



**Malova v Kenya Ports Authority (Cause E120 of 2023)
[2024] KEELRC 2091 (KLR) (4 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2091 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E120 OF 2023**

M MBARÚ, J

JULY 4, 2024

BETWEEN

LEE ALI MALOVA CLAIMANT

AND

KENYA PORTS AUTHORITY RESPONDENT

JUDGMENT

1. The claimant was employed by the respondent in the year 1998 as a casual employee and confirmed in November 2008 as a senior Dockers grade HG3 earning a salary of Ksh.70, 353.56. The respondent dismissed the claimant from his employment on 4 May 2022 on the grounds of gross misconduct.
2. The claim is that the summary dismissal was without due process or justification. The respondent alleged that they caught the claimant stealing side mirrors but he was not accorded a hearing as required under Section 41 of the *Employment Act*.
3. The claim is that there was an unfair termination of employment. He was not paid his terminal dues. He is seeking the following;
 - a. 12 months compensation Ksh.844,242.72;
 - b. Notice pay Ksh.70,353.56;
 - c. Loss of future earnings for 14 years Ksh.11,819,398.08;
 - d. Salary arrears from 29 June 2015 when the claimant was suspended and lifted in October 2023 for 77 months
January 2016 to May 2022 for 77 months
Total Ksh.5, 839,345.48



- e. Damages for unlawful arrest and incarceration Ksh.6,000,000;
 - f. Costs of the suit.
4. The claimant testified in support of his case that the respondent dismissed him from his employment after being charged in court and was released under the provisions of Section 87A of the Penal Code. He submitted the criminal case outcome to the respondent but they refused to reinstate him. He was charged in Criminal Case No.1610 of 2019. He was alleged to have stolen a customer's property but the prosecution withdrew the charges.
 5. His dismissal was without notice, and the respondent failed to give him a hearing. He wrote seeking to be reinstated. On 5 December 2019, the respondent's board heard his case but was dismissed without being taken through due process. At the time his salary was ksh.70, 353.56. He lost future earnings and during his period of interdiction, he was not paid his salary. For the false charges and incarceration, the respondent should pay damages and costs.
 6. In response, the respondent admitted that the claimant was employed as a senior docker. While on suspension, his gross wage was Ksh.49, 263 made up of half basic pay of Ksh.29, 613 and a full house allowance of Ksh.19, 650. The claimant was dismissed on 4 May 2022 for gross misconduct.
 7. On 12 May 2014, the claimant was arrested for involvement in stealing motor vehicle parts within the respondent's premises. He was charged on 13 May 2014 under Section 279(g) of the Penal Code in Mombasa Criminal Case No.906 of 2014.
 8. On 28 May 2014, the claimant was suspended and charged in court. He was required to report to the office every Friday at 9 am for any instructions.
 9. On 24 October 2014, the claimant was arrested within the Port for a similar offence while on suspension. He was charged in court on 27 October 2014 under Section 279(g) of the Penal Code in Mombasa Criminal Case No.1995 of 2014.
 10. The claimant's suspension was lifted on 25 April 2016 and reinstated and issued a warning.
 11. On 13 September 2019, the claimant was arrested for the offence of theft of motor vehicle parts. He was charged in court on 16 September 2019 and charged under Section 279(g) of the Penal Code in Mombasa Criminal Case No.1610 of 2019.
 12. The various complaints of stealing and arraignments in court were followed up with suspension letters pending the outcome of court cases. A show cause was issued and on 28 May 2014, the claimant was suspended for the first offence of stealing. He admitted to the offence in his letter dated 16 June 2014 and asked to be forgiven.
 13. The criminal case No., 906 of 2014 was withdrawn on 19 February 2015 and the claimant was acquitted under Section 204 of the Criminal Procedure Code. The claimant wrote an apology letter on 27 February 2021.
 14. On 8 June 2015, the claimant's criminal case No.1995 of 2014 was withdrawn under Section 87(a) of the Criminal Procedure Code. On 29 June 2015, the claimant wrote a letter pleading his innocence and on 25 April 2016 the suspension was lifted and a warning letter issued. The half salary withheld during the suspension was paid in full on 29 April 2016.
 15. On 13 September 2019, the claimant was arrested for the offence of theft of motor vehicle parts and arrayed in court on 16 September 2019. He wrote a letter of apology. On 30 September 2019, a notice to show cause was issued for gross misconduct. A recommendation for a disciplinary hearing was issued.



On 23 October 2019, an interdiction from duty was issued and the claimant acknowledged receipt on 1st November 2019. On 5 December 2019, a hearing notice was issued for 9 December 2019 and the claimant was informed to attend with a union official as required under Section 41 of the [Employment Act](#).

16. The claimant absconded court in Mombasa criminal case No.1610 of 2019 and was released on a cash bail of Ksh.40, 000. He did not attend court for 16 mentions upon his release on bail and his cash bail was forfeited. His case was withdrawn under Section 87A of the Criminal Procedure Code on 3 March 2021.
17. Through a letter dated 4 May 2021, the respondent notified the claimant of their verdict and reasons for summary dismissal. The grounds were that his habits were unethical, he could not be trusted, and he had repeated criminal cases, all amounting to gross misconduct.
18. There are no unpaid dues and the claims made should be dismissed with costs.
19. In evidence, the respondent called Juma Salim Chungwabi the human resources officer, discipline. He testified that the claimant was an employee of the respondent but had several criminal cases but no conviction. The criminal process and internal disciplinary procedures are separate. The claimant admitted to his wrongdoing and wrote written apologies. The claimant was invited to the disciplinary hearing and being unionized was allowed to attend with a representative. The invitation letter dated 5 December 2019 was received by the claimant on 9 December 2019.
20. Juma testified that every time the claimant would be arrested, he wrote an apology and his wages would be paid. His withheld wages during the suspension were paid in full. The payment slips to confirm have not been filed.
21. Upon cross-examination, the witness confirmed that the disciplinary hearing notice to the claimant dated 5 December 2019 was not copied to his union. The notice allowed the claimant to attend with a union official of his choice. There are no minutes to confirm who was in attendance.
22. At the close of the hearing, both parties agreed to file written submissions. These are analyzed and taken into account in the analysis of the issues in dispute.

Determination

23. On 4 May 2022, the respondent dismissed the claimant from his employment because, on 28 May 2014, he was suspended from duty following a security report that he was involved in stealing motor vehicle parts. He was charged in court on 13 May 2014. The respondent also noted that on 27 October 2012, security reported that the claimant had committed a similar offence, he was arrested and chaired in court on 27 October. The criminal charges were later withdrawn. Hence the respondent noted that the claimant's conduct was unethical and repeated offender which amounted to gross misconduct and justified summary dismissal.
24. The respondent noted that the half salary not paid during suspension would be paid.
25. At the time of the summary dismissal, the claimant was earning half a salary of Ksh.49, 266.26 being a basic wage of Ksh.29, 613 and a house allowance of Ksh.19, 650 per month.
26. It is settled that before termination of employment, even in a case of gross misconduct, the employee must be given a hearing under the provisions of Section 44(4) read together with Section 41(2) of the [Employment Act](#), 2007 (the Act). This is to give the employee a fair chance to make his representations in the presence of an employee of his choice.



27. In *Josephine M. Ndungu & others v Plan International Inc (2019) e KLR* the Court held that;
- Fair procedure, on the other hand, refers to, but is not limited to, affording the employee an opportunity of being heard before the termination. Upon discharge of the said burden on a balance of probability, the employer assumes the burden of proof, under sections 43(1), 45(2) and 47(5) of the Act, to justify the reason for the termination and prove that a fair procedure was followed. ...
28. The court went ahead to outline the legal threshold under 45)2(b) of the Act that should be applied being;
- i. related to the employee's conduct, capacity or compatibility; or
 - ii. based on the operational requirements of the employer;
29. In this case, through a letter and notice dated 5 December 2019, the respondent invited the claimant to attend a disciplinary hearing on 9 December 2019 at 0900 hours and that you would be accompanied by a witness or a union official if you wished.
30. The claimant contested that he was not allowed to attend the hearing with his union representative. That the disciplinary hearing notice was not copied to his union even though he was unionized.
31. The notice dated 5 December 2019 informed the claimant to attend with a representative of his choice. The payment statements for March 2022 and April 2022 do not have union dues deductions. The claimant did not state which union was representing him in the absence of payment of union dues.
32. The respondent applied the motions of Section 41 of the Act. The claimant was allowed to attend a disciplinary hearing with a person of his choice.
33. The claimant confirmed that he attended the disciplinary hearing as required. The outcome took into account his conduct, the fact of being suspended for various acts of gross misconduct and his work record was replete with letters of apology, suspensions and criminal charges.
34. Under the provisions of Section 43 of the Act, the respondent had genuine reasons leading to the summary dismissal of the claimant. The police report, arrests and arraignment in court, even though without a conviction, the respondent undertook their civic duty and made reports. The outcome of such proceedings was not in the control of the respondent.
35. In the case of *Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike [2017] eKLR* aptly captured the standard to apply and held that;
- Under Section 43 of the Act, the onus is on an employer to prove the reason or reasons for the termination, failing which the termination shall be deemed to be unfair. The test is, however, a partly subjective one in that all an employer is required to prove are the reasons that he “genuinely believed to exist,” causing him to terminate the employee’s services. In the present case, it seems quite clear from the evidence on record that KPLC believed, and had ample and reasonable basis for so believing, that Wasike had attempted to steal cable wire from KPLC stores which he was in charge of. That being the case, we think the learned Judge plainly erred in entering into a detailed examination of whether or not the 300 metres of cable wire were part of the 1,100 metres that were being legitimately removed from the store, as well as an examination of whether or not there was sufficient documentation in



proof of the discrepancy and the like. It was enough, we think, that the gateman found cables that were concealed and should not have been getting out of the stores.

36. In this case, the respondent noted that they had lost trust and faith in the claimant for repeated offences of stealing and being charged in court with similar offences relating to stealing within the Port of Mombasa and the premises of the respondent. Such justified the resulting summary dismissal.

Notice pay and compensation are remedies removed from the claimant.

37. On the claim for lost future earnings, the claimant is seeking payment of wages for 14 years. His case is that his employment was terminated unfairly and prematurely and he lost prospects of earnings in the future. The claimant has not offered his labours to the respondent over the years during various suspensions. He has been charged in various criminal cases including Mombasa Criminal Case No.906 of 2014; Criminal Case No.1995 of 2014; and Criminal Case No.1610 of 2010. He apologized for his conduct through letters dated 12 June 2014; 27 February 2015; and 21st September 2019.
38. Under the provisions of Section 45(5) of the Act, this record comes to bear. Account must be taken of the claimant's conduct and culpability for various acts of gross misconduct and the warning letters issued. The claimant frustrated his employment. The finding that summary dismissal was justified removes the claimant from claiming any loss for future earnings.
39. On the claim for salary arrears from 29 June 2015 to October 2023, in the letter dated 4 May 2022, the respondent offered to pay the claimant half salary not paid during the suspension period. The claimant should and ought to attend at the shop floor, undertake clearance to allow the respondent to go through the records over the years and pay his unpaid wages, if any.
40. On the claim for costs, the court sympathizes with the claimant to the extent that the respondent was not particularly tidy in submitting its records. He was kept in abeyance regarding his disciplinary case over the years. This must have created great anxiety for him and caused him unnecessary expense. An example is the disciplinary hearing concluded on 9 December 2019 but the outcome was only issued on 4 May 2022. There is no justification for such delays. Even though the claim is found without merits, the court finds it fit to award costs assessed at ksh.5,000 all-inclusive to be paid within 30 days after which the same shall accrue interests at court rate from this date until paid in full.
41. Accordingly, the claim is found without merit and is hereby dismissed. Save, costs of Ksh.5, 000 are hereby awarded to be paid within 30 days after which the same shall accrue interests at court rate. The claimant is to attend at the shop floor for clearance and payment of any unpaid wages during the suspension, if any.

DELIVERED IN OPEN COURT AT MOMBASA THIS 4TH DAY OF JULY 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

