



**Njuguna v Times U Sacco Limited (Cause E011 of 2023)  
[2024] KEELRC 1249 (KLR) (15 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1249 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU  
CAUSE E011 OF 2023  
ON MAKAU, J  
MAY 15, 2024**

**BETWEEN**

**DANIEL WAWERU NJUGUNA ..... CLAIMANT**

**AND**

**TIMES U SACCO LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The claimant filed a statement of claim dated 25<sup>th</sup> May 2023 accusing the respondent of unfair and unlawful termination of his employment by the letter dated 20<sup>th</sup> March 2023. He averred that the termination was not grounded on valid reason and fair procedure was not followed before the termination. Therefore, he prayed for the following reliefs: -
  - a. That the Honourable Court be pleased to declare that the termination of the claimant's employment by the Respondent was un-procedurally unfair and unlawful;
  - b. The Honourable court be pleased to award the claimant 12 months' compensation / damages for the wrongful and unfair termination amounting to Kshs.1,656,480/= tabulated as (138,040 x 12)
  - c. The Honourable court be pleased to reinstate the claimant in employment in the position of finance manager without any loss of benefits whatsoever.
  - d. Costs of the suit and interests on the sums awarded in a) and b) above, from the date of judgment.
  - e. Such further orders and/or relief as this court may deem just and fit to award.



2. The respondent filed a statement of defence dated 20<sup>th</sup> July 2023 admitting that it employed the claimant until 10<sup>th</sup> March 2023 when it suspended him for insubordination and gross misconduct. It further averred that it afforded the claimant an opportunity to defend himself both in writing and verbally before a disciplinary committee on 17<sup>th</sup> March 2023. Subsequently, the Board considered the matter and decided to terminate the claimant's contract and pay him salary in lieu of notice plus other accrued dues and pension. However, he was not satisfied and he appealed, but the appeal was dismissed for lack of merits. Therefore, it prayed for the suit herein to be dismissed with costs.
3. The parties did not file any agreed issues for determination. However, arising from the said pleadings, the issues in dispute revolve around the fairness of the termination of the claimant's employment and the merits in the reliefs sought.

### **Evidence**

4. The claimant testified as CW1 and adopted his written statement dated 25<sup>th</sup> May 2023 as his evidence in chief. He further produced as exhibits 14 documents in his lists of documents dated 25<sup>th</sup> May 2023 and 25<sup>th</sup> September 2023.
5. In brief, he stated that by a letter dated 2<sup>nd</sup> December 2019, he was confirmed as permanent and pensionable employee of the respondent after completing his probation. His starting salary was Kshs.90,613 but due to his diligent service it was increased severally up to Kshs.138,040 as at January 2023.
6. On 9<sup>th</sup> February 2023, he was suspended without pay for gross misconduct and insubordination. On 8<sup>th</sup> March 2023 he received a letter inviting him to a disciplinary hearing on 10<sup>th</sup> March 2023 and he attended. The committee comprised the chairman, secretary and Chief Executive Officer (CEO). He was then asked questions about alleged insubordination and threats to the CEO during an internal meeting on 9<sup>th</sup> February 2023 and he denied. No witnesses were called or documentary evidence produced to prove the alleged offences but he was just told to go home and wait for their decision.
7. Subsequently, he received termination letter dated 20<sup>th</sup> March 2023 citing the reason as gross misconduct, insubordination and threat to the CEO, negligence in performance of his duties and under performance. He contended that the disciplinary committee was not independent and impartial because the CEO sat as a member of the Disciplinary Committee to judge him yet she was his accuser.
8. He further contended that the time given to prepare for the disciplinary was too short, being two days. Besides, the Management letter and SASRA Surveillance Report mentioned in the hearing notice was never served on him. He was also not allowed to have a representative during the hearing. Finally, he contended that the alleged under performance in the termination letter was raised in 2021 and resolved with finality and he was allowed to continue working.
9. With respect to the respondent's list of documents, he stated that the extract of minutes of the Board meeting held on 17<sup>th</sup> March 2023 is not correct and as he never attended the said meeting.
10. On cross-examination, he admitted that he was served with the suspension letter dated 9<sup>th</sup> February and it stated that he insubordinated the CEO. He admitted that he attended a meeting with the CEO, Michael Ndubi (External Auditor) and Ms.Carol, Assistant to the external Auditor. He confirmed that he was called to the meeting as the Finance Manager to answer some questions by the CEO. The same queries had been raised by the Internal Auditor and he had answered when the CEO was absent.
11. He clarified that the external auditor had raised the queries a week before 9<sup>th</sup> February 2023 and he responded via email. The same issue was being raised in the meeting and he got annoyed because he



- could not configure the loan balance ledger without assistance of the ICT and the CEO insulted him. However, he admitted that he did not mention the alleged insult in his written statement.
12. He denied that he banged a book on the CEO's table and clarified that he just dropped it on the table and ran away. He ran away without permission because of the insults by the CEO and after the environment became hostile. He contended that the CEO should also have been taken through disciplinary process for her misconduct and because she had previous warning for insulting him.
  13. He admitted that he never protested the short notice of the disciplinary hearing. He further admitted that he was paid one-month salary in lieu of notice and accrued leave after the separation. He maintained that the alleged threat to the CEO was false.
  14. The respondent called two witnesses. Its CEO Catherine Mwamba (RW1) adopted her written statement dated 26<sup>th</sup> September 2023 as her evidence in chief. She also produced 5 documents as exhibits. In brief she stated that on 9<sup>th</sup> February 2023, she met the external auditors in her office to discuss queries raised, which needed clarifications from the claimant. She then called the claimant who was in a meeting in another room.
  15. When the claimant arrived, he was furious and refused to answer the queries raised by the external auditors. He then menacingly charged at her threatening to hit her with a diary he was holding in his hands. He totally refused all the instructions given by her then banged the diary on her desk and stormed out of her office. As a result, the meeting with the external auditors ended prematurely due to atmosphere created by the claimant. She denied ever insulting the claimant.
  16. As a result of the foregoing misconduct, the claimant was suspended without pay by the letter dated 9<sup>th</sup> February 2023. Thereafter, the claimant was invited to a disciplinary hearing and attended without any protest about the notice period. She also attended the hearing as complainant and the claimant was heard fully by the committee. She further testified that HR Manual (page 77 of claimant's documents) provided that CEO shall attend all the disciplinary meetings.
  17. She confirmed that the claimant never appeared before the full Board since he had been heard by a subcommittee of the Board. She maintained that the claimant was dismissed for gross misconduct and another person was appointed to replace him. Therefore, she contended that the prayer of reinstatement is impossible since the vacancy was filled.
  18. On cross examination, she reiterated that the claimant was suspended for insubordination and threat to the CEO on 9<sup>th</sup> February 2023. The same reasons were also cited for his dismissal. She stated that Article 9.14.2 of the HR Manual provides for right of appeal from the sub-committee while Article 9.13 provides for appeal from the Board to the supervisory committee. She admitted that the claimant was never served with show cause letter but a suspension. She contended that the claimant was not given the option of being accompanied by another employee to the hearing and he never requested to be accompanied by any.
  19. She admitted that the claimant attended the meeting with external auditor willingly after she was called. However, he retorted to every instruction she gave him and then stormed out making the meeting impossible to continue. She denied that he had lost his sister during that time. However, she admitted that the claimant was paid bonus in January 2023 for exemplary service, just before the suspension on 9<sup>th</sup> February 2023. She further admitted that the claimant was given new roles vide letter dated 23<sup>rd</sup> January 2023. She clarified that the supervisory committee considered the appeal against the dismissal by the Board.



20. The external auditor, Mr. Michael Ndubi testified as RW2 and adopted his written statement dated 26<sup>th</sup> September, 2023 as his evidence in chief. He clarified that the claimant never hit the CEO on the material date. He further clarified that the claimant was seated at the same table with the CEO and he walked out after being agitated by the questions put to him by the CEO. He contended that there was no issue with respect to the claimant's personal transactions but clarified that the queries raised were supposed to be answered by the Finance Manager.

### Submissions

21. The claimant submitted that the termination of his employment was not done in accordance with fair procedure. He contended that clause 9.5(1) of the HR Manual was violated because he was not issued with a notice to show cause. He contended, further that the suspension letter did not require him to show cause contrary to clause 9.5 (1) of the HR Manual.
22. He further submitted that he was not heard on his appeal as required by clause 9.13 and 9.14.2 of the HR Manual which provides for an appeal from the decision of the Board to the supervisory committee. Consequently, he submitted that the termination was tainted with irregularities and violation of the HR Manual.
23. The claimant further submitted that the reason for the suspension and dismissal was not valid. He contended that the alleged insubordination and threat to the CEO were not true. He cited the evidence by RW2 who testified that the alleged offence was not committed but the claimant just walked out of the office after the environment became toxic. He contended that, walking out after being demeaned, pestered with questions and allocated duties beyond his contractual obligation did not constitute gross misconduct under section 44 (4) of the *Employment Act*. In his view, walking out in the said circumstances was the only reasonable thing to do.
24. As regards the alleged underperformance and non-performance of his contractual obligations, he submitted that such allegation was not true. He contended that he received bonus for exemplary service for the year 2022. Therefore, the claimant submitted that the termination was unfair for lack of valid reason and failure to follow fair procedure as set out under section 41 of the *Employment Act*, 2007. For emphasis, he relied on the case of *Cooperative Bank of Kenya Limited v Kennedy Kimaiyo Kiplagat*.
25. For the said matters, he submitted that he is entitled to the reliefs sought by dint of section 49 (1) (c) of the *Employment Act*.
26. On the other hand, the respondent submitted that the suspension and the dismissal of the claimant was justified because he was guilty of gross misconduct. It submitted that RW1 testified that the claimant menacingly banged her desk and threatened to hit her in the presence of RW2. It contended that the claimant admitted during cross examination that he became agitated by the questions being put to him and banged his diary on the CEO's desk and walked out without permission of the CEO.
27. The respondent, further submitted that the claimant appeared before a disciplinary committee where he acknowledged his inappropriate behaviour and apologised for the same vide his exhibit II. It contended that, if at all he had not done anything wrong, he ought not to have apologised.
28. It further submitted that the claimant did not require a show cause letter because his misconduct did not require any investigation to be done. It contended that the offence was cognitive and in the presence of an independent witness. Further, the claimant never protested that the hearing notice was too short and never requested for more time to prepare for the hearing. He also never indicated that he had witnesses to call.



29. As regards attendance of the CEO at the disciplinary hearing, the respondent submitted that the CEO attended as the complainant/witness and not as a committee member. It clarified that the hearing was conducted by the Finance and Administration Committee. It submitted that the claimant has not adduced any evidence to prove that the committee was partial. Consequently, it maintained that a fair procedure was followed before the termination.
30. In view of the foregoing, the respondent submitted that the claimant is not entitled to the reliefs sought. Further the vacancy has since been filled and therefore the reinstatement sought cannot issue. Besides, the relationship between the claimant and the respondent is strained. For emphasis, reliance was placed on the case of *Joshua Rodney Marimbah v Kenya Revenue Authority* (2021) eKLR where the court held that reinstatement is not tenable where the conduct of the employee is incompatible with the employer.

### **Issues for determination**

31. I have carefully considered the pleadings, evidence and submission. It is not denied that the parties herein were engaged in an employment relationship until 20<sup>th</sup> March 2023 when the respondent terminated the employment of the claimant citing gross misconduct. Section 45 (1) and 2 of the *Employment Act* provides that: -

- “(1) No employer shall terminate the employment of an employee unfairly.
- (2) A termination of employment by an employer is unfair if the employer fails to prove –
- a. That the reason for the termination is valid;
  - b. That the reason for the termination is a fair reason -
    - i. Related to the employee’s conduct, capacity or compatibility, or
    - ii. Based on the operational requirements of the employer; and
  - c. That the employment was terminated in accordance with fair procedure.”

32. The issues for determination are: -
- a. Whether the reasons for the termination were valid and fair.
  - b. Whether the procedure followed was fair.
  - c. Whether the reliefs sought are merited.

### **Reasons for the termination**

33. Section 43 (1) of the *Employment Act*, 2007 Provides that: -

- “1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons 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.”



34. In this case, the reasons for the termination were captured in paragraph 4 of the termination letter as follows: -

“However, the Board having heard your response as stated above and having considered your conduct on the 9<sup>th</sup> February 2023 came to the conclusion that your conduct constitutes gross misconduct and that your explanation as stated above was not acceptable because; your insubordination and threat to the CEO amounted to breach of Section 8 (d) of the Institution’s Code of Conduct; you have been warned severally on your failure or negligence in the performance of your duties as a finance manager, warnings which you have ignored and continued to underperform as at the 9<sup>th</sup> February 2023. Having taken into consideration all the facts and circumstances, the institution decided to summarily dismiss you from your employment with immediate effect.”

35. Basically, the termination was for the reason of insubordination and threat to the CEO contrary to section 8 (d) of the respondent’s code of conduct; and failure or negligence in the performance of his duties as Finance Manager. The claimant allegedly ignored previous warnings for the same offence.

36. During the hearing, the respondent did not adduce evidence to prove the failure or negligence in performance of duty. Instead all the efforts were towards proving the offence of insubordination and threat to the CEO. I have considered the minutes of the disciplinary committee and confirmed that the same thing was done there. Consequently, the alleged offence of failure or negligence in performance of duty was not proved.

37. As regards the offence of insubordination and threat to the CEO, RW1 alleged that the claimant walked towards her menacingly and threatened to hit her with a diary. The claimant denied and accused RW1 for demeaning him, and insulting him in the presence of RW2. RW2 testified during cross examination and stated that the claimant and RW1 were sitting on the same table facing each other and the claimant was agitated by the questions by RW1 and he walked out. RW2 further stated that there was no issue with respect to the claimant’s personal transaction.

38. I make some observations from the evidence by RW2; first he clarified that the claimant was sitted and questions were put to him by the CEO. It is therefore not true that he walked in menacingly towards the CEO threatening to hit her with a diary. Second, the claimant was given instructions by the CEO to clarify some issues but he became agitated. Consequently, the allegation by RW1 that he failed to comply with her instructions was true. Section 44 (4) (e) of the *Employment Act*, 2007 provides that: -

“(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:-

(e) an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer”



39. Having weighed the evidence tendered by the respondent against the above provision, I am satisfied that the respondent has proved on a balance of probability that the claimant insubordinated the CEO by failing to clarify the issues raised by the external auditor and walking out on her. However, the offence of threat to hit the CEO with a diary has not been proved since RW2 testified that the two were seated at the same table facing each other and when the claimant was agitated by the CEO's questions he just walked out.

### **Procedure followed**

40. The claimant contended that the procedure followed was not fair because he was not given a chance to show cause before the disciplinary process was commenced. The respondent maintained that showing cause was not necessary herein because there was no need of investigations before a disciplinary hearing.
41. Clause 9.5 of the respondent's HR Manual provided that the Board may suspend an employee for serious misconduct that requires investigations/clarification. The CEO is the one to write the suspension letter making specific charges and directing the employee to show cause within a specified period, why disciplinary action should not be instituted. The letter should indicate that the suspension is without pay but the employee will be entitled to all allowances and medical cover. If the employee fails to respond within the period given disciplinary action shall be instituted without further reference to him.
42. In this case the respondent set out charges in the suspension letters but failed to invite the claimant to defend himself. Consequently, I find that he was not accorded any chance to show cause why disciplinary process should not be instituted against him. The suspension letter also failed to notify the claimant about his right to be paid all allowances and medical cover.
43. As regards the hearing before the disciplinary committee, there is no denial that the CEO attended the disciplinary hearing. The minutes of the hearing indicate that the CEO attended as Ex-officio and she is the one who prepared the minutes. It is therefore not true that she attended as the complainant/witness. The fact that she is the one who took the minutes is confirmation that she was present when the decision in her own case was made. That was not fair because she was conflicted. Besides the claimant was not given the right to be accompanied to the hearing by a fellow employee of his choice.
44. The other issue raised by the claimant is that he appealed against the dismissal but the appeal was never heard. RW1 confirmed that the claimant was never heard on his appeal. Having considered the totality of the evidence presented, I find and hold that the respondent did not follow a fair procedure before terminating the services of the claimant.
45. There is evidence that the respondent breached the procedure set out in its own HR Procedure Manual. It failed to invite the claimant to show cause why disciplinary process should not be instituted against him and to notify him of the right to allowances during the suspension as required by clause 9.5. It further failed to grant the claimant the right to be accompanied to the hearing by a fellow employee of his choice and finally it failed to hear his appeal as required by clause 9.13 (b) of the HR Manual.
46. Section 41 of the [Employment Act](#), 2007 provides that: -
- “(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, an 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 grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”

47. Section 45(5) (a) of the [Employment Act](#) further provides that in deciding whether it was just and equitable for the employer to terminate the employment of an employee, the court shall consider;

“The procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee, and the hearing of any appeal against the decision.”

48. Since the termination herein was not in compliance with the procedure set out under section 41 and 45(5) (a) of the [Employment Act](#) and the HR Manual, the termination was unfair with the meaning of section 45 of the Act.

### Reliefs

49. In view of the foregoing holding, I declare that the termination of the claimant’s employment was unfair and unlawful. The claimant prayed for 12 months salary as compensation for unfair termination in addition to reinstatement to his position without loss of benefits. There is uncontested evidence that the vacancy of finance manager was filled and therefore reinstatement is not tenable.

50. It follows that the only remedy available is damages under section 49(1)(c) of the [Employment Act](#). The claimant was paid one-month salary and therefore what remains is compensation.

51. He worked for the respondent from January 2019 to March 2023 about four years. He had legitimate expectation to continue working but for the unfair termination. Being an employee in Banking sector the court takes judicial notice that his chances of securing another job in the sector is minimized. I have also considered that he contributed to the termination through misconduct. In view of the foregoing consideration, I find that an award of six (6) months gross salary is reasonable compensation for the injury suffered. Hence Kshs.138,040 x 6 =Kshs.828,240.00

### Conclusion

52. I have found that there was valid reason for dismissing the claimant but the procedure followed was not fair. Consequently, I enter judgment for the claimant as follows: -

- a. The termination of his employment is hereby declared unfair and unlawful.
- b. The claimant is awarded Kshs.828,240.00 being six months gross salary as compensation for the unfair termination.
- c. The award is subject to statutory deductions.
- d. The claimant is awarded costs plus interest at court rates from the date of this judgment.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 15<sup>TH</sup> DAY OF MAY, 2024.**

**ONESMUS N MAKAU**



**JUDGE**

**Order**

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**ONESMUS N MAKAU**

**JUDGE**

