



**Njugiria v Tusker Mattresses Limited (Cause 1218 of 2017)
[2022] KEELRC 13572 (KLR) (7 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13572 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1218 OF 2017
AN MWAURE, J
DECEMBER 7, 2022**

BETWEEN

PETER THIONG'O NJUGIRIA CLAIMANT

AND

TUSKER MATTRESSES LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed a memorandum of claim dated June 29, 2017.

Claimant's Case

2. The Claimant states he was employed as a shop assistant by the Respondent from January 1, 2002 to September 27, 2014. His salary was Kshs 25,934/-.
3. He further says that on September 27, 2014 he was terminated from employment without any reason and respondent have failed to pay his dues.
4. He says the Respondent's director Stephen Mukuna was against formation of a union and was threatening union representatives. He says on September 17, 2014 he was accused of stealing an item from the Respondent and subsequently he was ordered to go home. He says he was never called for any disciplinary hearing and despite being accused of stealing he was never investigated and was never charged with stealing.
5. He says he served the Respondent for 13 years and during that period he used to work for 14 hours and never went on leave and was not compensated. He says subsequently he was unlawfully and un procedurally terminated from duty and prays to be compensated as per the prayers in paragraph 17 of the memorandum of claim.



Respondents Case

6. The Respondent admits the Claimant worked for the Respondent for the period claimed and he admits the Claimant was terminated from his employment and the termination was lawful and procedural.
7. He says they had given him warning letters on September 22, 2014 and September 25, 2014 to prove his services were wanting. He was given a chance to answer the allegations levelled against him.
8. The Respondent avers they terminated the Claimant's employment lawfully and so prays that his claim be dismissed with costs.
9. The respective opted not to give evidence in Court.
10. The court did not find the submissions of the respective parties on the portal or in the court file.

Determination

11. The Claimant's case is to the effect that his employer who is the Respondent accused him of stealing an item from his store. The Claimant says he had worked for the Respondent for about 12 years as a shop assistant. He says he was asked to go home and would be called to answer to the charges against him. He however says he was never called for any disciplinary meeting but instead on September 27, 2014 he was called to pick his dismissal letter.
12. Yet there are several letters in the file accusing him of gross misconduct and in particular of stealing a scarf. There is a letter dated September 24, 2014 inviting him to a disciplinary hearing on September 25, 2014. He was even informed of the allegations of attempting to steal a lady's scarf.
13. On September 25, 2014 there are minutes demonstrating that the Claimant attended disciplinary hearing and he answered to the charges against him. He was informed he could take a fellow worker as his witness in the letter inviting him for disciplinary hearing.
14. There is no reason for Court to doubt the minutes produced for a meeting of September 25 2014 where Claimant was in attendance and answered to the charges raised against him.
15. It abhors the Court why Claimant could blatantly lie that he was not called for a disciplinary meeting yet there is evidence that he was called and he participated in the disciplinary hearing.
16. The employer is mandated as per section 45(1) of the *employment act* to give a valid reason for termination of an employee. The respondent gave a valid reason that the Claimant who was in a sensitive role of a shop assistant and yet was found attempting to steal a scarf. In the meeting he claimed he had bought the same for his wife but the explanation he gave sounds quite suspicious. If at all he was innocent why was he hiding it in some place.
17. There must be clear procedures of how staff purchased merchandise from the supermarket. And as it was observed during the disciplinary hearing Claimant was an old employee of the Respondent and he knew the policies of the Respondent.
18. The Court is satisfied that the Respondent complied with the law and in particular with section 45(1) of the *Employment Act* which provides as follows:
 45. 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——
 - i. related to the employees conduct, capacity or compatibility; or
 - ii. based on the operational requirements of the employer; and
 - c. that the employment was terminated in accordance with fair procedure.
19. Also the Respondent followed the required procedure in conducting the disciplinary hearing. They informed the Claimant the reasons for calling him to a disciplinary hearing. They informed him the venue of the meeting and his rights including the fact that he could invite a witness to be present during the explanation. This is in compliance to section 41(1) of *Employment Act* which provides as hereunder:
- 41.1 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.
20. In myriad of cases the law is mandatory that an employer who intend to terminate employment of his employee should give a reason for termination of an employee in a language he understands and in the presence of his witness.
21. In the case of Kenfreight E.A. limited vs Benson K. Nguti (2016)eKLR which held:” apart from issuing proper notice according to the contract for payment in lieu of notice as provided an employer was duty bound to explain to an employee in the presence of another employee or a union official n a language the employee understood, the reason or reasons for which the employer was considering termination of the contact. In addition an employee is entitled to be heard and his representation if any considered by an employer before the decisions to terminate his contract of service was taken.
22. The Court is satisfied the Respondent satisfied the requirement provided in the employment laws and followed the procedure provided in law and in particular in section 41 of *employment act*. The Court is satisfied the Respondent terminated the Claimant’s employment lawfully and so dismisses the Claimant’s case.
23. The Court will make no orders as to costs
24. The Claimant is to be issued the certificate of service within 14 days from today’s date.

Orders accordingly.

Delivered, dated and signed in Nairobi this 7th 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 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

