



Kariuki v Nakuru Water & Sanitation Co Ltd (Employment and Labour Relations Cause E021 of 2023) [2024] KEELRC 1138 (KLR) (2 May 2024) (Judgment)

Neutral citation: [2024] KEELRC 1138 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS CAUSE E021 OF 2023**

HS WASILWA, J

MAY 2, 2024

BETWEEN

MARTIN MUCHAI KARIUKI CLAIMANT

AND

NAKURU WATER & SANITATION CO LTD RESPONDENT

JUDGMENT

1. The claimant instituted this suit by an undated statement of claim, filed on 16th March, 2023, alleging wrongful and unfair termination and praying to be compensated for the unfair termination. The claimant sought for the following reliefs; -
 - a. A declaration that the claimant's termination from the Respondent's employment was unlawful and unjustified as the same greatly offended the mandatory provisions of the [Employment Act](#) and related legislation.
 - b. One month pay in lieu of notice of Kshs. 90,506.
 - c. Basic pay for days worked of Kshs. 45,253.
 - d. House allowance of Kshs. 32,860.
 - e. Pro-rata leave pay of Kshs. 114,973.
 - f. Pro-rata leave travelling allowance.
 - g. Terminal dues for entire unfinished term of employment till retirement of Kshs.6,516,432.
 - h. Compensation under section 49(1)(c) of the [Employment Act](#) of Kshs. 1,086,072.



2. The claimant states that he was employed by the Respondent as an administration officer from the year 2004, earning a monthly basic salary of Kshs 90,506. That he held this position until 26th April, 2021 when his services were terminated.
3. He stated that he was summarily dismissed based on allegations of approving excessive fuel orders, which were based on flawed audit report made by an officer serving in the Respondent company in defiance of Court Judgement.
4. He stated that he was condemned unheard and subjected to internal process that had a predetermined outcome in the sense that he was dismissed for reasons that were unrelated to his performance, actions and or omissions.
5. The claimant states that he has worked for the Respondent for over 16 years as such, he had legitimate expectations to work until his retirement age which was six years away. Further that he is unable to secure employment in other companies considering his age.
6. After termination, the claimant states that he was not exhaustively paid his terminal dues.
7. During hearing the claimant testified as CW-1 and states that he now works as a farmer. Initially he used to work for the defunct municipal council of Nakuru as a watchman in the year 1997, then promoted to be the clerical officer from the year 2000 to 2004 when he was deployed to the water department and continued working as a clerical officer until 2006 when he was promoted to be the procurement officer and in 2008 he was promoted to be the Administrative officer, a position that he held until his termination.
8. The claimant adopted his witness statement dated 16th March, 2023 and added that he was dismissed during Covid-19 pandemic for reasons that fuel had been misused. He maintained that some people were targeted for termination. He testified that if the audit was done properly then the culprits could have been caught because, the chain of persons in the approval line begin with users' department, then transport officers who feed the requisitions into the computer, then Administration officer who does verification then Human Resource department for finalization before the order is taken in the petrol station. He told this Court that some officer that were on the fuel chain such as finance department and Commercial manager were not mentioned in the report but instead, they sat in the disciplinary committee. He also told this Court that he was accused of approving fraudulent requisitions when, he was not the one that feed the requisition of the computer. He also stated that the system at some point was faulty.
9. On disciplinary hearing, he stated that the committee that sat for disciplinary hearing was unfair and that they disciplined the driver involved one Paul Kitonga but paid him his terminal dues including retirement benefits, while he was not paid any terminal dues.
10. On cross examination by Njogu Advocate, the witness, testified that his main role was to arrange for security and check for millage used by a car in fuel consumption. He testified that fuel requisitioning and approval was done by the transport manager. He stated that, he used to check the mileage as fed in the system and once it tallies, he would approve and forward to transport department for action. He confirmed that the HR manager and the transport manager were also terminated. He blamed the mistake on the system that was faulty and stated that had the system been fixed, the issues raised therein would not have arisen.
11. On Re-examination by Chepkirui Advocate, he testified that his main role was to check the system after receiving documents that shows the performance of the vehicle and fuel requisition. He testified that the audit report did not compare any payment vouchers to ascertain the said loss.



Respondent's case.

12. The Respondent entered appearance on the 23rd March, 2023 and filed a defence to claim on 2nd June, 2023. He avers that the claimant was its employee, administration officer in the middle management cadre(grade8) and the head of section for administrative services with its main role to ensure all work tickets were properly filed and monthly fuel consumption report generated.
13. With regard to circumstances leading to the termination of the claimant, it is averred that on 15th December, 2020, the Respondent's managing director requested its internal audit manager to conduct investigations on the very high fuel consumption which had been noted in the months of September, October and November, 2020, despite its operations having been significantly affected by Covid-19 Pandemic.
14. The said investigations were carried out and a report was made where several employees of the Respondent were interviewed. The Auditor found out that there were major control weaknesses in the implementation of the fleet management module and especially on the fuel sub-module where the claimant, as the in charge of transport, failed to utilize the ERP Fleet management module to monitor consumption of fuel and lubricants for the Respondent's motor vehicles.
15. In the Report the audit manager, recommended the claimant with four other employees namely; Benjamin Maibu, Gilber Nyaata, Paul Gitonga and Anne Turgut, to be held accountable for loss of the fuel and lubricants worth Kshs. 3,219,256, since they all played a role in the chain that led to the said loss.
16. Particularly, it was found that the claimant was the one that approved all fuel requests and also authorized fuel orders, which became fraudulent and caused the Respondent to incur losses.
17. Consequent to this, the claimant was issued with a show cause letter dated 27th January, 2021, which informed him the charges levelled against him, the nature of the said charges, the consequences therefrom.
18. Subsequently, he was suspended to pave way for investigation and granted ample time to respond to the show cause letter by 3rd February, 2021.
19. The response was received and analysed by the staff advisory committee, which resolved to invited the claimant for disciplinary hearing, where in by a letter of 14th April, 2021, he was invited for hearing on 19th April, 2021 and supplied with all evidence the Respondent was going to rely on including the investigation report.
20. On the date of hearing, the claimant was accompanied by a representative of his choice, one Davis Mugo. After hearing, the claimant was found capable and the committee recommended his dismissal and surcharged Kshs 1,054,481 out of the whole amount lost.
21. The Respondent maintained that the loss occurred when the claimant authorized fuel requests, received fuel invoices from the contracted service provider, attached fuel Orders and forwarded the same to the finance department for payments.
22. It is averred that although the claimant claimed not to be aware of the engagements and conduct of the staff reporting to him including those who were making fraudulent fuel request, he admitted to supervising transport assistant, Mr. Gilbert Nyaata, who was among persons that were implicated and found to have contributed to the loss incurred.



23. It is stated that among the vehicles which fuel requests were made successfully, were grounded vehicles, while other vehicles were in the garage. Further that the mile reading done were not consistent with actual readings in the odometer of most vehicles, therefore that the claimant abdicated his duties.
24. Upon dismissal that was communicated by the letter of 26th April, 2021, the claimant was granted 60 days to appeal the decision of the disciplinary committee, which the claimant appealed on 28th April, 2021 and the Board considered and dismissed it and communicated its decision by the letter dated 16th June, 2021.
25. The Respondent therefore maintained that the claimant's termination was done in accordance with the law, as such the termination was justified and they prayed for the Claim to be dismissed with costs.
26. During hearing, the Respondent called Joseph Joh Githinji, the internal auditor as its RW-1. He adopted his witness statement of 31st May, 2023 and produced the Audit report as Exhibit 3. He testified that the role of the claimant was in relation to utilization of fuel as such no fuel could be utilized without the approval of the claimant and the HR manager. He testified that during investigation he found out that some vehicles and machines such as the generator at the headquarters has fuel approved for it when it was no longer in use. He testified that they quantified the loss and recommended the claimant and the other culprits be surcharged for the loss.
27. Upon cross examination by Ayuka Advocate, the witness testified that he was employed in 2014. He informed this Court that the Respondent counterclaimed for the loss of fuel in lower court case number E273 of 2021, Martin Muchai Karuka. He stated that Paul Gitonga was the driver that was taking the fuel and that he recommended that he be held liable for the loss as well. He admitted that the report in Court is not signed, neither is the informers' statements signed. He also admitted that he has not attached any supporting documents such as invoices that informed his Audit report. He stated that in the list of the person held culpable, the name of Muchai is not listed, he however stated that the 3 people that were dismissed such as the claimant were dismissed for being person that authorize fuel use.
28. On further cross examination, he stated that payments are done by the finance department however that he did not get any statement from anyone in the finance department.
29. On re-examination, he maintained that the claimant was held liable for loss because he authorized fuel for vehicle in the garage and machines that were out of use.
30. The second witness, Kadita Wanjiru Muchoki, testified as RW-2. She is the HR and Administration manager. She adopted her witness statement of 31/5/2023 and also produced the Respondent's documents marked as Exhibit 1-21 respectively. She testified that the claimant was the administration manager and his role was to validate fuel in the module and sign orders to be taken to suppliers. She told this Court that initial fuel requests are made by the transport officer, then the claimant verifies the orders and ensure all were in order and in the process flag out any issue that was questionable. she testified that there was a loss of about 1 Million that was linked to the claimant. She stated that the disciplinary committee relied on the investigation report in arriving at its findings.
31. Upon cross examination by Ayuka Advocate, the witness told this Court that the claimant was responsible for a third of the loss. She stated that the driver responsible was also disciplined but the DCIO recommended he be discharged honourably and be the state witness as such, the driver, Paul Gitonga was retired and paid all his dues. On statement not signed, she stated that the statements were computer generated as such are not signed. She testified further that the petrol attendant was interviewed and stated that Paul Gitonga was the only one that used to draw the fuel. She lastly



admitted that there are no invoices produced or attached showing how the invoices proceeded till payment.

Claimant's Submissions.

32. It was submitted for the claimant from the onset that the the claimant worked for the Respondent diligently without any disciplinary and or performance issues for 16 years. It was argued that the reason for his termination was for authorizing fraudulent fuel requests in the company's fuel management system in the period between 1st September 2020 to 30th November 2020, leading to a loss of Kshs 3,219,256.00. He admitted that he was taken through the procedure expected in law and under the employment contract in the period preceding his summary dismissal. He was heard by the committee appointed by management that came to the decision of summary dismissal, which he disagreed with and appealed to the Board of Management, which upheld his summary dismissal.
33. The Claimant submitted that he disagrees with the basis of the dismissal on account of both law and facts, in that the evidence relied on by the Respondents was choreographed, and targeted at him and 2 others in the Human resource department, and meant to end at in his summary dismissal, and the dismissal was therefore illegal and contrary to the provisions of the *Employment Act*, 2007. He argued that he was not given an opportunity to interrogate the informants as the information informing the audit was a computer generated with no informant signature. Secondly that the evidence led in court and at the internal hearing was consistent in that no input from the finance or accounting department on the alleged loss of Kshs 3, 219, 256. 00, no vouchers or cheques, or money transfer of the sum was shown at both levels. This fact was admitted by the auditor. Therefore, that the loss in itself was not proved to the required standard and thus the alleged surcharge cannot stand.
34. It was also submitted that in ELRC Case E62 of 2021; *Ann C. Turgut vs Nakuru Water & Sanitation Services Company Limited*, filed in this Court, the Respondents surcharged Ann C. Turgut for the entire amount 3,219,256.00 allegedly lost yet, the claimant how is being apportioned Kshs. 1,054,481.00, a further confirmation of the mutating claim and duplicity of the claim by the Respondent.
35. The claimant submitted that the Respondent's witnesses admitted during trial and produced documents indicating that the fuel lost was actually collected by drivers and other employees in jerry cans and drums. The Respondents identified one Paul Gitonga, yet the said employee was retained in employment till normal retirement. He argued that the differential treatment of staff involved in the alleged fraud against the Respondent company is proof of ill motive, at the least, targeted investigation with the summary dismissal of the Claimant as the outcome. That this differential treatment by the Respondent is contrary to the provisions of Section 5 (2), *Employment Act* 2007.
36. The claimant contends that his summary dismissal is against the provisions of Sections 43, 44 and 45 of the *Employment Act*, as the Respondent failed to place the Claimant within the provisions of law that govern summary dismissal. Therefore, that his summary dismissal was irregular and thus is entitled to the relief sought.

Respondent's Submissions.

37. The Respondent on the other hand submitted on two issues; whether the termination of the claimant's services was valid both procedurally and substantively and whether the claimant is entitled to the remedies sought.



38. On the first issue, the Respondent submitted that to exhaustively answer the above issue, the Respondent is required to prove first that the reasons of termination were fair, and second that the procedure for termination was fair as well and/or lawful.
39. On reason, it was submitted that the reasons given for the Claimant's termination was well captured in the Summary dismissal letter of 26th April, 2021 where the Claimant had been negligent in the conduct of his duties and there was reasonable suspicion that he had committed a crime against the employment in authorizing fraudulent fuel requests in the fleet management system that resulted into loss of Kshs. 3,219,256 to the company contrary to Section 44 of the *Employment Act*, 2007 and section 8.2.2 of the Human Resource and Administration Policy and procedure manual 2019 and section 13 of the *Public Finance Management Act*, 2015. Secondly that he failed to utilize the ERP Fleet Management Module to monitor consumption of fuel and lubricants for the company vehicles which culminated into the heavy loss contrary to company's expectation and section 44 of the *Employment Act*, 2007.
40. It was submitted further that before the Claimant's termination, the Respondent carried out Internal Audit where its internal audit manager, Joseph John Githinji, conducted investigations into the very high fuel consumption which had been noted in the months of September, October and November 2020 and confirmed that the Respondent had lost approximately Kshs. 3,219,256 in fuel consumption during the said period. The blame was apportioned on three Respondent's employees; The claimant, transport Assistant, Mr. Gilbert Nyaata and Human Resource and Administration Manager(HRAM), Ann C. Turgut and disciplinary action was taken against the three employees.
41. With regard to the claimant in particular, the report found him culpable for approving fraudulent fuel requests made by drivers. He argued that the investigation report gave a detailed analysis on how the ERP Fleet Fuel Management system was configured such that fuel requests is initiated in the system by the Transport Assistant then the fuel request is checked by the Administration Officer, the Claimant herein, and finally the fuel request is approved by the Human Resources and Administration Manager(HRAM).
42. It was submitted that the Claimant was called upon to show cause why disciplinary action should not be taken against him for negligence of duty and committing an offence to the detriment of the company and supplied with a copy of report detailing how he approved fraudulent fuel request and issued fuel orders that occasioned the Respondent loss of Kshs. 3,219,256 . In response, the Claimant stated that he did not instruct the Transport Assistant to initiate fuel requests and when the fraudulent fuel requests were presented for his approval and signing, he proceeded without question as the HRAM requested. He further explained that the HRAM has never delegated the function to him in the system hence she maintained responsibility and authority in the execution of the same. He further explained that being answerable to the HRAM, she could neither be challenged out of fear of him being accused of insubordination. Therefore, that the claimant did not deny entering fraudulent entries in the system but only attribute the negligence to the HRAM negligence. Hence his action or omission points to negligence.
43. The Respondent maintained that the claimant's omission of turning a blind eye, watched and participated in fraudulent acts for fear of being accused of insubordination was a disservice to the company and a breach of his duty to the company. Furthermore, that the claimant has never reported any challenged in operating the EPR system or threats by the HRAM, therefore, he had no excuse in watching these fraudulent activities and thus the termination based on these reasons were justified.



44. To support this, the Respondent relied on the case of *Galgalo Jarso Jillo Vs Agricultural Finance Corporation* [2021] eKLR, it was held that;

“In terms of section 43 of the *Employment Act*, an employer will be deemed to have a substantive justification for terminating a contract of service if he/she genuinely believed that the matters that informed the decision to terminate existed at the time the decision was taken. In other words, it is not a requirement of the law that the substantive ground informing the decision to terminate must in fact be in existence. All that is required is for the employer to have a reasonable basis or genuine believe that the ground exists even if it later turns out that it, in fact did not. In my view what the law is concerned with here is whether the circumstances surrounding the decision to terminate would justify a reasonable man on the street standing in the same position as the employer , to reach a similar decision as him/her regarding the termination.”

45. Similarly, the Court of Appeal in *Kenya Revenue Authority Vs Reuwel Waitihaka Gitahi & 2 others* [2019] eKLR said as follows: -

“The standard of proof is on a balance of probability, not beyond reasonable doubt, and all the employer is required to prove are the reasons that it “genuinely believed to exist,” causing it to terminate the employee’s services. That is a partly subjective test.’

46. The Respondent submitted on the summary dismissal that under section 44 of the Act, one of the grounds that would justify the finding of gross misconduct against an employee is the commission or suspicion of commission by an employee of a crime against the property or person of the employer. Establishment of this grounds does not require the employer to have watertight evidence of the alleged criminal transgression for the ground to arise. All that is required is for the employer to have justifiable and compelling grounds to suspect that the affected employee has engaged in acts that are criminal in nature and which affect the property or person of the employer. This was further reiterated by the court in the case of *Thomas Sila Nzivo v Bamburi Cement Limited* [2014] eKLR, the court observed as follows: -

“The Respondent had reasonable and sufficient grounds to suspect the Claimant of having acted to the substantial detriment of the Respondent and its property, and was justified in summarily dismissing the Claimant under Section 44 [4] [g] of the *Employment Act* 2007. The Employer was not required to have conclusive proof of the Claimant's involvement; it was only expected to have reasonable and sufficient grounds. The physical audit, the discovery that no oil was available even as the Claimant protested he received such (6) re all gave the Respondent reasonable and sufficient grounds to act against the Claimant. ”

47. On due Process, the Respondent relied on the case of *Kenfreight E.A. Limited v Benson K.Nguti* [2016] eKLR, where the Court of Appeal held that;-

“Apart from issuing proper notice according to the contract (or payment in lieu of notice as provided), an employer is duty-bound to explain to an employee in the presence of another employee or a union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service is taken. ”



48. Accordingly, that the Claimant was informed of his transgressions by a Show cause letter dated 27th January, 2021 where the Claimant was subsequently suspended from duty and was informed of the reasons thereof. The Claimant responded to show cause letter on 3rd February, 2021 and by another letter dated 14th April, 2021 the Claimant was summoned to a disciplinary hearing slated for 19th April, 2021. The Claimant was informed of his right to be accompanied to the hearing by an employee/representative of his choice and further supplied with all relevant documents including internal report implicating him and the Investigations Report. Additionally, that on the Claimant's request, the Respondent supplied the Claimant with additional evidence/documents that implicated him and he signed and acknowledged receipt. The same was also witnessed. That on the date of the disciplinary hearings, the Claimant was accompanied by his representative of choice i.e. one Mr Davis Mugo, then the Staff Advisory Committee heard the Claimant's evidence and submissions and that of his representative and thereafter, on 23rd April 2021, held a meeting where they deliberated on the investigations and the evidence adduced for and against the charges and thereafter, the committee confirmed that the claimant authorized fuel requests, received fuel invoices from the contracted service provider, attached fuel orders and forwarded the same to the finance department for payment. The committee also found that the Claimant authorized fuel requisitions for vehicles that were grounded while others were in the garage yet he ought to have scrutinized and supervised fuel consumption.
49. It was further discovered that the claimant only chose to monitor mileage readings on the motor vehicles recorded in the system which in itself were inconsistent with actual readings on the odometer on most vehicles. These he argued is a clear indication that the Claimant abdicated his duties to supervise those who were under him and in so doing occasioned loss on the Respondent. Consequently, he was summarily dismissed by the letter dated 26th April 2021, which he appealed but the appeal was dismissed. Hence due procedure was followed.
50. On remedies, sought, the Respondent submitted that the Respondent has proved the reason for termination and subjected the claimant to due process as such the termination was done in accordance to the law and justified in the circumstances, as such the claim ought to be dismissed with costs to the Respondent.
51. I have examined all this evidence and submissions of the parties. From the evidence on record, the claimant was the transport officer of the respondent. His duty was to arrange for security and check for mileage used by a car on fuel consumption.
52. He testified that fuel requisitioning and approval was done by the transport manager. His admission that he did physical check of mileage of vehicles presupposes that the vehicles in question was in use and so he was checking them against work tickets.
53. The respondents' case was that the claimant approved all fuel requests and also authorised fuel orders. They however admitted that there was an audit that was done which was unsigned. The said report also didn't mention the name of the claimant.
54. They however stated that the investigations revealed that some vehicles and machines such as the generator at the headquarter was fuel approved for when it was no longer in use. That the claimant was held liable for loss because he authorised for fuel for vehicles in the garage and machines that were out of use.
55. From the above evidence, the claimant was one approving fuel use. He was also the one as per his evidence checking mileage of vehicles and so knew vehicles that had been used. It is affirmed that vehicles in the garage not in use were approved for fuel use. This indicates that either he didn't check them or he ignored the obvious that the vehicles were not in use and therefore fraudulently approved



fuel for vehicles not in use and was therefore culpable. This leads to my conclusion that there were valid reasons to warrant his dismissal.

56. The claimant was also taken through a disciplinary process. He was invited and presented himself and minutes of the said meeting have been produced in court as exhibits.
57. It is my finding that the respondents followed due process in prosecuting the claimant disciplinary case and found him guilty of the charges levelled against him. In the circumstances, I find that the claimants case has no merit and must therefore fail. I therefore dismiss the claimants' case accordingly.

JUDGEMENT DELIVERED VIRTUALLY ON THE 2ND DAY OF MAY, 2024.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE.

In the presence of:-

Ayuka for Claimant – Present

Chepkulul for Respondent – Present

Court Assistant - Fred

