



**Onunga v Equator Bottlers Ltd (Cause E006 of 2021)
[2022] KEELRC 13400 (KLR) (7 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13400 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E006 OF 2021
S RADIDO, J
DECEMBER 7, 2022**

BETWEEN

JOHN OKEYO ONUNGA CLAIMANT

AND

EQUATOR BOTTLERS LTD RESPONDENT

JUDGMENT

1. The Court is confronted with the questions:
 - i. Whether the termination of the Claimant's employment was unfair?
 - ii. Appropriate remedies.
2. The Cause was heard on 28 June 2022 and 6 October 2022.
3. The Claimant filed his submissions on 25 October 2022 and the Respondent on 10 November 2022.
4. The Court has considered the pleadings, evidence, and submissions.

Unfair termination of employment

Procedural fairness

5. The Claimant challenged the procedural fairness of the termination of his employment on the ground that the Disciplinary Panel was biased and had a predetermined mind to have him dismissed. He also contended that lawful procedure was not followed.
6. The Respondent issued a show-cause notice dated 5 June 2020 to the Claimant. The notice set out the allegation against the Claimant and requested him to respond by 6 June 2020.



7. The Claimant responded and on 8 June 2020 was informed that a disciplinary hearing would be held on 11 June 2020. On 9 June 2020, the Claimant signed a Disciplinary Enquiry Notification Form. The form informed him of the right to be accompanied by a colleague.
8. The Claimant attended the hearing and the Respondent informed him of the termination of his employment through a letter dated 22 June 2020.
9. With regard to the bias on the part of the Panel, the Claimant asserted that his colleague had objected to the participation of the chair, one Mr Kilungu who was their immediate boss.
10. The Respondent, however, contended that the said person was not the Claimant's direct report and that the Claimant did not appeal against his participation.
11. It is not out of the ordinary for an employee's immediate supervisor to participate in disciplinary proceedings and, therefore, in the Court's view, persuasive evidence of bias should be placed before the Court.
12. The Claimant did not put any persuasive evidence of bias against the chair of the Panel and considering that the Claimant was informed of the allegations to confront, was afforded written and oral chances to defend himself and was also informed of the right to be accompanied, the Court finds that the Respondent complied with the requirements of procedural fairness.

Substantive fairness

13. The reasons which the Respondent gave for the termination of the Claimant's employment were attempted theft of liquor and marketing merchandise, obtaining access keys to the marketing store without authorization and accessing the market store without prior authorisation.
14. The Claimant, an employee from the engineering department did not deny accessing the marketing store but he explained that they had gone to the stores to collect some parts which had been kept there.
15. On the question of the keys, the Claimant stated that he had been given the keys to the stores by a former Managing Director about 4 years earlier and he had been accessing the stores whenever necessary.
16. The Respondent did not displace the testimony.
17. The Claimant denied taking any items or products from the stores and stated that cctv surveillance footage played during the disciplinary hearing did not capture him taking any liquor or merchandise from the stores.
18. The Respondent did not deny that the marketing store was under security camera surveillance. The Respondent did not put before the Court the footage from the cameras, which it relied on during the disciplinary hearing.
19. If the Claimant had illegally taken the liquor or merchandise from the stores, the cctv footage would have captured such an activity.
20. The Respondent did not attempt to explain why it did not introduce the footage in evidence. The Court can, therefore, draw an inference the footage would have corroborated the Claimant's testimony.
21. Further, the Respondent did not deny that it had employed security guards who used to search employees and vehicles leaving the premises.



22. The Respondent did not place before the Court any evidence that the Claimant was caught with any unauthorised products by the guards.
23. On the evidence before the Court, the Court concludes that the Respondent failed to discharge the burden placed on it by sections 43 and 45 of the *Employment Act*, 2007.
24. Consequently, the Court finds that the termination of the Claimant's employment was devoid of valid or fair reasons.

Appropriate remedies

Salary in lieu of notice

25. The Respondent offered the Claimant a one-month salary in lieu of notice and nothing turns on this head of the claim.

Compensation

26. The Claimant served the Respondent for about 24 years and in consideration of the length of service, the Court is of the view that the equivalent of 10 months' gross wages as compensation would be fair (gross salary in January 2020 was Kshs 85,553/-).

Conclusion and Orders

27. The Court finds and declares that the termination of the Claimant's employment was devoid of valid and fair reasons and awards him:
 - i. Compensation Kshs 855,530/-
28. The Claimant to have costs.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 7TH DAY OF DECEMBER 2022.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Claimant Omondi, Abande & Co. Advocates

For Respondent Kiragu Wathuta & Co. Advocates

Court Assistant Chrispo Aura

