



**Tirop v Menengai Oil Refineries Ltd (Cause 251 of 2015)
[2022] KEELRC 13406 (KLR) (6 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13406 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 251 OF 2015
HS WASILWA, J
DECEMBER 6, 2022**

BETWEEN

RAPHAEL KIPLANGAT TIROP CLAIMANT

AND

MENENGAI OIL REFINERIES LTD RESPONDENT

JUDGMENT

1. This suit was instituted vide the memorandum of claim dated September 2, 2015 alleging to have been unfairly terminated and seeking for compensation for the unfair termination. He sought for the following prayers;
 - a. One-month salary in lieu of notice.
 - b. Off duties.
 - c. Public holidays.
 - d. Salary for the 4 days March, 2015.
 - e. Compensation for the unfair termination section 49 (1)(c).
2. The respondent entered appearance on the October 15, 2015 through Federation of Kenya Employer and filed a response to claim on the February 1, 2016 denying all the contents of the claim and asserting that the claimant's services were terminated legally after being served with several warning letters and subjected to hearing which he failed to improve on how he carries out his duties. It was stated that the claimant is the author of his own misfortunate and that the claim herein is without any merit and should be dismissed with costs.



Claimant's Case.

3. The claimant testified as CW-1. He avers that he was employed by the respondent on March 1, 2008 as a driver of a light van and later promoted to drive a heavy commercial vehicle, a job which he maintained till his termination on March 4, 2015. That he reported to work every day at 5am and clocked out at 7pm, working overtime which was not paid for.
4. That he was terminated without any notice or being subjected to any disciplinary action. Upon the said termination he was to be paid his salary together with notice pay but only paid his March, 2015 salary and the notice pay was deducted under unclear circumstances to pay for alleged absent days.
5. He blames his employer for what he alleged as frustration to get another employment and alleged that his employer caused him to be fired while at employment of Flamco company.
6. Upon cross examination he testified that his payslip for March 2015 shows he was paid leave allowance of Kshs 22,000 and another leave allowance for year 2014 appearing in the pay slip of June, 2014. He also admitted receiving his certificate of service on March 9, 2015. He testified that he started employment at Flamco limited on April 30, 2015 but his employer was warned by the respondent that if they employ him they would not supply them with goods. He then maintained that he was not sacked for unsatisfactory performance as alleged and on the contrary that he had worked for the respondent for 7 years without any disciplinary issues. He also admitted to receiving bonus pay every December.
7. On re-examination, he testified that an employee called Vinny from the respondents was the one that warned Flamco from employing him causing him to lose the said job the next month. He also clarified that he was paid leave for some years not all.

Respondent's Case.

8. The respondent's Senior Human Resource manager, Peter Kenenje Muchibi, testified as RW-1. He adopted his statement of February 11, 2015 which indicated that the claimant's services were terminated lawfully and after following due process.
9. Upon cross examination, RW-1 testified that the claimant was terminated due to poor performance but that he did not have evidence to support the reason for termination. He added that the drivers were supposed to do at least 3 trips but the claimant could manage to do 1 to 2 trips.

Claimant's Submissions.

10. The claimant submitted from the onset that the termination was not preceded by a notice, explanation, hearing or compensation as provided for under sections 41 and 43 of the *Employment Act*. It was argued that the allegation of poor performance and warning letters was not supported by any iota of evidence. To support its case he relied on the case of *Rashid Jeneby v prime Bank Limited* [2015] eKLR, where Justice Ndolo reiterated that the employer is burden with demonstrating the reason for termination.
11. The claimant also relied on the case of *Sikuku Nzuvi Ngii v Gacal Merchants Ltd* [2015] eKLR, where Justice Makau insisted on the importance of observing the provisions of sections 41 and 43 of the *Employment Act* before an employer can terminate the services of an employee. It was further argued that having been terminated without any established reason and without being subjected to any hearing. The termination is unfair under the law and urged this court to hold in his favor.
12. In conclusion he prayed for the claim to be allowed as prayed with costs.



Respondent's Submissions.

13. The respondent on the other hand submitted that the claimant was summarily dismissed from employment in accordance with section 44(4) of the *Employment Act* for failing to meet set delivery targets and absenting himself from work without any permission. It was argued that poor performance alone was sufficient to secure the claimant's termination. It was further argued that the claimant was indeed undemanding, a fact which he confirmed when he annexed a letter of termination by Flamco which shows the reason for termination as unsatisfactory performance.
14. To support that defence, the respondent relied on the case of *Mckinley v BC Tel*, [2001] 2SCR 161(Canlii) where it was held that;

“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 case. Rather the question to be addressed is whether, in the circumstances, the behavior was such that the employment relationship can no longer viably subsist...the question of whether provides just cause summary dismissal is a matter to be decided by the trier of facts and to be addressed through an analysis of the particular circumstances surrounding the employee's behavior.”
15. On the reliefs sought, it was argued that the claimant was paid notice pay as such is not entitled to pay on lieu of notice. With regard to prayer for compensation for unfair termination, it was argued that the same is not tenable in light of the fact that the claimant was summary terminated from service. On overtime and leave, the respondent submitted that the master roll and the pay slips produced demonstrate that the claimant received leave allowance each year and was always paid overtime when earned.
16. In conclusion, the respondent submitted that the claimant's termination was fair in the circumstances and urged this court to dismiss the suit with costs. He relied on the case of *Eric Omuondo Ounga v Kenya Commercial Bank Limited*[2017] eKLR.
17. I have examined all evidence and submissions of the parties herein. The claimant was dismissed from service vide a letter dated March 4, 2015 for reason that he had not been taking his work seriously.
18. No further explanation was given to the claimant on what constituted “not taking his work seriously”.
19. There is no evidence of prior warnings nor evidence of the alleged absenteeism.
20. Section 41 of the *Employment Act, 2007* 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”.

21. There is no evidence that the claimant was subjected to any disciplinary hearing and neither is there any proof that the claimant was terminated due to valid reasons.
22. Section 45 (2) of the Employment Act 2007 states as follows;
 - "45
 - (1) A termination of employment 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 employee’s 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”.
23. In absence of proof that the claimant was terminated for valid reasons and after due process, I find the termination of the claimant unfair and unjustified and I declare that so.
24. In terms of remedies, I find for the claimant and I award him as follows;
 1. 1 months’ salary in lieu of notice = 32,000/=
 2. Salary for 4 days of March 2015 = 4,266.80/=
 3. Compensation equivalent to 10 months’ salary for unlawful and unfair termination = 10 x 32,000 = 320,000/=Total awarded = 356,266.80/=
Less statutory deductions.
4. The respondent will pay costs 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:

Orare for Respondent – present

Korong & Co. for claimant – absent

Court Assistant – Fred

