



**Jefwa v Ecu Worldwide [K] Limited (Cause 818 of 2017)
[2024] KEELRC 13633 (KLR) (6 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13633 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 818 OF 2017**

**AK NZEI, J
MAY 6, 2024**

BETWEEN

AUGUSTUS KAHINDI MKARE JEFWA CLAIMANT

AND

ECU WORLDWIDE [K] LIMITED RESPONDENT

JUDGMENT

1. The suit herein was instituted by the Claimant on 12th October 2017 vide an evenly dated Memorandum of Claim whereby the following reliefs were sought:-
 - a. a declaration that termination of the Claimant’s employment was unfair and unlawful.
 - b. twelve (12) months’ salary compensation Kshs. 654,840.
 - c. salary for days worked in August, 2017 Kshs. 30,000.
 - d. three (3) months’ salary in lieu of notice Kshs. 163,710.
 - e. 36 months’ exemplary/punitive damages Kshs. 1,964, 520
2. The Claimant pleaded that he was employed by the Respondent on 7th March 2005 as a clearing & forwarding clerk, and rose through the ranks to become an Imports Co-ordinator based at the Respondent’s Mombasa office.
3. The Claimant further pleaded:-
 - a. that his duties and responsibilities were set out in his letter of promotion dated 21st February 2014, and that the nature of his work was such that any of the four (4) employees in the Imports Department (Karisa Kazungu, Wilfred Mutisya, Mercy Mkabili and the Claimant) would receive emails from the Respondent’s sister companies worldwide, open files and proceed to track the cargo while updating the concerned consignee.



- b. that while away on leave in July 2017, the Claimant received an email from Karisa Kazungu to the effect that there were certain Invoices that had not been paid, and that the said Karisa Kazungu, Wilfred Mutisya and Mercy Mkabili had admitted to having stolen the money meant for the Invoices.
 - c. that upon reporting back to work, the Respondent's Chief Accountant, Benjamin Nzoka, summoned him (the Claimant) and sought to know from him how the money was allegedly stolen from the Respondent company.
 - d. that the Claimant denied the allegations of theft and disputed the authenticity of documents and statements referred to by the Respondent's managers in support of the false allegations.
 - e. that on 17th August 2017, the Claimant received an evenly dated letter, summarily dismissing him from employment on allegations of theft of money belonging to the Respondent. That the Respondent's decision to summarily dismiss the Claimant was discriminatory, unlawful and unfair.
 - f. that the Respondent circulated a malicious and defamatory letter dated 7th August 2017 within the clearing and forwarding industry implying that the Claimant was dishonest, wayward and unfit to be employed in the clearing and forwarding industry, and that as a result, the Claimant was never able to secure another employment.
 - g. that the Respondent acted in breach of the terms of the Claimant's contract of employment and (the provisions of the Employment Act 2007), and that the Claimant was entitled to compensation and damages.
 - h. that the Claimant's employment was terminated without notice, hearing/fair hearing and payment of dues.
4. Alongside the Memorandum of Claim, the Claimant filed his written witness statement dated 12th October 2017 and an evenly dated list of documents, listing 9 documents. The listed documents included letters of appointment dated 7th March 2005 and 1st July 2005 respectively, a salary review letter dated 12th July 2005, Promotion letter dated 21st February 2014, a notice to show cause dated 4th August 2017, a letter of suspension dated 7th August 2017, a letter of termination dated 17th August 2017 and demand letters dated 4th September 2017 and 5th September 2017 respectively. The Claimant filed a further list of documents dated 3rd March 2022, listing his payslips for June and July 2017, an email from Wilfred Mutisya dated 1st August 2017, email correspondences and the Claimant's police clearance certificate (good conduct) dated 25th February 2022.
 5. The Respondent filed a Memorandum of Response on 25th January 2018 and denied the Claimant's claim. The Respondent further filed written witness statements of Benjamin Kioko Nzoka (dated 9th April 2018) and Mercy Mkabili (dated 26th August 2019); and a list of documents (dated 26th August 2019) listing 8 documents. The listed documents included a bundle of documents referred to as copies of released shipment without the Respondent receiving the cash summary thereof, among others. The Respondent filed a supplementary list of documents dated 24th February 2022 and a fresh witness statement of Benjamin Nzoka dated the same date (24th February 2022).
 6. Trial opened before me on 6th June 2022. The Claimant adopted his witness statement dated 12th October 2017 as his testimony and produced in evidence the documents referred to in paragraph 4 of this Judgment. The Claimant further testified:-



- a. that he did not forge any documents or steal from the Respondent as alleged by the Respondent, and that he had not been arrested over the alleged theft.
 - b. that the Claimant attended a disciplinary meeting on 14th August 2017, but no minutes were taken, that no minutes or a report of the meeting were given to the Claimant, and that the Claimant's dues were not paid.
 - c. that the Claimant worked in the Respondent company with employees who admitted to having stolen from the Respondent, and that the Claimant was not given any reason why his name was dragged into the stealing issue as he was not one of those who stole, and why his employment was terminated.
 - d. that the Claimant was on leave when the issues of stealing arose, and when his fellow employees admitted liability.
7. Cross-examined, the Claimant testified that he was called to a disciplinary meeting for purposes of being shown proof of the alleged stolen money, but was instead asked to explain himself, which he did. That he attended the disciplinary hearing with his lawyer. The Claimant further testified:-
- a. that his duties at the Respondent company were as set out in his letter of promotion dated 21st February 2014, and that any Invoice raised by the Respondent and bearing the initials "MA" originated from the Claimant.
 - b. that once the Claimant raised an Invoice, he gave it to the client/consignee who would then pay the Invoiced amount to the Respondent company's accounts department, upon which the Claimant would issue a delivery order, which would be verified by the Respondent's 4 authorized signatories for verification of the information thereon, payment and release of the consignment/shipment.
 - c. that he (the Claimant) did not use previously issued receipts to clear subsequent consignments as he did not issue receipts. That receipts were issued by the accounts department, and that the Claimant received such receipts one at a time.
 - d. that an Invoice is printed/generated first, while the delivery order comes last. That the Reference Number (file number) on the Invoice is usually captured on the Delivery Order. That the Reference Number on the Invoice at page 9 of the Respondent's bundle of documents was the same as that on the Delivery Order at page 10 of the said bundle, though the said Invoice was printed on 5th May 2017 while the Delivery Order had been printed earlier on 6th April 2017, coming before the Invoice. That the handwriting on the Delivery Order was that of the Claimant, though the signature thereon was not. That the Invoice bore the Claimant's initials.
 - e. that there was no indication on the said Delivery Order (dated 6th April 2017) whether payment had been made on that particular delivery and clearance.
8. The Claimant further admitted, under cross-examination, to have issued two other Invoices on 5th July 2017 whereon details of a Delivery Order which had been issued earlier, on 22nd June 2017, were indicated/printed. The said two Invoices were further demonstrated to have been issued by the Claimant as they bore the initials "MA", which the Claimant testified referred to him. The Claimant further admitted to having written wrong receipt numbers on Delivery Orders; leading to clearance of different Invoices/consignments on which payment was not shown to have been made.



9. The Respondent called two witnesses, Mercy Mkabili (RW-1) and Benjamin Kioko Nzoka (RW-2). Both witnesses adopted their respective filed witness statements as their respective testimonies and produced in evidence the documents referred to in paragraph 5 of this Judgment. RW-1 testified and demonstrated how the Respondent company lost money through fraudulent dealings of the Respondent's employees, who included herself (RW-1) and the Claimant.
10. RW-1 further testified that when it became clear that there was fraud in the company whereby money was being stolen from the Respondent company, the 4 employees in the imports department were each given a list of outstanding shipments/Invoices, depending on the files which each of them had handled. That those who agreed to pay, she being one of them, were allowed to continue working and cases against them were dropped. That the Claimant refused to pay and was terminated.
11. RW-2 testified that the Claimant worked with the Respondent company as an Imports Assistant/Co-ordinator and was terminated because the Respondent company lost money and the Claimant refused to admit liability, though all the evidence pointed to him. That the company lost USD 17,844.58 as a result of goods/imports being released without payment and on the basis of payment receipts issued to different customers. The witness took the Court, in detail, through various Invoices and Release Orders shown to have been issued by the Claimant, and demonstrated release of shipments/consignments before payment, though payment was supposed to be made before release. I will not reproduce the said recorded details in this Judgment.
12. It was RW-2's evidence that the Claimant was paid his salary for the month of August 2017, and that he, the Claimant, was not entitled to notice pay and the other reliefs sought by him.
13. Cross examined, RW-2 testified that when the Respondent's other employees were summoned over the theft in issue, the Claimant was on leave, and that they admitted liability. That the Claimant was summoned by email after he reported back from leave, and that he complained, by email, that the notice was too short as he had just reported back from leave. That the hearing was nevertheless conducted. The witness told the Court that he was not sure whether the Claimant was furnished with minutes of the hearing. That the Claimant's terminal dues were tabulated but were not paid.
14. RW-2 clarified, under re-examination, that although the Claimant was on leave from 6th July 2017 to 31st July 2017, the documents/invoices in issue had been issued much earlier, as early as March 2017. That although some receipts exhibited were issued by persons/a person other than the Claimant, the Claimant had used those receipts to clear other consignments/shipments, leading to loss of money by the Respondent as pleaded and demonstrated by it in evidence.
15. It was RW-2's further evidence that a show cause letter was issued to the Claimant on 4th August 2017, to attend hearing on 14th August 2017.
16. Having considered the pleadings filed and evidence presented by both parties herein, issues that present for determination, in my view, are as follows:
 - a. whether termination of the Claimant's employment by the Respondent was unfair.
 - b. whether the Claimant is entitled to the reliefs sought.
17. On the first issue, the Claimant pleaded that he was employed on 7th March 2005 as a clearing and forwarding clerk and rose through the ranks to become an imports co-ordinator, and that his duties and responsibilities were stated in his letter of promotion dated 21st February 2014. Some of the duties and responsibilities listed in the said letter of promotion, which the Claimant produced in evidence, were:-



- a. liaising with Shipping Lines towards release, charges and any disputes for L C L and F C L shipments.
 - b. to check correctness of incoming overseas invoices from ECU offices and Agents, and to pass them over to Accounts in a timely way.
 - c. to ensure that the input and flow of documents between Import Department and Accounts is timely achieved.
 - d. to maintain the highest level of integrity towards management, colleagues, customers and suppliers.
 - e. any other duty that could be assigned to him and which were related to his designation.
18. In the show cause letter dated 4th August 2017, the Respondent accused the Claimant of, inter alia, releasing shipments to clients whereby the Respondent lost USD 18,876.77, and attached a list of the released shipments to the show cause letter. The Claimant was, vide the said show cause letter, suspended from duty and invited to appear before a disciplinary committee on 14th August 2017 at 11:00 Hours in the Respondent's offices. The Respondent is not shown to have advised the Claimant of his right to be accompanied at the hearing by a fellow employee or a union official as required under Section 41 of the *Employment Act*.
19. RW-2 testified that the Claimant complained that the notice given to him was too short as he had just returned from leave, but that the hearing proceeded, nevertheless. Minutes of the disciplinary hearing were produced in evidence by the Respondent, but the Claimant denied having seen the minutes prior to their being filed in Court by the Respondent. The Claimant's response to the show cause letter is shown to have been made vide an email dated 15th August 2017, and is shown to have been made at the instance of the disciplinary committee. This fact is discernable from the Claimant's termination letter dated 17th August 2017.
20. The termination letter states in part:-
- “... We appreciate your attendance to the hearing session and acknowledge receipt of your feedback dated 15/08/2017 as agreed with the committee.
- The committee has read contents of your feedback and has concluded to terminate your employment through summary dismissal under *employment act* (sic) Section 44(g) with immediate effect ...”
21. For any termination of employment to pass the fairness test, it must be demonstrated that there was both substantive and procedural fairness. It was held as follows in the case of Walter Ogal Anuro –vs- Teachers Service Commission [2015] eKLR:-
- “...For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”
22. The reasons for termination of a contract are matters that an employer can genuinely support by evidence, and which have an adverse effect on the employer-employee relationship between the employer and the employee. Where the employee pleads and alleges unfair termination of employment, the employer must justify the grounds and/or reasons for the termination and must demonstrate



adherence to the laid down statutory procedure in effecting the termination. This is the creed of Sections 43(1) and 45(2) of the *Employment Act*.

23. The Court of Appeal stated as follows in the case of *Naima Khamis -vs- Oxford University Press [e.a] Ltd [2017] eKLR:-*

“...On the first issue, that is whether the termination was lawful, we wish to take note of the provisions of Section 43(1) of the *Employment Act*, which provides that in any claim arising out of termination of a contract, the employer is required to justify the reason or reasons for the termination, and where the employer fails to do so, the termination is deemed to have been unfair.

Also, Section 45(2) (c) requires a termination to be done according to a fair procedure. 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 an employee an opportunity to be heard as by law required.”

24. In the present case, the Respondent’s witnesses demonstrated in detail that shipments/consignments were released to its customers/clients/Agents without payment being done to the Respondent, and that the release was being done on the basis of Invoices and Delivery Orders on which details of receipts issued by the Respondent’s Accounts regarding different shipments were fraudulently printed. A number of such documents were shown to have been issued by the Claimant. It is worthy noting that the Claimant’s duties and responsibilities were shown to have included checking the correctness of such documents/invoices.
25. Although the evidence presented pointed to the possibility that the aforestated employment / contractual iniquities were committed by the Claimant jointly and/or in community with other employees of the Respondent, this fact did not, and does not absolve the Claimant from blame. His actions impacted adversely on the employer-employee relationship between himself and the Respondent. The Respondent had valid reasons to terminate the Claimant’s employment, and was justified to do so. It is my finding that termination of the Claimant’s employment was substantively fair.
26. On procedural fairness, however, I make a finding that termination of the Claimant’s employment was procedurally unfair. The mandatory procedure set out in Section 41 of the *Employment Act* is not shown to have been adhered to by the Respondent. the said Section provides as follows:-

“(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, the 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 ground of misconduct or poor performance, and the person, if any chosen by the employee within subsection (1) make.”

27. The show cause letter dated 4/8/2017, produced in evidence by both parties, did not inform the Claimant of his rights under the foregoing section of the statute. The evidence on record shows that the Claimant turned up for the disciplinary hearing on 14/8/2017 in the company of his lawyer, and that the disciplinary committee, after holding some form of proceedings, asked the Claimant to respond to the show cause letter dated 4/8/2017; which the Claimant did vide an email dated 15/8/2017, denying the allegations made against him.

No further disciplinary proceedings were conducted, and the Claimant was never given an opportunity to appear before the disciplinary committee in the company of a fellow employee or a union official as by law required.

28. I must, for record purposes, state here, as I have previously stated in several other cases, that a show cause letter, which usually sets out a catalogue of charges levelled against an employee, should never be combined with an invitation to attend a disciplinary hearing, as the two are different and serve different purposes. An employee on whom a show cause letter/charge sheet is served should be given a reasonable time to formally respond to the charges against him or her. Upon making a formal response to the formal charges, an employee may be invited for a disciplinary hearing and should be given a reasonable time to prepare for the hearing, and must be informed of his rights under Section 41 of the Employment Act. Failure to comply with the mandatory procedure set out in the said section renders the termination procedurally unfair.

29. I find and hold that termination of the Claimant’s employment was procedurally unfair, and I so declare.

30. On the second issue, I have noted from the evidence adduced by the Claimant that his gross monthly salary at the time of termination of kshs. 54,570. I have seen the Claimant’s payslips for the months of June and July 2017. The Claimant’s employment was terminated on 17/8/2017.

31. Having made a finding that termination of the Claimant’s employment was procedurally unfair, I award the Claimant the equivalent of six months’ salary as compensation for unfair termination of employment. That is ksh. 54,570X6 = ksh.327,420. I have taken into account the fact that the Claimant wholly or substantially contributed to termination of his employment.

32. The claim for days worked in August 2017 is allowed at ksh. 30,000. The Respondent (RW-2) testified that the Claimant was not paid his terminal dues.

33. The claim for payment in lieu of notice is allowed at ksh. 54,570 pursuant to Section 35(1) (c) of the Employment Act.

34. The claim for exemplary/punitive damages is declined as there is no basis for such claim.

35. In sum, and having considered written submissions by the Respondent as the Claimant did not file any, judgment is hereby entered for the Claimant against the Respondent as follows:-

- a. Compensation for unfair termination of employment.....ksh. 327,420
 - b. Days worked in August 2017.....ksh. 30,000
 - c. Payment in lieu of notice.....ksh. 54,570
- Total ksh.411,990



36. The Claimant is awarded costs of the suit and interest at Court rates. Interest shall be calculated from the date of this judgment.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 6TH MAY 2024

AGNES KITIKU NZEI

JUDGE

Order

This Judgment has been delivered via Microsoft Teams Online Platform.
signed copy will be availed to each party upon payment of the applicable
Court fees.

Appearance:

.....Claimant

.....Respondent

