



**Nyayucha v For You Clothing Limited (Employment and Labour Relations Cause 117 of 2017) [2022] KEELRC 13419 (KLR) (6 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13419 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 117 OF 2017**

**HS WASILWA, J  
DECEMBER 6, 2022**

**BETWEEN**

**ZAPHANIAN MOSES NYAYUCHA ..... CLAIMANT**

**AND**

**FOR YOU CLOTHING LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant instituted this suit against the respondent vide a memorandum of claim dated March 13, 2017, alleging to have been unfairly terminated and seeking for compensation for the unfair termination with special emphasize on overtime pay. He sought for the following reliefs;
  - a. A declaration that the claimant's termination was unfair and compensation be awarded as provided under section 49 of the *Employment Act*.
  - b. One-month salary in lieu of notice.
  - c. 2 months' unpaid leave.
  - d. Twelve months' salary compensation for unfair termination.
  - e. One rest day pay per week for over 30 years worked.
  - f. Overtime for over 30 years worked. (to be tabulated by the labour officer)
  - g. Gratuity pay.
  - h. Costs of this suit plus interest.
2. The summary of this case is that the claimant was employed by the respondent as a Sales man earning a gross salary of Kshs 15,694 at the time of dismissal on the September 14, 2016.



3. The reason for termination according to the claimant was that he was at work as usual and assisting a customer in the fitting room when the respondent's manager directed him to source for clothes in another store and upon informing him that he was attending to a customer, the respondent's director insulted him in the presence of customers and fired him in the evening for alleged insubordination. That he was dismissed without being paid any of his dues after working for the respondent for over 30 years.
4. During the pendency of his employment, he alleged to have been reporting to work everyday from 6 am to 8 pm from Monday to Saturday and on Sunday he would report at 10 am till 6 pm, together with all holidays, without getting any overtime pay.
5. In response to the claim, the respondent entered appearance on the March 22, 2017 and filed a response to the claim on the April 12, 2017 averring that the claimant worked for it from January 2, 2001 till September 9, 2016 when his services was terminated for insubordination, abusing the Shop manager and threatening to physically assault the said manager. Furthermore, that while in the respondent's employ, the claimant received several warning letters for his unbecoming conduct.
6. The respondent stated that the claimant owes a total of Kshs 99, 131 being loan areas which he had borrowed from the respondent and was yet to clear.
7. During hearing the claimant testified as CW-1 and avers that he worked for the respondent for 16 years and not 30 years indicated in the claim. He also clarified that he used to earn Kshs 14, 787. He maintained that he was attending to customer on the fateful day and when asked to go get clothes from Woolmatt he asked to finish with the customer in the fitting room before going, a request which did not go well with the respondent's manager who resulted to abusing him. He denied receiving any warning the entire period he worked for the respondent. He also testified that for all duration he missed work, he had sought for permission before hand and in any case such off days were not paid for. He prayed for leave for 3 years preceding his termination and relied on the muster roll that it showed he never took any leave from 2014 till the year of termination.
8. Upon cross examination by Oseko advocate, the witness testified that he was employed in 2001 till September 9, 2016. He denied threatening his employer or in subordinating his boss. He also denied owing the respondent any money in form of loan. He also denied taking leave from 5<sup>th</sup> to October 31, 2014 and instead testified that he was sick and on sick off to undergo a surgical operation.
9. The respondent's manager, Sumeria Keyur, testified as RW-1 and adopted his witness statement filed on July 2, 2018. He added that the claimant was not unfairly terminated rather that he started being rude in front of customers then they issued him with verbal and written warnings. He maintained that the claimant took all his leave days. He testified that the respondent does not open on Sundays and holidays and that on overtime worked the employees were duly compensated for the same. He also stated that the claimant was a NSSF and NHF paid up member as such not entitled to any gratuity.
10. Upon cross examination by Gathecha advocate the witness testified that the claimant had worked for them for about 15 to 16 years as he was employed in 2001. He testified that they issued two written warning letters on April 8, 2015 and another of June 8, 2016 which are all marked as second warning letters. He stated that the reason for termination was for threatening to beat him up. He also stated that they held a meeting with him before issuing him with the termination letter. With regard to leave the witness testified that the claimant took all his leave days and mostly he took his leave in October but in 2012 he took it in June and in 2011 he took it in August. He was however at pain to show that the claimant was lend Kshs 99,000 they are demanding. He added that the "O" appearing in the muster roll is for off days.



### Claimant's Submissions.

11. It was submitted for the claimant from the onset that the termination was not justified in both reason and procedure. It was argued that even in instances where an employee commits acts of gross misconduct that warrants summary termination, the law requires for procedural fairness to be observed. To support this argument, he relied on the case of *Anthony Mkala Chitavi v Malindi Water and Sewerage Company Limited* [2013] eKLR where the court gave the ingredients for procedural fairness as follows;

“The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee. Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible. Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.”

12. Contrary to the argument by the respondent, the claimant submitted that this is not a case of summary termination rather that the termination is unfair in the way in which the dismissal was done because no procedure was followed before the termination.
13. The claimant in conclusion prayed for the claim to be allowed as prayed.

### Respondent's Submissions.

14. The respondent submitted from the onset that the claimant's services were terminated for justifiable reason. It was argued that the claimant unsubordinated his employer's manager and even insulted him when he was being instructed to carry out some duties for his employer. In support of this they relied on the case of *Pheoby Aloo Inyanga v Stockwell One Homes Management Limited & another* [2022] eKLR where the court relied on in *Mckinley vs BC Tel*, [2001] 2 SCR 161, 2001 SCC 38 [CanLII], it was held:

“When examining whether an employee's misconduct justifies his or her dismissal, courts have considered the context of alleged insubordination. Within this analysis a finding of misconduct does not by itself, give rise to a just cause. Rather the question to be addressed is whether, in the circumstances, the behaviour was such that the employment relationship can no longer viably subsist.”<sup>39</sup>. To summarise, this first line of case law establishes that the question whether dishonesty provides just cause for summary dismissal is a matter to be decided by the trier of fact, and to be addressed through an analysis of the particular circumstances surrounding the employee's behaviour. In this respect, courts have held that factors such as the nature and degree of misconduct, and whether it violated the essential conditions of the employment contract or breaches an employer's faith in an employee, must be considered in drawing a factual conclusion as to the existence of just cause.”

15. Similarly, that the claimant was summarily terminated for insulting his bosses an act that can attract summary dismissal as provided for under section 44 of the *Employment Act*. Furthermore, that he had been issued with several warnings before the said termination.



16. On the reliefs sought the respondent submitted with regard to overtime and off days pay that the same was paid to the employees each month since the muster roll show the overtime earned and payslips shows the same to have been paid when earned. Also that the claimant worked for only 6 days in a week as the respondent does not open its shop on Sunday as such that the claim for off day should be disallowed. With regard to annual leave pay sought, the respondent argued that the claimant took all his leave days as indicated in the muster roll, thus none is due or owing and therefore cannot be compensated.
17. In conclusion it was submitted that the claimant has failed to substantiate his claim for unfair termination and therefore is not deserving of any of the reliefs sought.
18. I have examined all evidence and Submissions of the parties herein. The claimants contention is that he was verbally terminated by the respondent allegedly for insubordination whereas he had been attending to a customer in the changing room whereas the respondent's Manager was insisting he goes to source for clothes in another store.
19. That the respondent proceeded to insult him in the presence of customers and fired him that same evening.
20. The respondent on their part averred that the claimant was fired for insubordination after abusing the Shop Manager and threatening to physically assault the said Manager.
21. The claimant insisted in his evidence that he had never received any warnings during the period he worked for respondent and that he didn't proceed on leave for 3 years preceding his termination.
22. In the evidence in chief, the RW1 stated that the claimant was fairly terminated.
23. In relation to this reason for terminating the claimant, there was no evidence to support either position.
24. It was the claimant's word against the respondents and vice versa.
25. There is no evidence that the claimant was also subjected to any disciplinary hearing in relation to the alleged insubordination.
26. The respondent failed to adhere to the law as provided for under section 41 of the [Employment Act](#) 2007 which states as follows:-

“41. Notification and hearing before termination on grounds of misconduct

- (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.
- (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the



person, if any, chosen by the employee within subsection (1), make”.

27. It is therefore my finding that the dismissal of the claimant was unfair and unjustified and I declare it so.

28. In terms of remedies, I find for claimant and I award him as follows;

1. 1 month’s salary in lieu of notice = 20,844/=

2. 1 year’s unpaid leave = 20,844/=

3. 10 months’ salary as compensation for the unfair and unjustified dismissal =  $10 \times 20,844 = 208,440/=$

Total = 250,128/=

Less statutory deductions

4. The respondent will pay cost of this suit plus interest at court rates with effect from the date of this judgment.

**DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 6TH DAY OF DECEMBER, 2022.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Ruto holding brief for Gathecha for Claimant – present

Oseko holding brief for Githiru for Respondent – present

Court Assistant – Fred

