimant's engagement as a driver. The respondent was not therefore obligated to include or mention this in the letter of appointment. The claimant must certainly have understood this as an integral implied term of the employment contract, even assuming the same was not specifically included in employment contract.
35. The court has in addition also seen the previous warning letters said to have contributed to the termination. There is one dated July 24, 2014 where he was warned for using company car after hours. There is suspension letter dated August 18, 2015.
36. The claimant was issued a notice of intended prosecution on November 4, 2015 and a cash bail which the respondent paid for him and was charged on the same date. He was clearly indicted for careless driving and causing an accident.
37. Section 44 of the [Employment Act](#) provides grounds that constitute gross misconduct and can lead to summary dismissal. Section 44(4) (c) employee wilfully neglects to perform any work which it was his duty to perform or if he carelessly and improperly performs any work which from its nature was his duty, under his contract to have performed carefully and properly.
- Also section 44(4) (d) use of abusive language to ones supervisors is also a ground to justify gross misconduct and therefore summary dismissal. The respondent had valid reasons no doubt to terminate the claimant as driving both the school children and the directors was his main duty and he was under a duty to drive with due care and diligence. He still had other charges levelled against him of using abusive language and borrowing money from the director's children.
38. The claimant was warned several times and the respondent witness says they invited the claimant to defend himself. The witness is the HR officer of the respondent Mr Milton Milimu.
39. The only flaw from this process is that the respondent has no proof that they invited the claimant for a disciplinary hearing under section 41 of the [Employment Act](#). Section 41(1) of the [Employment Act](#) provide 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.

40. The provision of section 41 is mandatory that the claimant must be accorded a chance to be heard in the presence of a fellow worker of his choice and/or a shop floor union representative. The claimant should be informed clearly before such a meeting the charges levelled against him to enable him to defend himself.

41. If this procedure is omitted and even if the respondent has a good reason to terminate the employee unfortunately the process becomes unlawful and court is forced to declare the termination unlawful. This is well stated in the case of *Walter Ogul Onuro v Teachers Service Commission* Cause 955 of 2011. The court held:

“For termination to pass the fairness test, it ought to be shown that there is not only substantive justification but also procedural fairness”.

42. In this case even if the respondent had a valid reason to terminate the claimant, the procedure was not adhered to and so the court is inclined to find judgement in favour of the claimant only for that reason.

43. The remedies awarded to the claimant are:

- i. Salary upto November 6, 2015 as offered by the respondent by their letter of November 6, 2015 signed by Mr Masese -25,764/-
- ii. One month salary in lieu of notice – 25,764/-
- iii. Leave earned not taken 9.5 days 8,588/-
- iv. Gratuity pay noting is not provided in the letter or appointment, and so is declined.
- v. Loss of earnings too generalized is declined.
- vi. General damages as nominal as claimant contributed to his dismissal – 2 months equivalent – 51,528/-
- vii. Each party will meet their costs.
- viii. Interest is awarded at court rates from the date of judgment till full payment.
- ix. Claimant to be issued with a certificate of service within 14 days.

Total award to the claimant is Kshs 111,644/-

Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI, THIS 8TH DAY OF DECEMBER, 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 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 has 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 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.

A signed copy will be availed to each party upon payment of court fees.

ANNA NGIBUINI MWAURE

JUDGE

