



Musyoki v Afya Co-operative Savings & Credit Society Ltd (Cause E442 of 2021) [2024] KEELRC 1174 (KLR) (7 May 2024) (Judgment)

Neutral citation: [2024] KEELRC 1174 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E442 OF 2021**

JK GAKERI, J

MAY 7, 2024

BETWEEN

JOSEPH KIOKO MUSYOKI CLAIMANT

AND

AFYA CO-OPERATIVE SAVINGS & CREDIT SOCIETY LTD RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Statement of Claim filed on 4th June, 2021 and amended on 19th May, 2023 following a Change of Advocates for the Claimant.
2. The Claimant alleges that his employment was unfairly terminated by the Respondent, his constitutional rights were violated and terminal dues were not paid.
3. It is the Claimant's case that he was employed by the Respondent on 8th November, 2004 as a Clerical Officer at Kshs.13,600/= per month, confirmed vide letter dated 22nd August, 2005, was promoted variously and served diligently for 13 years and 10 months.
4. The Claimant avers that he was suspended vide letter dated 4th July, 2018 on suspect ATM transactions through his computer and I.P address and he responded in writing vide memo dated 9th July, 2018 and was summarily dismissed via letter dated 16th August, 2018.
5. The Claimant faults the summary dismissal on the grounds that the reason cited was unproven and there was no procedural fairness.
6. The Claimant prays for;
 - i. A declaration that the dismissal from employment was unfair, illegal and wrongful.
 - ii. 12 months gross salary Kshs.1,504,200.00.



- iii. Unpaid salary from September 2018 to date Kshs.7,017,920.00.
 - iv. Service pay for 13 years Kshs.1,629,550.00.
 - v. 3 months' salary in lieu of notice Kshs.376,050.00.
 - vi. Penalty for non-issuance of certificate of service Kshs.100,000.00.
 - vii. Reinstatement to his position.
- In the alternative
- viii. Certificate of service.
 - ix. Pro rata leave for 10 months Kshs.41,783.00.
 - x. Exemplary damages Kshs.2,000,000.00.
 - xi. Costs of the suit.
 - xii. Interest on all monies payable from date of filing the suit till payment in full.
 - xiii. Any other relief that the court deems fit to grant.

Response

- 7. In its Memorandum of Response, the Respondent admits that the Claimant was its employee as alleged.
- 8. That investigations revealed that the Claimant had posted Kshs.2,363,441.00 into a deceased former employee's account (Mr. Alex Kanyi) funds which were later withdrawn through M-Sacco using Mpesa Account No. 0790845614 and was dismissed for the same.
- 9. According to the Respondent, it was more probable than improbable that the deposit of cash into the account of a deceased employee and withdrawal was effected by the Claimant.
- 10. That as at the date of termination, the Claimant's gross salary was Kshs.152,000/=.
- 11. By a Counter-claim, the Respondent avers that the Claimant is indebted to it to the tune of Kshs.5,090,883.00 comprising;
 - Capital loan Kshs. 594,980.00
 - Furniture loan Kshs. 606,970.00
 - Emergency loan Kshs. 150,000.00
 - Surcharge Kshs.3,019,851.00
 - FOSA advance Kshs. 719,082.00

and prays for judgment against the Claimant for the sum of Kshs.5,090,883/= with interest and a declaration that the Claimant's suit is vexatious and frivolous and the termination was procedural.
- 12. The Respondent prays for costs on the counter-claim.
- 13. In his defence to the Counter-claim, the Claimant denies the counter-claim and faults the same for want of particulars which made it impossible to ascertain its nature and scope of each loan and claim.



14. The Claimant urges that the court lacks jurisdiction to hear and determine the counter-claim as it involves recovery of Sacco loans from a member, he denies owing the same and prays for its dismissal.

Claimant's evidence

15. The Claimant admitted that he left employment in July 2018 and was paid a salary for the month and had no pending salary for the month and was not in employment in September 2018.
16. The witness admitted that he was a member of a pension scheme and contributions were made regularly and other statutory deductions were also made.
17. The witness admitted that he had not provided evidence that he had pending leave days.
18. Similarly, the witness admitted that he had taken staff loans and had not cleared the same as he was not working.
19. On re-examination, the witness testified that he was praying for salary after dismissal as the loans were pegged on the salary and the termination was unfair.

Respondent's evidence

20. The witness confirmed that he did not prepare any of the documents filed by the Respondent but admitted that the Claimant's letter of suspension was silent on the duration of suspension.
21. RWI confirmed that the Claimant's dismissal was based on the investigation report and the Respondent held no meeting with the Claimant before the dismissal.
22. Concerning the counter-claim, the witness confirmed that the Respondent had filed neither the loan agreements nor the repayment schedule.
23. On re-examination, the witness testified that the Claimant's payslip showed that he had outstanding loans with the Respondent.

Claimant's submissions

24. As regards the reason(s) for termination of the Claimant's employment, counsel for the Claimant submitted that the Respondent had failed to prove that it had a valid and fair reason to do as the suspension letter had scanty details and no duration of suspension.
25. Similarly, the investigations conducted by the Respondent's IT Manager were inconclusive as to the nature of the Claimant's culpability and the Respondent did not issue a notice to show cause.
26. Reliance was made on the sentiments of the court in Peter Otabong Ekisa V County Government of Busia (2017) eKLR on the requirements of Section 47(5) of the *Employment Act*, 2007, to urge that the Respondent had not discharged the burden of proof.
27. Sentiments of the court in Emmanuel Mambo Oduory V One Acre Fund (2020) eKLR were also cited.
28. As regards the procedure adopted by the Respondent, reliance was made on the decisions in Joseph Ndung'u V Mastermind Tobacco (K) Ltd (2014) eKLR, Mary Nduku Mumo V ALS Ltd (2015) eKLR and Ngatia V Airmac Ltd (2022) KEELRC 1259 to urge that the Respondent neither complied with its internal procedures nor the law.
29. On the counter-claim, counsel submitted that it was unmerited as no loan agreements were produced and the court had no jurisdiction to resolve the dispute.



30. Equally, the Respondent had already recovered the loan from other sources as evidenced by letter dated 27th February, 2019.
31. On the reliefs sought, counsel submitted that the Claimant was entitled to all the reliefs prayed for and cited the sentiments of the court in Peter Kihiko V Blessed T.C World-Class Spares Ltd (2015) eKLR and Godfrey Julius Ndumba Mbogori & another V Nairobi City County (2018) eKLR on compensation and exemplary damages respectively as the Respondent ignored its staff manual, made allegations against the Claimant, disregarded its internal findings and tenets of fair hearing and suspended the Claimant.

Respondent's submissions

32. Counsel for the Respondent addressed the Claimant's entitlement to the reliefs sought and the counter claim.
33. On unpaid salaries from September 2018 to date, counsel urged that the prayer was illogical as the Claimant ceased to be an employee in August 2018 and was thus not rendering any service to the Respondent and no compensation was due.
34. Reliance was made on Kenfreight (EA) Ltd V Benson K. Nguti (2019) eKLR.
35. As regards severance pay, counsel submitted that none was payable as the Claimant's National Social Security Fund contributions and pension scheme deductions were being made regularly, by virtue of Section 35(6) of the *Employment Act*, 2007.
36. Reliance was made on the decisions in B.O.M Ng'araria Girls Secondary School V KUDHEIHA Workers (2017) eKLR, Geoffrey Cheruiyot Kirui V Mogogosiek Tea Factory Co. Ltd (2022) eKLR, Osota Paul Osiemo V Intersecurity Services Ltd (2021) eKLR among others to urge that Section 35(6) of the *Employment Act*, 2007 disentitles members of the NSSF service pay.
37. On exemplary damages, counsel submitted that the Claimant had failed to prove his entitlement to it and cited the sentiments of the court in Godfrey Julius Ndumba Mbogori & another V Nairobi City County (2018) eKLR and John Njoroge V National Bank of Kenya Ltd (2018) eKLR to reinforce the submission.
38. Concerning the counter-claim, counsel submitted that since the Claimant accessed the various loans by virtue of his employment, the court has jurisdiction to determine the issue and the Claimant owed the Respondent the sum of Kshs.5,090,883.00.

Determination

39. The issues for determination are;
 - i. Whether termination of the Claimant's employment by the Respondent was unfair.
 - ii. Whether the Claimant is entitled to the reliefs sought.
 - iii. Whether the Respondent's counter-claim is merited.
40. As to whether termination of the Claimant's employment was unfair, the Respondent did not submit on the issue. The Claimant's counsel maintained that the termination was unfair for want of a valid reason and observance of procedural precepts.
41. It requires no emphasis that for a termination of employment to pass the fairness test encapsulated by the provisions of the *Employment Act*, 2007, and reinforced by judicial decisions, it must be proved



that the employer had a valid and fair reason to do so and conducted the termination in accordance with a fair procedure.

42. Equally, courts have maintained that a termination of employment must be substantively justifiable and procedurally fair as exquisitely captured by Ndolo J. in *Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR.
43. In *Naima Khamis V Oxford University Press (EA) Ltd* (2017) eKLR, the Court of Appeal was emphatic that a termination of employment may in law be substantively and/or procedurally unfair/unlawful as follows;

“ . . . 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.”

Reason for termination

44. The Respondent alleged that the Claimant was involved in fraudulent transactions relating to a deceased member’s account, one Mr. Alex Kanyi. The suspension letter dated 4th July, 2018 was emphatic that the Claimant was suspected of being involved in Suspect ATM transactions through the computer and IP address assigned to the Claimant.
45. The letter made no reference to any investigation or duration of the suspension.
46. However, a two page report signed by Mrs J. W. Nguru dated 11th July, 2018 includes several findings on how the deceased’s account was manipulated to create a credit balance of Kshs.2,363,441.24 and subsequently withdraw using Mpesa Account No. 0790845614.
47. The report states that the Claimant posted the Kshs.2,363,441/= to Mr. Alex Kanyi’s account.
48. The report made seven (7) recommendations including scrutiny of the mobile phone used to uncover the registered holder, a system audit trial and audit of all balances brought forward from the old Navision among others.
49. In sum, the report recommended an investigation though not in explicit terms and the recommendations were not directed to any person or department.
50. Regrettably, the Respondent’s witness, Mr. Robert Muinde made no reference to any investigation report, nor its recommendations or findings.
51. Relatedly, the witness appeared unaware of the documents the Respondent had availed as evidence in support of its defence and in support of the counter-claim.
52. Counsel for the Claimant made reference to a report by the Respondent’s IT Manager which none of the parties procured as evidence and is thus of no probative value.
53. In its summary dismissal letter dated 16th August, 2018, the Respondent states that the reason for dismissal was that the Claimant had posted funds in a deceased person’s account which were later withdrawn via Mpesa.
54. The letter makes no reference to any investigation conducted or carried out after the suspension by any person and no report had been previously availed to the Claimant or his response sought.



55. It is noteworthy that after receipt of the suspension letter, the Claimant submitted a response dated 9th July, 2018 by which he explained the processes of issuance of ATM Cards stating that he was not involved.
56. The Claimant raised at least 5 concerns for which he sought details and none were provided by the Respondent.
57. If indeed the Respondent had credible evidence that the Claimant's computer and IP address were involved in the fraudulent transactions, why did it not issue a notice to show cause for the Claimant to provide a rebuttal.
58. Closely related to the foregoing, it is also curious that the Respondent neither acknowledged nor responded to the Claimant's response to the suspension letter. The Claimant was seeking particulars of the alleged conduct.
59. As correctly submitted by the Claimant's counsel, Section 47(5) of the [Employment Act](#), 2007 requires the employee to make a prima facie case on for unfair or unlawful termination and it behooves the employer to disprove the allegations as held in *Peter Otabong Ekisa V County Government of Busia* (Supra).
60. More specifically, Section 43 of the Act provides that;

“In any claim arising out of termination of a contract, the employer shall be required to prove the reason(s) for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.”
61. The foregoing provision reinforces the provisions of the [Evidence Act](#) that he who alleges bears the burden of proof.
62. For the foregoing reasons, it is the finding of the court that the Respondent has failed to demonstrate that it had a valid and fair reason to terminate the Claimant's employment.

Procedure

63. It requires no gainsaying that the procedural precepts prescribed by the provisions of Section 41 of the [Employment Act](#), 2007 are mandatory. (See sentiments of the Court of Appeal in *Pius Machafu Isindu V Lavington Security Guards Ltd* (2017) eKLR).
64. In *Postal Corporation of Kenya V Andrew K. Tanui* (2019) eKLR, the Court of Appeal summarised the elements of procedural fairness as follows;
 - 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 representations made by the employee and the person chosen by the employee.”
65. The court was unambiguous that;

“A hearing not so conducted is irregular.”



66. In the instant case, it requires no belabouring that the Respondent issued a suspension letter dated 4th July, 2018 and the next communication with the Claimant was the summary dismissal letter dated 16th August, 2018.
67. The dismissal letter makes reference to the suspension letter and a director's meeting held on 15th August, 2018, which had resolved that the Claimant be dismissed from employment summarily.
68. The letter makes no reference to a notice to show cause nor invitation for a hearing or a hearing.
69. On cross-examination, RWI confirmed that he had no minutes of the board meeting held on 15th August, 2018 and the Claimant did not attend the meeting.
70. The witness, additionally confirmed that the Respondent did not invite the Claimant for any meeting before dismissal.
71. Evidently, the Claimant was not accorded the rights under the provisions of Section 41 of the *Employment Act, 2007*.
72. Having failed, refused or neglected to accord the Claimant a fair hearing before dismissal on 15th August, 2018, it follows that the termination of employment was procedurally wanting and thus unfair within the meaning of Section 45 of the *Employment Act, 2007*.
73. In sum, it is the finding and holding of the court that the summary dismissal of the Claimant from employment was unlawful and unfair.

Whether the Claimant is entitled to the reliefs sought.

i. Declaration

74. Having found that termination of the Claimant's employment was unlawful and unfair, a declaration to that effect is merited.

ii. 3 months' salary in lieu of notice

75. Clause 6 of the Claimant's Offer of Appointment dated 2nd November, 2004 provided for termination of employment by either party giving the other three months' notice or three month's salary in lieu of notice.
76. Having found that the Respondent summarily dismissed the Claimant from employment unfairly, the Claimant is awarded 3 months' salary in lieu of notice.

iii. Penalty for non-issuance of certificate of service

77. The provisions of Section 51 of the *Employment Act, 2007* do not confer jurisdiction on this court to impose any form of penalty on an employer who has refused, failed or neglected to issue a certificate of service.
78. Similarly, such refusal, failure or neglect is not a ground for compensation.
79. The prayer lacks a legal basis and is dismissed.

iv. Reinstatement

80. Having left employment in August 2018, the remedy of reinstatement is unavailable by dint of the provisions of Section 12(3)(vii) of the *Employment and Labour Relations Court Act, 2011*.



The prayer is dismissed.

81. The alternative remedy of pro rata leave for 10 months at 2 days per month also falls by the way side for lack of supportive evidence as neither the written statement dated 28th May, 2021 nor the oral testimony adduced in court make no reference to any outstanding leave days or how many they were.

82. The Claimant confirmed as much on cross-examination.

The prayer is declined.

v. Exemplary damages

83. Contrary to the Claimant counsel's submission that the Claimant's case deserves an award of punitive damages for the unlawful termination of employment, the court is not so persuaded and is in agreement with the Respondent's submission that the Claimant has failed to prove any of the circumstances outlined in *Rookes V Barnard* (1964) AC 1129 in *Julius Ndumba Mbogori & another V Nairobi City County* (2018) eKLR.

The prayer lacks merit and is dismissed.

vi. Service pay

84. On cross-examination, the Claimant confirmed that he was a member of the National Social Security Fund (NSSF) as well as a member of a pension scheme and contribution were regularly made.

85. Equally, a copy of the Claimant's payslip on record confirms as much.

86. The prayer for service pay is unsustainable by dint of the provisions of Section 35(6) of the *Employment Act*, 2007 and it is accordingly dismissed.

vii. Unpaid salaries from September 2018 (56 months)

87. On cross-examination, the Claimant confirmed that he was no longer an employee of the Respondent from September 2018 and had no pending salary for the months served.

88. Section 17 of the *Employment Act*, 2007 provides;

1. "Subject to this Act, an employer shall pay the entire amount of the wages earned by or payable to an employee in respect of work done by the employee in pursuance of a contract of service directly, in the currency of Kenya – . . ."

89. Since the Claimant prays for salaries he would have earned but for the summary dismissal, the prayer styled as unpaid salaries is unmerited and is accordingly dismissed as it relates to anticipatory earnings.

viii. 12 months compensation for wrongful termination

90. Having found that termination of the Claimant's employment by the Respondent was unfair for want of a substantive justification and procedural fairness, the Claimant is entitled to compensation under Section 49(1)(c) of the *Employment Act*, 2007.

91. The court has considered the following;

i. The Claimant was an employee of the Respondent from 8th November, 2004 to 16th August, 2018, a duration of 12 years and 9 months which is reasonably long.

ii. The Respondent failed to tabulate nor prove the Claimant's transgressions.



- iii. The Claimant expressed his wish to remain in the Respondent's employment by praying for reinstatement.
 - iv. The Claimant did not appeal the Respondent's decision to terminate his employment.
92. In the circumstances, the court is satisfied that the equivalent of 6 months gross salary is fair.

ix. Certificate of service

93. The Claimant is entitled to a certificate of service by dint of Section 51 of the *Employment Act*, 2007.

Counter-Claim

94. The Respondent prays for the sum of Kshs.5,090,883.00 due from the Claimant as loans, surcharge and FOSA advance.
95. Contrary to the Claimant's counsel's submission that the loan claim was denied in the Claimant's Defence to the Counter-Claim, the Claimant admitted in court that he had taken staff loans and had not cleared as he had not been working.
96. Similarly, and contrary to the Claimant's counsel's submission that the court has no jurisdiction to hear and determine the Respondent's counter-claim, this court has jurisdiction to hear and determine matters incidental to employment.
97. The Claimant enjoyed these facilities by virtue of his employment status and is estopped from alleging that the contract of borrowing and employment are severable. In the court's view, they are not as one is wholly dependent on the other.
98. Puzzlingly, the Respondent tendered no shred of evidence to prove any of the three loans, surcharge or the FOSA advance.
99. RWI confirmed on cross-examination that the Respondent had filed neither the loan agreements nor the repayment schedules for each loan.
100. On re-examination, the witness relied on the Claimant's payslip on record as evidence of the loans advanced to him.
101. It is trite that a payslip is not a contractual document but a requirement of Section 20 of the *Employment Act*, 2007.
102. (See *Grain Pro Kenya Inc. Ltd V Andrew Waithaka Kiragu* (2019) eKLR).
103. Having alleged that the Claimant owed it the humongous sum of Kshs.5,090,883.00 as loans, surcharge and FOSA advance, it was incumbent upon the Respondent to adduce documentary evidence to prove the Claimant's indebtedness.
104. More significantly, by letter dated 27th February, 2019, by the Managing Director addressed to the Claimant under the reference "Closure of Dormant Account" the Respondent notified the Claimant that his account had been closed and his dormant loan was offset from his shares and the balance of Kshs.1,056,322.41 recovered from the guarantors. The Claimant thus had no shares with the society.
105. The Claimant did not contest the contents of this letter, which he availed as evidence.
106. Notably, the letter makes no reference to a particular loan or account.



107. In the end, it is the finding of the court that the Respondent's counter-claim dated 9th August, 2021 has not been proved and is accordingly disallowed.
108. In the upshot, judgment is entered for the Claimant against the Respondent in the following terms;
- a. Declaration that termination of employment was unlawful.
 - b. Three months' salary in *lieu* of notice Kshs.376,050/=.
 - c. Equivalent of six months gross salary Kshs.751,920/=.
Total Kshs.1,127,970/=
 - d. Certificate of service.
 - e. 50% of the costs.
 - f. Interest at court rates from date hereof till payment in full.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 7TH DAY OF MAY 2024

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

