



**Ikonya v Unga Farm Care East Africa Limited (Cause 50 of 2015)
[2022] KEELRC 12800 (KLR) (29 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12800 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 50 OF 2015
HS WASILWA, J
SEPTEMBER 29, 2022**

BETWEEN

PAUL KIRUGA IKONYA CLAIMANT

AND

UNGA FARM CARE EAST AFRICA LIMITED RESPONDENT

JUDGMENT

1. The claimant instituted this suit vide a memorandum of claim dated February 5, 2015, claiming to have been unfairly terminated and seeking for compensation for the unfair termination. He prayed for the following reliefs;
 - a) A declaration that his termination was unfair.
 - b) Compensation for unfair termination being 12 months salary.
 - c) Payment for all his terminal benefits.
 - d) Payment of all sums calculated as non-payment in salary and other allowances.
 - e) Costs of this claim.
2. The claimant was employed by the respondent as a process operator by the letter of appointment dated May 8, 2007 which was to take effect from May 14, 2007 at a starting monthly salary of Kshs 21,329. On December 20, 2007 his employment was confirmed and his salary increased to Kshs 30,051.
3. He states that he worked diligently for the respondent and out of sheer hard work, his salary was further increased on the July 22, 2011. On September 1, 2011, he was promoted to be the production supervisor now earning a salary of Kshs 48,496.
4. It is the claimant's case that on the night of February 18, 2012, there was an incident of theft of the respondent's property, which he was implicated. He was arrested and charged with offense of theft by



- servant under Nakuru criminal case number 651 of 2012. While in custody, he received a letter dated February 20, 2012 suspending him for one week to pave way for investigations and that he was to report back to work on February 27, 2012. A day after he received a dismissal letter dated February 21, 2012.
5. He contends that he was not given notice for dismissal, neither was he subjected to any disciplinary hearing as such that the termination was unfair and seeks to be compensated for the unfair termination.
 6. The respondent entered appearance on March 11, 2015 and filed a response to claim on the May 27, 2015. It admitted to employing the claimant but averred that the termination was lawful and justified in the circumstances.
 7. The respondent avers that the claimant's services was governed by the terms in the employment contract which provides under clause 5 for service free from *inter alia*; dishonestly, negligence and misconduct. Contrary to the terms of the said contract, the claimant was involved in acts of gross misconduct which exposed the respondent to great loss therefore that the termination was warranted and carried out in accordance with section 44(4)(g) of the *Employment Act*. It is further stated that the claimant had committed criminal offense under the stated section, thus the termination was justified.
 8. The respondent states that following investigations carried out on the incident of the night of February 18, 2012, it was established that the claimant together with others took part in a plot to defraud the respondent of 245 bags of Indian soya valued at approximately Kshs 716,425.
 9. Prior to the said incident, the respondent states that the claimant had received three warning letters, which were sufficient by themselves to secure a dismissal.
 10. The respondent maintained that the termination was justified in the circumstances and prayed for the claim to be dismissed with costs.

Hearing.

11. During hearing the claimant testified as CW-1 and stated that he was terminated from employment on February 20, 2012, though, the letter of terminated was served on him on the February 28, 2012. He stated that he was arrested and taken to remand from February 18, 2012 to February 20, 2012, where he was released. Upon release he was served with the suspension letter and terminated the next day on the February 21, 2012. He testified that no investigation were carried out before the suspension as he was not served with any report of investigations. He stated that he went back to the respondent to clear though he was not paid his terminal dues. He adopted his witness statement of May 31, 2018 and produced the documents of February 5, 2015 as his exhibits.
12. Upon cross examination by Musembi advocate, the claimant testified that the verifying affidavit is dated February 5, 2014 and the claim is filed on February 19, 2015. He testified that he was subjected to the terms of the employment contract dated May 8, 2007 and was aware of what was to happen in case someone was found in acts of gross misconduct. He stated that the letter of suspension indicated that he was implicated for fraud and charged with offense of theft by servant which he was discharged of for lack of evidence. He stated that the complainant did not testify on the charges.
13. On re-examination the claimant testified that he was not found guilty of the criminal charges preferred against him. He stated that after the arrest he was suspended and later terminated without being heard.
14. The respondent's human resource assistant, Titus Odero, testified as RW-1 and adopted his witness statement dated May 17, 2022. He stated that he never worked with the claimant directly as he joined the respondent in September, 2021. He stated that he perused through the claimants file and confirmed that indeed he was the respondent's employee. He testified that according to the records, investigations



were carried out which implicated the claimant with fraud and was charged for that offense, therefore that the termination was a result of the fraudulent acts by the claimant, which were and justified in the circumstances.

15. Upon cross examination by Koome advocate, the respondent testified that he was not present when the alleged loss of consignment occurred. He confirmed that he was giving secondary evidence as he did not see any investigation report, or any letter of recommendation for the claimant's dismissal. He confirmed that the respondent did not issue notice to show cause, neither did they invite the claimant to any disciplinary hearing. He also confirmed that the claimant was on day shift the day the consignment was lost. He testified further that the claimant was not paid any terminal dues upon termination because he had not cleared with the respondent.
16. Upon re-examination, the witness testified that the claimant was informed on the reasons for termination which was for gross misconduct.

Claimant's Submissions.

17. The claimant submitted on three issues; whether there was a valid reason for termination, whether the respondent observed due process in the termination and whether the claimant is entitled to the reliefs sought.
18. On the first issue, it was submitted that the reason given for termination was on allegation of being part of a plot that stole from the respondent. No investigation report was served on him; neither was he subjected to any hearing to established the genuineness of the theft allegation. Furthermore, that the investigation that were carried out by the respondent did not link him to the offense of theft informing the withdrawal of the criminal charges. Therefore, that the termination was without any reason. To support his argument the claimant relied on the case of *Nicholas Muasya Kyula v Farmchem Limited* [2012] eKLR where the court held that :

“In making the finding the court considers that it is not sufficient for the employer to make allegations of misconduct against the employee. The employer is required to have internal systems and processes for undertaking administrative investigations and verifying the occurrence of the misconduct before a decision to terminate is arrived at. Typically, the process would entail the following steps:(a) A report to the relevant authority that a misconduct has been committed by an employee. (b) A preliminary report to gather relevant information on the alleged misconduct (c) If the evidence is obvious and the misconduct is gross, the employer can summarily dismiss.....(d) If the evidence is not obvious and the misconduct is not gross or its weight is not clear during the preliminary investigation, the proper notification is drawn. The notification commonly called a show cause letter must clearly spell out the intended ground for termination being misconduct, poor performance or physical incapacity. The particulars must be clear enough for the employee to be able to effectively defend himself or herself. The notice must give the employee reasonable time within which to respond. (e) Upon responding or the time allowed lapsing, the employee should be called to a hearing. At the hearing all relevant information should be recorded in a fair process where the complainant is not leading or chairing the proceedings. The employee should be given ample chance to exculpate oneself. A third party of the employee's choice should be permitted to attend the hearing (f) A report of the hearing proceedings should be drawn and formally maintained by the employer as evidence of due process of fairness. The report must set out the findings on the allegations, any mitigating or aggravating factors and



the recommendations which may include the termination (g) The decision made must then be communicated to the employee.”

19. On the second issue, it was submitted that contrary to the provisions of section 41 of the *Employment Act*, the respondent failed to subject the claimant to disciplinary hearing, a fact which was corroborated by RW-1. On that basis the termination of the claimant is unfair and the court should hold as much, he then relied on the case of *Joseph Maina Theuri v Gitonga Kabugi & 3 others* [2017] eKLR, where the court held that;

“The fulcrum of the employment relationship in this country is fair labour practices as envisaged under article 41 of the Constitution. What is fair straddles and goes beyond what is lawful or legal.”

20. The claimant also relied on the case of *Ken Freight (EA) Limited v Benson K Nguti* [2016] eKLR where the Court of Appeal held that;

“The *Employment Act*, for example, introduced and prescribed minimum terms which the parties must consider as they contract. It established the concept of fair hearing and placed a duty on an employer to give reasons before dismissing or terminating the services of an employee. These developments are a stark departure from the traditional power of the employer to terminate or dismiss at will as demonstrated in the earlier decisions of the courts.”

21. On the third issue, the claimant submitted that having established that the termination of the claimant’s services was not procedurally and substantively sound, the reliefs sought ought to issue.

Respondent’s Submissions.

22. The respondent submitted from the onset that the claim herein is incompetent and should be struck as the verifying affidavit annexed to the memorandum of claim is dated February 5, 2014, while the claim is dated February 5, 2015, which means that the verifying affidavit was sworn when there was no claim to verify contrary to the dictates of rule 4(2) of the *Employment and Labour Relation Court (Procedure) Rules*. He argued that the statement of claim as it stands is not verified as such should be struck out. To support his claim, he relied on the case of *Charles Ole sayua and another v Mary Siano Sarisar and 6 others*, Nakuru HCCC No 2000/2004 where the court held that;

“the plaint filed by the plaintiff has not been verified, there is no affidavit verifying the averments made in the plaint. For the reason stated above, the plaintiff’s suit against the defendants is incurably defective.”

23. On the substance of the claim, the respondent submitted that the claimant was terminated from employment having been found in violation of his employment contract. It was argued that the issue of theft was raised before the police who carried out investigations and established *prima facie* evidence of charging the claimant, therefore the mere fact that the respondent suspected the claimant to have committed the offense is sufficient grounds to secure termination under section 44(4)(g) of the *Employment Act*.
24. It was further submitted that the claimant had been served with two warning letter before the termination in a span of 12 months, which on its own qualify for termination of an employees as per the contract of employment.



25. On the reliefs sought, the respondent submitted that the same should be disallows and added that the maximum compensation sought is misplaced in light to the fact that the claimant had only worked the respondent for four years. In this they relied on the case of *Francis Mugua Boro v Smartchip Dynamics Limited*.
26. On the claim of unpaid salary, the respondent submitted that the claimant worked for it till February 18, 2012 as such is not deserving of February salary pay. Furthermore, that no evidence was led before this court to demonstrate that the claimant had worked for the whole month. Similarly, that no evidence was led to demonstrate that the claimant did not utilize his leave days.
27. In conclusion the respondent prayed for the claim to be dismissed with costs.
28. I have examined all evidence and submissions of the parties. The claimant was indeed terminated by the respondent following his arrest and subsequent arraignment in court on charges of theft by servant.
29. He was finally acquitted of the charges. The claimant however was dismissed summarily without being given a chance to be heard and without establishing the validity of reasons for the termination.
30. This is in contravention of section 45(2) of the *Employment Act* 2007 which states as follows;

“ 45.

- (1)
- (2) 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”.

31. In view of this one fact, I find the claimant was terminated unfairly and unjustly and I therefore find in his favour and award him as follows;
 1. 1 month salary *in lieu* of notice = 48,497/=
 2. 12 months salary as compensation for the unlawful termination = 12 x 48,497 = 581,964/=

Total = 630,461/=

Less statutory deductions

 3. Payment of his terminal dues
 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 29TH DAY OF SEPTEMBER, 2022.



**HON. LADY JUSTICE HELLEN WASILWA
JUDGE**

In the presence of:

Koome for Claimant – present

W. Musembi for Respondent – present

Court Assistant - Fred

