



**Kimeu v Excel Chemicals Limited (Cause 1589 of 2016)
[2022] KEELRC 1694 (KLR) (19 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1694 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1589 OF 2016**

**JK GAKERI, J
MAY 19, 2022**

BETWEEN

WILLY KIMEU CLAIMANT

AND

EXCEL CHEMICALS LIMITED RESPONDENT

JUDGMENT

1. By a memorandum of claim filed on 11th August 2016, the Claimant sued the Respondent alleging that he was unlawfully and/or unfairly terminated by the Respondent and prays for –
 - i) 12 months’ compensation for unfair termination.....Kshs.256,611.00
 - ii) One month’s pay in lieu of notice..... Kshs.21,384.25
 - iii) Accrued leave..... Kshs.7,841.00
 - iv) Salary for 11 days in April 2016..... Kshs.7,841.00
 - Total Kshs.....293,677.25
 - v) Costs and interest from the dates of filing.
2. The Claimant avers that he was employed by the Respondent at a monthly salary of Kshs.21,384.25 and was unlawfully terminated on 11th April 2016 and without payment of salary for the days worked.
3. The Respondent filed a response to the memorandum of claim on 19th September 2016 denying that it had terminated the Claimant’s employment unlawfully. It averred hat the Claimant was lawfully terminated on 13th May 2016 not 11th April 2016 as alleged.
4. It is the Respondent’s case that on 9th April 2016, the Claimant failed to fully offload cargo in the lorry assigned to him and failed/neglected to give a statement or explanation why the goods had not been



offloaded from the vehicle. That the Claimant did not report to work on 11th April 2016 and despite telephone calls he refused to resume work.

5. The Respondent further avers that it invited the Claimant for disciplinary hearing on 28th April 2016 by letter dated 14th April 2016 but he did not attend despite a telephone call follow up. That the Respondent issued a termination letter on 13th May 2016. Both letters were posted to the Claimant's address.
6. It is the Respondent's case that the Claimant absented himself from work and refused to explain why goods had not been offloaded from the lorry and thus had a lawful justification to terminate the Claimant's employment.

Claimant's Evidence

7. The Claimant testified that he used to drive motor vehicle registration no. KAN 640Y. That on 9th April 2016, the Transport Manager directed him to park the motor vehicle and take KBZ 522T whose driver had left employment. The motor vehicle had been idle for about two weeks. The Transport Manager directed that the motor vehicle be parked at the loading zone to be loaded with goods destined for Nakumatt Supermarket, Head Office and proceed on lunch for loading to take place which he did.
8. That on his return, he was told to park the motor vehicle near the main gate and close its doors. He then went to the office to pick the delivery note from Mr Kamal, the General Manager who was in the company of Nishan and Shah. That as he walked towards the motor vehicle, they called him back and Mr. Shah took the delivery note and instructed the Claimant to reverse the lorry to the loading zone and the vehicle was offloaded in the Claimant's presence. That Mr. Shah referred to the Claimant as a thief while the others insulted him.
9. It is the Claimant's testimony that on 11th April 2016, when he reported to work at 7.00 am, he was summoned to the office at 8.00 am and requested to draft a statement admitting he had stolen two tonnes of goods but declined and was chased out of the gate.
10. On cross examination, the Claimant confirmed that he was employed as a driver and obtained delivery notes from Mr. Kamal. The consignee would sign the note on delivery of the goods and it would be returned to the office. That he was not involved with the goods found in KBZ 522T as his usual vehicle was KAN 640Y. It was his evidence that the KBZ 522T was parked in the yard.
11. The witness confirmed that no one called him for a meeting or collection of a letter. The witness confirmed his cell phone number as 0716 703 631 and insisted that he was not called by the Respondent at any point and neither received the letter to show cause nor the termination letter and copies were delivered to the Labour Office.
12. The witness stated that he refused to write a statement because the Respondent wanted him to admit that he had stolen goods.
13. It was the Claimant's testimony that he had not previously driven the motor vehicle in question.
14. Finally, the witness confirmed that his duty was to deliver goods as a driver and was chased away by the Respondent on 11th April 2016.
15. In re-examination, the witness stated that turnboys would load and unload the goods and was not questioned about any delivery note.



Respondent's Evidence

16. RW1 adopted the witness statement and was cross examined. The witness confirmed that the Claimant was employed as a driver of the Respondent and his duties were to deliver goods to costumers, return any undelivered goods and take care of the vehicle. That the contract of employment had no specific duties of the Claimant. That it was not the Claimant's duty to load or unload goods from the lorry. That loaders loaded and offloaded goods.
17. The witness stated that mot vehicle Registration No. KBZ 522T was assigned to the Claimant for a long time but had no evidence to prove that fact tough he was the General Manager of the Respondent and had no copy of the delivery note in question or an inventory of the goods involved.
18. The witness further confirmed that the notice to show cause did not accuse the Claimant of having failed to ensure that loaders offloaded all goods or he failed to deliver a delivery note as the custodian of the document.
19. It was RW1's testimony that Mr. Nishan, Titus and Mahendra witnessed the goods being offloaded from KBZ 522T but their statements were not forwarded to the Claimant together with the notice to show cause and the company did not lose any goods.
20. Finally, the witness confirmed that the Claimant left on 9th April 2016 and was not paid for the nine days worked in April 2016.
21. That neither the show cause nor termination letter was registered on postage and the reason for termination was absconding duty.
22. On re-examination the witness stated that drivers were allocated vehicles by the Transport Manager and the letters were posted to the Claimant's address.

Claimant's Submissions

23. According to the Claimant, the issues for determination are:
 - i) Whether the Claimant's termination was lawful and procedural;
 - ii) Whether the Claimant is entitled to the reliefs sought.
24. As to whether the termination of employment was lawful, the Claimant relies on Section 45 of the [Employment Act](#) to urge that the termination was unlawful owing to the incongruence between his duties and the contents of the letter to show cause which accused him of failing to off load goods from KBZ 522T.
25. That since the contract of employment was ambiguous as regards the duties of the Claimant it had to be interpreted contra proferentem as against the party relying on it as was the case in [Mwangi Ngumo v Kenya Institute of Management](#) [2012] eKLR.
26. That the Claimant's duties were limited to driving and the accusation of failure to offload all goods in the vehicle was unfair and invalid.
27. It is the Claimant's submission that the Respondent did not in fact demonstrate that there were any goods in the vehicle to be off loaded. "I had neither a delivery note nor inventory or rejection notice or the prejudice suffered by the company."



28. That the Claimant was not given an opportunity to be heard and was simply hounded out of the company and the Respondent tendered no evidence that the notice to show cause and the termination letter were actually served upon the Claimant or certificate of postage.
29. It is submitted that the policy allegedly breached by the Claimant was not proved nor was it demonstrated that the Claimant was aware of it.
30. It is further submitted that the statements of the three witnesses were not attached to the notice to show cause yet the Claimant was expected to participate in the proceedings.
31. It is submitted that the Claimant's termination was unfair and unprocedural. Reliance is made on the decision in *Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd* [2013] eKLR to underline the procedural precepts in termination of employment contracts as is the decision in *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR.
32. That termination of the Claimant's employment failed the substantive and procedural fairness test.
33. As regards the reliefs sought, the Claimant submits that he is entitled to the reliefs particularised in the memorandum of claim.

Respondent's Submissions

34. The Respondent submits that the pith and substance of the matter is whether the Claimant was under a duty to ensure that goods entrusted to him and returned goods were offloaded from the assigned vehicle before it is loaded again and relies on Clause 1 of the letter on appointment on the duties and responsibilities of the Claimant. That the duties and responsibilities of the Claimant were discussed and mutually agreed.
35. It is the Respondent's submission that the Claimant was alone in the vehicle and was in charge of the delivery note, would deliver the goods and return the delivery note. That he was in charge of the cargo and on the material day, he drove the vehicle to the loading bay.
36. It is submitted that it was not practically possible to set out each and every thing the Claimant was to do in the execution of his duties as a driver. The Court is urged to find that there was no ambiguity in the contract of employment as alleged by the Claimant and the Claimant's duties had been discussed and agreed upon.
37. The Respondent submits that the Claimant did not controvert the Respondent's evidence that he failed to offload goods that had not been delivered.
38. It is further submitted that taken as a whole, the Respondent's version of the events is more reflective of the factual situation than that of the Claimant as it is consistent.
39. That the Respondent copied its letters to the Labour Office in adherence to fair labour practices.
40. Section 44(4)(c) of the *Employment Act* is relied upon to urge that the Respondent had sufficient reason to justify summary dismissal of the Claimant by his failure to offload undelivered goods from the vehicle and his termination of employment was therefore sound and valid.
41. That the Respondent invited the Claimant for a disciplinary hearing by posting a letter to his postal address and was notified by a call, a hearing took place on 28th April 2016 and the minutes show that the Claimant did not attend the hearing which justified the summary dismissal.



42. Reliance is made on the decision in *Banking, Insurance & Finance Union (Kenya) v Barclays Bank of Kenya Ltd* [2014] eKLR to urge that an employer cannot be faulted when an employee invited to a disciplinary hearing fails to attend without justifiable cause as held by Mbaru J.
43. It is submitted that the Respondent adhered to the procedural requirements set out in the *Employment Act* and the termination was fair and lawful and the Claimant is not entitled to an award of damages.
44. As regards unpaid leave days, it is the Respondent's case that the Claimant had not completed one year of service and had not earned leave within the meaning of Section 28 of the *Employment Act*.
45. Finally, it is submitted that the Respondent is ready and willing to pay for the days worked in April 2016 and issue the certificate of service and prays for dismissal of the suit with costs.

Analysis and Determination

46. The issues for determination are whether: -
 - a) The termination of the Claimant's employment was fair;
 - b) The Claimant is entitled to the reliefs sought.
47. It is not in dispute that the Respondent employed the Claimant as a driver on 22nd October 2015 at a basic salary of Kshs.18,595/= per month, excluding 15% house allowance. He was entitled to 21 days leave per annum, three months probationary period and one month's salary or notice by either party for termination.
48. The Claimant consolidated salary was Kshs.21,384.50 per month as evidenced by the payslips on record.
49. Paragraph 1 of the letter of appointment on duties and responsibilities state that:

“You will carry out the duties and responsibilities of a driver as directed by management. Your detailed duties and responsibilities will be discussed and mutually agreed upon the you when you begin work.”
50. Both the Claimant and the Respondent's witness confirmed on cross examination that the Claimant was employed as a lorry driver and had no other specific duties by contract, mutual agreement or policy.
51. RW1 confirmed on cross examination that no mutual agreement had been entered into as regards the duties and responsibilities of the Claimant and the Respondent had no policy.
52. As to whether the Claimant's termination of employment was fair, the *Employment Act*, 2007 contains elaborate provisions on the substantive and procedural precepts to be complied with in the conduct of a fair termination of employment.
53. Sections 41, 43, 45 and 47(5) prescribe the basic framework on termination of employment contracts.
54. On their part, this Court and the Court of Appeal have tenaciously enforced and in many instances elaborated on the import of the specific provisions.
55. In *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR the Court of Appeal expressed itself as follows on the foregoing provisions –

“There can be no doubt the Act, which was enacted in 2007, places heavy legal obligations on employer in matters of summary dismissal for breach of employment contract and unfair



termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (Section 47(5)), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination... so that the appellant in this case had the burden to prove, not only that his services were terminated, but also that his termination was unfair or wrongful. Only when this foundation has been laid will the employer be called upon under Section 43...”

56. The Claimant testified that after the drama on Saturday 9th April 2016 when the Respondent discovered that motor vehicle registration no. KBZ 522T had unloaded goods and blamed it on the Claimant, he left at 1.00 pm and reported on 11th April 2015 and at 8.00 am. He was summoned to the office by Mr. Shah who was in the company of Kamal Nishan and Shah’s son. It was his testimony that he was ordered to write a statement to the effect that he stolen certain goods, a direction he declined and was as a consequence chased out of the compound. That he was not accorded the requisite notice or termination letter.

57. Having laid the foundation, it was the employer’s opportunity to discharge its burden of proof.

58. In the words of the Court of Appeal in *Naima Khamis v Oxford University Press* [EA] Ltd [2017] eKLR –

“From the foregoing, termination of employment may be substantively and/or procedurally unfair. A termination is also deemed substantively unfair where the employer fails to give valid reasons to support the termination. On the other hand, procedural unfairness arises where the employer fails to follow the laid down procedure as per contract or fails to accord the employee an opportunity to be heard as by law required.”

59. See Ndolo J. in *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR. The Court is bound and guided by these sentiments.

Reason for Termination

60. According to the Claimant, he was terminated because he refused to write a statement on 11th April 2016 after the events of 9th April 2016 when he was accused of having failed to offload all the goods in motor vehicle registration no. KBZ 522T.

61. According to the notice to show cause dated 14th April 2016, the Claimant failed to ensure that all the returned goods were offloaded from motor vehicle registration No. KBZ 522T before it was loaded with other goods. The letter invited the Claimant for a hearing on 28th April 2016.

62. Regrettably, the Respondent tendered no evidence that the letter was actually posted to the Claimant’s postal address P. O Box 5, Muthetheni. The Claimant denied receipt of the letter or having been called by anyone yet the Respondent had his mobile phone number.

63. In addition, the Respondent tendered no evidence of the officer or person who called the Claimant’s number to inform him about the disciplinary hearing.

64. Strangely, the termination letter dated 13th May 2016 has another ground for termination. It states as follows:

“You have failed to resume duties and as such we take it that you are no longer interested in working with our company.”



65. From a plain reading of this sentence, it would appear that the Respondent is accusing the Claimant of desertion, that he absconded duty. It is unclear when the Claimant absconded duty. The Respondent made no allegation of abscondment of duty and led no evidence to suggest so. It is trite law that parties are bound by their pleadings.
66. It is unclear whether the reason for termination of the Claimant's employment was failure to offload returned goods or absconding duty.
67. Analogous to the notice to show cause, the Respondent led no evidence to demonstrate that the alleged termination letter was served upon the Claimant. RW1 confirmed on cross examination that the two letters were not registered and had no evidence of postage. Finally, the Respondent led no evidence of the steps it took to ensure that the Claimant resumed duty as required by law. See *Felistas Acheba Ikatwa v Charles Peter Otieno* [2018] eKLR, *Boniface Mwangi v B.O.M. Iyego Secondary School* [2019] eKLR and *Joseph Nzioka v Smart Coatings Limited* [2017] eKLR.
68. The incongruence between the accusations in the notice to show cause and the reasons in the letter of termination would appear to suggest that the Respondent had no firm ground to stand on. The ambivalence may have been occasioned by the absence of sufficient evidence to establish the allegations as reasons or justification of termination of employment.
69. It is noteworthy that the Claimant was emphatic that his usual lorry was registration no. KAN 640Y but on 9th April 2016 he was assigned KBZ 522T. The Claimant testified the motor vehicle had been parked in the yard for about two weeks. This evidence was not controverted by the Respondent.
70. More importantly, and as confirmed by the RW1, it was not the duty of the Claimant to load or unload goods. His job was to deliver the goods and have the delivery note signed by the customer and return it to the office together with any rejected goods.
71. It is not alleged that the Claimant had used the motor vehicle registration no. KBZ 522T previously and was thus aware that it had returned goods. It is also not alleged that Claimant was responsible for the delivery note relating to the returned goods. The Respondent produced no delivery note or inventory of the goods in the motor vehicle or rejection notice. Puzzlingly, the Respondent led no evidence that any of the loaders involved noticed the alleged goods in the motor vehicle.
72. Finally, the Respondent tendered no evidence that motor vehicle registration no. KBZ 522T had goods when it was assigned to the Claimant on 9th April 2016.
73. Puzzlingly, the failure the Claimant is accused of fell outside his duties and responsibilities as encapsulated in paragraph 1 of the letter of appointment. The paragraph is unambiguous that:
- “You will carry out the duties and responsibilities of a driver as directed by management.”
74. RW1 confirmed that there was no other document or mutual agreement on the duties and responsibilities of the Claimant. The witness further confirmed that the Claimant had no role in the loading and offloading of goods since the company had loaders and on the material day, he was directed to take the motor vehicle to the loading bay to load cargo. The Respondent's submission that the Claimant's duties included loading and unloading of goods contradicts the evidence on record as represented by its witness.
75. Section 43(2) of the *Employment Act*, 207 provided that:



The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

76. From the evidence on record, the Respondent has not in the Court's view demonstrated that it had genuine reasons to justify termination of the Claimant's contract of employment.
77. Further the Respondent has not demonstrated that it had justifiable grounds for termination of the Claimant's employment as ordained by Section 47(5) of the *Employment Act*.
78. For the above reasons, it is the finding of the Court that the Respondent has not on a balance of probabilities established that termination of the Claimant's employment was substantively justifiable and was therefore substantively unfair.

Procedure

79. Section 41 of the *Employment Act*, 2007 sets out the procedural steps to be complied with in the conduct of a fair termination of employment. The Court of Appeal itemised the specific steps in *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR as follows:

“Four elements must thus be discernible for the procedure to pass muster: -

- (i) An explanation of the grounds of termination in a language understood by the employee.
- (ii) The reason for which the employer is considering termination.
- (iii) Entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made.
- (iv) Hearing and considering any representation made by the employee and the person chosen by the employee.”

80. The Court is in agreement with these sentiments. See also *Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd* [2013] eKLR.
81. In the instant case, the letter inviting the Claimant to a disciplinary hearing on 28th April 2016 was not served upon him. The Respondent adduced no evidence that the letter was actually posted to the Claimant's address. The Respondent had no record of postage or postage certificate. Finally, the Respondent led no evidence that it actually called the Claimant through his mobile number 0716703631 to collect a hard copy of the letter.
82. How else would the Claimant appreciate the case he had to confront? In view of the far reaching consequences of the disciplinary hearing and requirements of the *Employment Act*, 2007, it was incumbent upon the Respondent to ensure that the Claimant received the letter or was fully aware of its contents and requirements.
83. The notice did not require the Claimant to make written representations notwithstanding the fact that the Respondent had written witnesses statements, copies of which were not attached to the hearing notice.
84. The Court is of the view that since the Respondent did not serve the notice of the disciplinary hearing upon the Claimant, the Claimant was unaware of the allegations against him or the reason for which the employer was considering termination.



85. As a consequence, the Respondent did not give the Claimant an opportunity to be heard as required by law. He neither attended the disciplinary hearing nor participated in the proceedings and was condemned unheard as the minutes dated 28th April 2016 attest.
86. It is unclear who gave the evidence and the questions asked.
87. According to the minutes of the disciplinary hearing, the Claimant's employment contract was terminated because he did not offload the previous day's goods which were still inside the vehicle, yet he was allocated the motor vehicle in question that morning and had not been notified of the goods in the motor vehicle. The minutes are emphatic that the Claimant started loading new goods before offloading previous days goods. This is contrary to the evidence of RW1 who confirmed more than once that the Claimant's duties did not include loading and unloading of goods. That the Respondent had loaders and off loaders.
88. For the foregoing reasons, it is the finding of the Court that the Respondent has on a balance of probabilities failed to demonstrate that it conducted the Claimant's termination in accordance with a fair procedure.
89. Further, it is the finding of the Court that the termination of the Claimant's employment contract was either substantively justifiable nor procedurally fair.

Reliefs

90. Having found that termination of the Claimant's employment contract was unfair for noncompliance with the provisions of the [Employment Act](#), I will not examine the reliefs available to the Claimant.

(a) One month pay in lieu of notice Kshs.21,384.25

91. Granted that the Respondent dismissed the Claimant without notice contrary to the provisions of the [Employment Act](#) and Clause 7 of the letter of appointment, the Claimant is entitled to the one month's salary in lieu of notice and is awarded Kshs.21,3384.25.

(b) Accrued leave days Kshs.7,841.00

92. The Claimant led no evidence of the particulars of the leave days claim. It is unclear as to how many days are involved. The claim is declined.

(c) Salary for 11 days worked in April 2016

93. The Respondent's witness confirmed that the Claimant was not paid for the days worked in April 2016. The Claimant is awarded Kshs.7,841.00.

(d) 12 months' compensation for unlawful termination of employment Kshs.256,611.00

94. Having found that the termination of the Claimant's employment was unlawful, the Claimant is eligible for the discretionary relief under Section 49(1)(c) of the [Employment Act](#) provided the provisions of Section 49(4) of the Act are complied with.
95. In arriving at the quantum of compensation, the Court has taken into compensation the following factors:
- i) The Claimant was an employee of the Respondent for a duration of about five months and 19 days, a relatively short time, slightly over two months after the probationary period and wished to continue.



- ii) The Claimant did not contribute to the termination of his employment contract and had no previous record of any alleged misconduct or indiscipline.
 - iii) The Claimant did not appeal against the termination of employment. In fact, he did not go back to the office at any time thereafter.
96. In the circumstances the equivalent of three months' salary is fair.
97. Accordingly, judgment is entered for the Claimant against the Respondent in the following terms:
- (a) One month's salary in lieu of notice Kshs.21,384.25
 - (b) Salary for 11 days worked in April 2016 Kshs.7,841.00
 - (c) Equivalent of three months salary Kshs.64,152.75
- Total Kshs.93,378.00
- (d) Costs of this suit.
 - (e) Interest at Court rates from date of judgment till payment in full.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 19TH DAY OF MAY 2022

DR. JACOB GAKERI

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 has 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.

DR. JACOB GAKERI

JUDGE

