



**Sara v Waso Trustland Project (Cause E015 of 2022)
[2024] KEELRC 1876 (KLR) (19 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1876 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU
CAUSE E015 OF 2022
ON MAKAU, J
JULY 19, 2024**

BETWEEN

LIBAN GOLICHA SARA CLAIMANT

AND

WASO TRUSTLAND PROJECT RESPONDENT

JUDGMENT

1. By a Statement of Claim dated 4th November 2022, the Claimant alleges that he was employed by the respondent as its Chief Executive Officer pursuant to the contract dated 28th January 2020. The engagement was for a 3-year period from 27th January 2020 to 26th January 2023 at a net salary of Kshs. 105,000/= and a travel/communication allowance of Kshs. 56,500/=. The Claimant contends that the Respondent terminated his services summarily on the 15th February 2021 on grounds of grievous misconduct, abuse of office, disobedience to the board's decision and financial impropriety bordering on fraud. In his view, the dismissal was unfair because the cited reasons were invalid and he was condemned unheard. He was also not paid his salary arrears plus terminal benefits and therefore he prays for the following reliefs:
 - a. A declaration that the Claimant's employment services with the respondent were terminated wrongfully, maliciously and or unfairly.
 - b. A declaration that the Respondent violated the Claimant's rights to fair administration action under Article 47, right to fair labour practices under Article 41, freedom from discrimination under Article 27 of the [Constitution of Kenya, 2010](#) as well as rules of natural justice.
 - c. The Honourable Court be pleased to award the Claimant 12 months compensation/damages for the wrongful and unfair termination.
 - d. An order do issue that the Respondent do pay the Claimant Kshs. 969,000/= being compensation for unpaid salary for the months from August 2020 to February 2021.



- e. That the Honourable Court be pleased to award exemplary and punitive damages.
 - f. An order do issue for the reinstatement of the Claimant to his former position as the Chief Executive Officer with no loss of benefit.
 - g. Costs of the suit and interest.
 - h. Such further orders and/or relief as this Court may deem just and fit to award.
2. The Respondent opposed the Claim vide its memorandum of response dated 10th January 2023 in which it averred that the dismissal was justified because the claimant had misconducted himself by embezzlement of its funds, abuse of office, defiance of directives of the Respondent's Board among other grievous acts of impunity. It further averred that the Claimant was dismissed after failing to satisfactorily show cause why he shouldn't be dismissed following the disciplinary hearing of 14th February 2021. Consequently, it prayed for the suit to be dismissed with costs since the claimant having been summarily dismissed, he is not entitled to the reliefs sought.

Evidence

3. During the hearing, the Claimant testified as CW1 by adopting his witness statement dated 4th November 2022 as his evidence in chief and produced six (6) documents as exhibits. In brief his evidence was that he was employed by the respondent as its Chief Executive Officer vide a written contract dated 27th January 2020. His net salary was Kshs.105,000 plus travel/communication allowances of Kshs.56,500.
4. He testified that he served diligently and professionally until the respondent served him with Notice to show cause after an Auditor raised queries. He responded to the show cause letter which was considered by the respondent's board and he was cleared. He continued with his duties until March 2021 when he received a dismissal letter dated 15th February 2021. He contended that the termination clause in his contract required that termination of his services was to be by a resolution of 2/3 of the board members and then payment of three months' salary to him.
5. He stated that the dismissal did not comply with the said termination clause since he was not paid the three months' salary. He further contended that he was neither served with a show cause letter nor accorded any hearing before his dismissal on 15th February 2021. He was also not paid his salary from September 2020 to March when he received the dismissal letter.
6. On cross examination, he stated that the board meeting of 19/11/2020 resolved that he be demoted from CEO to Programme officer but the salary remained the same. He stated that, as CEO, he was the signatory to the Respondent's accounts. He acknowledged that an audit was done and he read the report which indicated embezzlement of funds, but didn't name the responsible person. He responded to the queries raised to the board and no resolution was made to freeze withdrawals.
7. He denied that he was served with cautionary letter dated 29th September 2020 but clarified that the issue of embezzlement of funds was discussed on 19.11.2020 and he was removed from being a signatory to the bank accounts. He admitted having been charged with criminal case no 551/2022 relating to transactions in the respondent's bank accounts. He maintained that he was not issued with show cause or invited to a disciplinary hearing before his dismissal as evident from the minutes of the board meeting held on 14/2/2021.
8. He reiterated that he was not paid his salary from September 2020 until the time he was dismissed even after the respondent's bank accounts were reopened.



9. During re-exam, he stated that the resolution made on 19/11/2020 only discharged him from being a bank signatory, but he continued working until March 2021. He was never issued with a fresh contract after the board meeting of 19.11.2020. He contended that the show cause letter he received contained thirteen (13) queries from the auditor and the Board in its meeting held on 19/11/2020 acknowledged receipt of his response.
10. He reiterated that all the other employees were paid their salaries after the accounts were reopened except him and clarified that he his last salary to receive was paid in August 2020.
11. CW2 was Hussein Golicha, a former board member of the Respondent. He adopted his statement dated 15/4/2023 as his evidence in chief. In brief he stated that he attended the board meeting held on 14.2.2021 which dismissed the claimant and confirmed that the claimant was not served with notice to show cause letter or called upon to defend himself before the dismissal. He also confirmed that the board resolved that the claimant be paid his dues but the same was never paid.
12. He further testified that he attended the Board meeting held on 19th November 2020 where the claimant and the treasurer were called to respond to audit queries. Stated that the board removed the claimant from being bank signatory but he continued serving as the CEO until he was dismissed.
13. On cross exam, he stated that the bank accounts were closed from September 2020 to February 2022. He contended that the claimant was not dismissed due to the audit queries but for closing the bank accounts.
14. CW3, Mohammed Konso, is a current board member of the respondent. He also adopted his written statement dated 17th April 2023 as his evidence in chief. In brief, he stated that the board held meeting on 19th November 2020 and discussed the show cause letter issued to the claimant. In the end it resolved to retain him and end the queries raised in the audit report.
15. He further stated that on 14th February 2021, the board held another meeting and resolved to summarily dismiss the claimant but pay his benefits from August 2020 to February 2021. The total amount owing was Kshs. 969,000 but it was never paid.
16. On cross examination, he admitted that an audit report was prepared when he was the respondent's secretary and revealed cases of misappropriation of funds. He further admitted that the report named the claimant and the then treasurer Mr. Jarso Halkano as the persons involved in the misappropriation of funds. He denied being aware of any criminal charges preferred against the claimant but said that he was aware that the board removed him from respondent's bank signatories.
17. He further admitted that as at the time when the board resolved to pay the claimant his benefits, the respondents accounts were closed. He contended that the claimant should have been paid his dues after the accounts were opened.
18. RW1 was Jilo Adan Abdi, the Respondent's current CEO. He adopted his statement dated 24/11/2022 as his evidence in chief and produced a bundle of 11 documents as exhibits. In brief, he admitted that the claimant was employed by the respondent as its CEO under a three years contract from 27th January 2020 to 26th January 2023. The contract spelled out the incidences which may lead to termination of the contract including gross misconduct, fund misappropriation, failure to perform assigned responsibilities duties for a long period of time without any explanations.
19. He further stated that the claimant was served with a cautionary letter on 29th September 2020 following unauthorized withdrawal of Kshs. 1.3 million between 1st June 2020 to 23rd September 2020 in violation of the board's decision of 10th may 2020. An audit report also which revealed



- misappropriation of Kshs. 6,786,880 between 2017 to 2020 and the claimant was served with show cause letter. Thereafter the board met on 19th November 2020 and demoted him to a Programme Officer and removed him from among the respondent's bank signatories.
20. RW1 further stated that, the claimant was required to provide records of pending bills and project activities which were scheduled for implementation between 20th December 2020 and 30th April 2021 but he failed to comply. As a result, the board met on 14th February 2021 and resolved that the said conduct by the claimant amounted to gross misconduct and summarily dismissed him from the position of Programme Coordinator.
 21. RW1 also stated that the claimant was subsequently charged in Criminal Case number E551 of 2022 with the offence of conspiracy to commit a felony, fraudulent accounting and also stealing by servant. The case is still ongoing. He further stated that since the dismissal, the claimant has refused to release the keys to the respondent's offices and assets including motor vehicle and laptop.
 22. On cross examination, he confirmed that he succeeded the Claimant and he is a son to the Respondent's current treasurer Mr. Abdi Jilo. He contended that since the claimant was dismissed from work, he is not entitled to payment of salary in lieu of notice. He admitted that the termination clause in the claimant's contract entitled him to a hearing before any disciplinary action was taken against him. He further admitted that the claimant was not in attendance of the board meeting of 14th April 2021 which resolved to dismiss him.
 23. He admitted that he had no contract to prove that the claimant was demoted to program manager in 2020. However, he produced a communication (Exhibit D.3) but it was undated, not on the respondent's official letterhead and not signed by the claimant to acknowledge receipt.
 24. He contended that before any financial transaction is done, there has to be a resolution by the board but the claimant sidelined that procedure. Instead he dealt with the treasurer alone and colluded with the bank to transact without third signatory. Finally, he admitted that the claimant is yet to be paid his salary for five and a half months.

Submissions

25. It was submitted for the claimant that he was condemned unheard contrary to the termination clause in his contract. He was also not paid his 3 months salary upon dismissal and thus his termination was unfair as the procedure was not followed.
26. It was further submitted that the board meeting held on 14/2/2021 dismissed the claimant for new allegations that were not in the earlier show cause letter which was resolved on 19th November 2020. It was argued that the claimant ought to have been accorded a hearing before the dismissal for new matters. Reliance was placed on the case of *Tom Obonyo v Tex Pro Limited* [2021] eKLR.
27. It was also submitted that the Respondent's witness confirmed that no new contract was issued to the Claimant appointing him programme coordinator contending that section 10 (5) of the *Employment Act* obliges the employer to consult his employee before effecting changes on employment contract. It was thus argued that if there was a change then the same was void for want of consultation.
28. Finally, it was submitted that the claimant is entitled to the reliefs sought, because the Respondent's witness has admitted the claimant's claim.
29. It was submitted for the respondent that the Claimant was not wrongfully dismissed since his contract provided for instances that warranted termination including gross misconduct, fund



misappropriation, failure to perform assigned duties without explanation. It was further submitted that the Claimant was implicated in massive misappropriation of the respondent's funds.

30. It was also submitted that the Claimant was issued with a show cause letter dated 09/10/2020 but failed to give satisfactory reasons and thus the demotion and eventual dismissal. Reliance was placed on the case of *Amos Kitavi Kivite v Kenya Revenue Authority* [2020] eKLR and section 44 (4) (g) of the *Employment Act*.
31. It was argued that the Claimant was only entitled to net salary less deductions and allowances being Kshs. 77,000 for the 6 months equaling to Kshs. 462,666. However, it was submitted that the said money should only be paid upon handover the respondent's property and email passwords.

Analysis

32. I have carefully considered the pleadings, evidence and submissions. There is no dispute that the claimant was employed by the respondent as its CEO under a three years' contract starting on 27th January 2020. It is also not in dispute that the respondent summarily dismissed the claimant on 15th February 2021 for gross misconduct. It is further not in dispute that the claimant was not paid his salary from September 2020 till the day he was dismissed. The issues for determination by this court are as follows:
 - a. Whether the dismissal of the Claimant was unfair and unlawful.
 - b. Whether the Claimant is entitled to reliefs sought.

Unfair and unlawful dismissal

33. The Claimant's case is that his dismissal was unfair and unlawful. Section 45 (1) & (2) of the *Employment Act* provides as follows:

- “(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.”

34. In this case the reason cited for the dismissal was set out in paragraph 2 of the dismissal letter dated 15th February 2021as follows:

“The reason for your dismissal is based on the grievous misconduct, abuse of office, disobedience to the Board's decisions and financial impropriety bordering on fraud. The manner in which you handled financial asset management of the organization is in total contravention of the organization's policies and procedures. Over the last 3years you have



single handedly run the organization in cohort (sic) with the treasurer without participation of the other Board members. The Audit report has revealed all these serious anomalies in the report presented to the Board. You have been a stumbling block to the implementation of the Audit recommendation. You have also been threatening the bank Managers of Sidian and Consolidated banks on the operation of the organization's two bank Accounts."

35. The claimant denied the above allegation and averred that he adequately responded to all the queries raised in the audit report and on 19th November 2020 the board considered the same and rested the matter. The respondent has produced an Audit report indicating that there was misappropriation of funds and implicated the claimant and the treasurer. There is evidence that the claimant is facing a criminal case in relation to the said misappropriation of funds. CW3 confirmed in his testimony that in deed the Audit report implicated the claimant.

36. In the case of *Kenya Revenue Authority v Reuel Waitbaka Gitahi & 2 others* [2019] eKLR the Court of Appeal held 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."

37. In this case the respondent's board served the claimant with a show cause letter dated 9th October 2020 setting out 13 queries including some of allegations in paragraph 2 of the dismissal letter above. The claimant responded and on 19th November 2020 the board deliberated on the response and unanimously reached a verdict that the claimant had erred. The board then deliberated on the appropriate action to take against the claimant and framed optional sentences against the claimant three namely, forgive and reprimand or summary dismissal or removal from bank signatories and be left with implementation of programme activities and day-to-day operations of the respondent until 31st May 2021 when his status would be reviewed by the full board.

38. The board chose the last option and the matter ended there. The question that arises is whether the claimant could be dismissed for the same allegations. My considered view is that he cannot because doing that would amount to punishing the employee twice for the same offence. However, the board was free to dismiss the claimant for any subsequent misconduct.

39. The dismissal letter cited new offences that is:

"You have been a stumbling block to the implementation of the Audit recommendation. You have also been threatening the bank Managers of Sidian and Consolidated banks on the operation of the organization's two bank Accounts."

40. The respondent did not plead in its defence how the claimant prevented the implementation of the audit recommendations or how he has been threatening the bank managers with respect to the operation of the respondent's bank accounts. Likewise, no evidence was adduced to substantiate the said allegations. All what RW1 stated is that after the board's decision on 19th November 2020 is that:

"The respondent even wrote a letter to the claimant to ask for records of the respondent's pending bills as well as the list of the project activities that the respondent had agreed with the donors to be implemented between 20/12/2020 and 30/04/2021 but the aid[sic] letter elicited no response from the claimant or at all."



41. The above evidence is at variance with the dismissal letter which accused the claimant of being a stumbling block to implementation of the audit recommendations. Such contradiction means that the evidence by RW1 has not proved the misconduct which was cited as the reason for dismissing the claimant on 14th February 2021.

42. Sections 43(1) and 47(5) of the *Employment Act* lays on the employer, the burden of proving and justifying the reason the termination of the contract of employment. The sections provide as follows:

“ 43.

(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.”

47.

(5) For any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of the employment or wrongful dismissal shall rest on the employer.”

43. Having carefully evaluated the evidence adduced by the two sides, I find and hold that the respondent has failed to prove, on a balance of probability, that the reasons cited for dismissing the claimant were valid and fair.

44. The claimant further faulted the respondent for dismissing him without serving him with a show cause letter or according him a hearing. Section 41 (1) of the *Employment Act* which 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.”

45. The above provision was also upheld by the court in *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR when it stated as follows:

“ Four elements must thus be discernible for the procedure to pass muster: -

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.”

46. I have already made a finding of fact that the allegations considered and determined by the board on 19th November 2020 could not be used to punish the claimant for the second time on 15th April 2021. I have further found that only new offences committed subsequent to the said punishment could be used to inflict another punishment on the claimant after complying with procedure set out under the contract of service and section 41 above.

47. RW1 confirmed in his testimony that the claimant was not served with show cause letter or accorded any hearing before the decision to dismiss him was arrived at on 15th April 2021. He confirmed that the dismissal was decided by a special board in a meeting where the claimant was not in attendance. Consequently, I hold that the dismissal was not done in accordance with a fair procedure.

48. I gather support from the case of *George Musamali v G4S Security Services Kenya Ltd* [2016] eKLR where the court stated that:

“ 14. A termination of employment takes two stages. First there must be a valid and justifiable reason for termination and once this is established, the termination must be carried out in accordance with the procedure laid down in the employers’ human resource manual or as set out in the *Employment Act* or both. The most important thing to be ensured is that there is a valid or justifiable reason for termination and that the termination must be conducted by following a fair procedure. This includes furnishing the employee with the charges he or she is facing and affording them an opportunity to defend themselves. It does not matter whether the employee’s guilt is apparent on the face of the record. He or she must be heard no matter how weak or useless his or her defence might seem to be. However, the conduct of the disciplinary hearing does not have to take the rigour of a Court trial. It suffices that the employee was notified of the charges and afforded an opportunity to respond before the decision to dismiss is made.”

49. Having found that the respondent has failed to prove that the dismissal was grounded on a valid and fair reason and that a fair procedure was followed, I now hold that the dismissal was unfair, wrongful and unlawful.

Reliefs Sought

50. In view of the foregoing holding, the claimant is entitled to a declaration that his contract of service was unfairly and wrongfully terminated. He sought for reinstatement to his office of CEO of the respondent but I find the said relief not practicable considering that there is evidence that RW1 was appointed to take that position. Accordingly, I award him compensation for unfair termination plus salary in lieu of notice under section 49 of the Employment.

51. Considering that he had served the respondent for more than three years, that he had two more years remaining in his contract term, and also that he contributed to dismissal through misconduct, I award



him three (3) months compensation for the unfair termination being 484,500. He is also awarded three (3) months salary in lieu of notice in line with his contract equaling to Kshs. 484,500.

52. In addition, thereto, the Claimant is awarded gross salary for work done and not paid between September 2020 and February 2021, being Kshs. 969,000.
53. The prayer for exemplary and punitive damages is declined for lack of any legal basis. On the contrary, the person who should be punished is the claimant because he has failed to handover assets and information belonging to the employer.

Conclusion

54. I have found that the dismissal of the claimant was unfair and unlawful. I have further found that the claimant is entitled to compensatory damages and employment benefits. Consequently, I enter judgment for the claimant against the respondent in the following terms: -
- a. A declaration that dismissal of the claimant is unfair and unlawful.
 - b. The respondent shall pay the claimant the following:
Notice..... Kshs. 484,500.00
Compensation..... Kshs. 484,500.00
Salary..... Kshs. 969,000.00
Total Kshs. 1,938,000.00
 - c. Since the suit involves charity funds from innocent donors, I will not condemn the respondent to pay costs.
 - d. The above award will be subject to statutory deductions but it will attract interest at court rates from the date of this judgment.
 - e. The said award shall be deposited in this court until the claimant hands over the employer's assets and information.

DATED, SIGNED AND DELIVERED AT NYERI THIS 19TH DAY OF JULY, 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.

