



**Wakoli v Geothermal Development Company (Employment and Labour Relations Cause E001 of 2023) [2024] KEELRC 2507 (KLR) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2507 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E001 OF 2023  
MA ONYANGO, J  
OCTOBER 17, 2024**

**BETWEEN**

**PANITA NAFULA WAKOLI ..... CLAIMANT**

**AND**

**GEOHERMAL DEVELOPMENT COMPANY ..... RESPONDENT**

**JUDGMENT**

1. Vide her Memorandum of Claim dated 1<sup>st</sup> February 2023 and filed in Court on 2nd February 2023, the Claimant sued the Respondent alleging that she was unlawfully, unprocedurally and unfairly terminated from employment.
2. The Claimant states that she was employed by the Respondent as a senior clerk, property management, with effect from 1<sup>st</sup> March 2010 to 2<sup>nd</sup> December 2022 when the Respondent unlawfully terminated her services.
3. She states that on 2<sup>nd</sup> December 2022, the Respondent handed her a summary dismissal letter without any reason.
4. According to the Claimant, her dismissal was illegal, unfair and unlawful and it violates the provisions of sections 41(1),44(4),45(2) and 43 of the *Employment Act* No 11 of 2007.
5. The Claimant particularized the unlawfulness of her termination as follows: -
  - a. The Respondent terminated her employment without following the laid down procedure in the *Employment Act*
  - b. The Respondent did not give the Claimant termination notice as provided under section 35 of the *Employment Act*.



- c. The Respondent dismissed the Claimant without proving that the reason for the termination was valid.
  - d. The Respondent failed to pay leave allowance to the Claimant contrary to section 35(5) of the [Employment Act](#)
  - e. The Respondent failed to pay service gratuity to the Claimant contrary to section 35(5) of the [Employment Act](#)
  - f. The Respondent never paid the Claimant salary arrears for 15 months
  - g. The Respondent failed to pay the Claimant his 12 months wages for loss of employment as provided under section 15(c) of the [Labour Institution Act](#).
  - h. The Respondent never explained to the Claimant the reasons for termination as required under section 41(1) of the [Employment Act](#)
  - i. The Respondent did not act in accordance with justice and equity in terminating employment contrary to section 45 of the [Employment Act](#)
  - j. No certificate of service was issued to the claimant contrary to section 51 of the [Employment Act](#),
6. The Claimant prayed for judgment against the Respondent for:
- a. A declaration that the claimant's services were unprocedurally, unlawfully and unfairly terminated and in the circumstances the claimant is entitled to compensation of his terminal dues as outlined in the Statement of Claim
  - b. The sum of Kshs 3,104,179.18 as set out hereinabove.
  - c. Certificate of service
  - d. Costs of this suit and Interests at court rates from time of filing the suit until payment in full
  - e. Any other further and better relief the Honourable Court may deem just and fit to grant.
7. The Respondent filed its Response to the Memorandum of Claim dated 7<sup>th</sup> July 2023 on 11<sup>th</sup> July 2023. At paragraph 7 of the Response to the Memorandum of Claim, the Respondent states that the Claimant voluntarily submitted a statement on 17<sup>th</sup> June 2021 where she admitted taking the company's property without authorization in response to the allegations of being involved in theft of the company's property.
8. The Respondent further states that the Claimant's disciplinary processes was rolled out in compliance with the Respondent's policies and the employment laws of Kenya, following admission by the Claimant and the findings of police investigations that she had been found in possession of the said property. That the process was fair and justified.
9. It is the Respondent's contention that the Claimant is not entitled to the amounts claimed as she was paid all her dues upon termination and that the termination from employment was fair and lawful.
10. The suit was set down for hearing on various dates. The Claimant testified on 16<sup>th</sup> March 2023 as CW1. She adopted her witness statement recorded on 1<sup>st</sup> February 2023 as her evidence in chief and relied on her bundle of documents filed in court.



11. The Claimant in her testimony referred to the Respondent's statement dated 17<sup>th</sup> June 2021 in the Respondent's bundle of document and stated that she was called to the security office and asked to write and state that she was the one who took the Respondent's property. She contended that she sued the Respondent seeking for compensation for unfair termination, payment of withheld salary and service pay.
12. On cross examination, the Claimant stated that she was a member of the Asset Disposal Committee of the Respondent and that the reason for her discipline and subsequent dismissal was not because of disposal. She stated that she was dismissed because of waste and that none of the items claimed to have been stolen were found in her possession. She stated that she was issued with a show cause letter whose basis related to the disposal of stores. She further stated that she was invited to a disciplinary hearing which was rescheduled to a later date at her request on medical grounds. It was the Claimant's testimony that she attended the disciplinary hearing scheduled for 1<sup>st</sup> October 2021 where she defended herself. The Claimant avers that after the disciplinary meeting, it was recommended that she be dismissed. She stated that upon dismissal, she lodged an appeal which after being heard was dismissed.
13. The Claimant further stated the committee recommended that the items be sold by public auction and that the disposal took place long before and was completed before the public auction. She averred that she did not take the alleged materials and maintained that all materials were auctioned in August before the clearance of 6<sup>th</sup> floor. When asked about her colleague Lucy Kathira, the Claimant stated that the said Lucy had been tasked to ensure the waste (broken tiles and bricks) were to be cleared from the 6<sup>th</sup> floor so that the room could be used by staff who had been posted to Nakuru. It was her evidence that the materials were found in Lucy's place and that even though she alleged that the materials belonged to the Claimant, the Claimant stated that she did not own any property in that area.
14. On re-examination, the Claimant stated that her dismissal from employment was not related to the disposal as no item to be disposed was found in her premises. She also stated that at the disciplinary hearing, she was told to present only the documents of disposal of materials. She averred that she has not cleared with the Respondent as she was denied access to the company premises.
15. On its part, the Respondent called Yunis Mariam, its Human Resource Manager who testified as RW1. She adopted her witness statement recorded on 7<sup>th</sup> July 2023 as her evidence in chief.
16. Ms. Yunis urged the court to find that due process was followed by the Respondent in dismissing the Claimant from employment.
17. On cross examination, RW1 told the court that in June 2021, they received information from Githioro Police Station to the effect that the Respondent's branded goods had been found with the Claimant.
18. It is her case that the Respondent instituted disciplinary proceedings against the Claimant. According to RW1, the Claimant was issued with a show cause letter on the basis that she had authorized gate passes through which the stolen goods were removed from the premises.
19. She stated that the Claimant was taken through a disciplinary hearing and further, that the committee members were to endorse the minutes but this was not done.
20. She also told the court that upon interdiction, the Claimant was paid half salary through electronic transfer. She also stated that the police report was never produced during the disciplinary committee hearing.
21. On re-examination, the Respondent's witness stated that the Claimant did not complain that she was forced to record a statement. She also stated that prior to the Claimant filing the suit, she did not



complain that her salary had not been paid and as such, she could not produce evidence of what had not been paid.

### **The Submissions**

22. In her submissions, the Claimant framed the issues for determination as:
  - i. Whether the Claimant was unlawfully, unprocedurally and unfairly terminated from employment by the Respondent
  - ii. Whether the Claimant is entitled to compensation for unlawful, unprocedural and unfair termination from employment as prayed in the memorandum of claim.
  - iii. Whether the Claimant is entitled to an award of certificate of service.
  - iv. Who should pay costs and interests of the suit
23. On the first issue, the Claimant submitted that she was not accorded a fair representation during the disciplinary hearing as she was neither furnished with all documents to enable her appropriately defend herself nor was she accompanied by a union member or representative which actions rendered the process deficient of all the ingredients contemplated under section 41 of the *Employment Act*.
24. It is the Claimant's submission that the failure to furnish her with all the necessary documents to enable her defend herself goes against the principle of natural justice and is prejudicial on the Claimant.
25. Regarding the allegation that the termination was unfair, the Claimant submitted that she was punished for merely performing her duties as the complaint made against her was as a result of her performing her task as delegated to her by her supervisor.
26. She explained that she had been instructed by her supervisor, Mr. Victor Denge to supervise the clearing of dumped materials and debris on the company's 6<sup>th</sup> Floor to create room for office space. That she sorted out the material and ensured that they were duly accounted for at the gate and signed for. It was her submission that after ensuring the material was all accounted for before being transported to be disposed, she had completed her task and as such, the driver was now responsible to ensure that the materials he was ferrying got to the intended destination. The Claimant relied on the decision in *Kenya Revenue Authority v Reuwel Waitbaka Gitabi & 2 others* (2019) eKLR to buttress the point that she was merely discharging her duties.
27. The Claimant also submitted that the statement she gave at the police station was given under duress as she was forced and hoaxed to write the said statement in a bid to place her at fault for the stolen material.
28. On the second issue, the Claimant urged the court to grant her the maximum compensation on the basis that she had been terminated unfairly from employment coupled with the fact that she had worked for the Respondent for a period of over 11 years.
29. The Claimant also prayed to be awarded one month payment in lieu of notice, salary arrears, service pay and leave dues for the year 2021. She also prayed to be issued with a certificate of service and also be awarded costs and interest.
30. In its submissions filed in court on 5th December, 2023, the Respondent identified the issues for determination as;
  - i. Whether the termination of the Claimant's employment was lawful and fair;
  - ii. Whether termination of the Claimant's employment was in accordance with a fair procedure;



- iii. Who should bear the cost of the suit.
31. On the issue whether the termination of the Claimant's employment was lawful and fair, it is the Respondent's submissions that the Claimant was terminated from employment based on the disciplinary committee's finding that she was in possession of unauthorized property of the employer.
32. The Respondent submitted that it had basis to terminate the Claimant's employment after it was established that she had breached its Human Resource Policies and Procedures. According to the Respondent, the police independently established that items found in the Claimant's possession belonged to the Respondent; the Respondent's own internal investigations established that indeed the items belonged to the Respondent, and were not authorized to be in the Claimant's private possession; and also, that the Claimant confessed that she was in possession of the items, albeit without authorization.
33. It is the Respondent's submission that during the hearing, the Claimant in her testimony confirmed that she issued the relevant gate passes that facilitated the exit of the items from the employer's premises. The Respondent contends that the Claimant abused her authority and position to unlawfully confer a benefit on herself through diverting employer's property.
34. On this basis, the Respondent submitted that it had a valid ground as stipulated in section 44(g) of the Employment Act to institute disciplinary charges against the Claimant and also, because the charges that the Claimant faced also constituted gross misconduct under clause 12.16(III) (XI) of its Human Resource Management Policies Procedures Manual.
35. It is therefore the Respondent's case that it had reasonable basis to conclude that the offence had been committed against it by the Claimant based on the report and findings by the police, the confession by the Claimant, as well as the findings of the internal investigations.
36. Regarding the second issue on procedural fairness, the Respondent maintained that the Claimant was accorded fair hearing through to an appeal as envisaged by Section 41 of the Employment Act 2007 as well as its own human resource policy.
37. As to who should meet the costs of this suit, it is the Respondent's case that the Claimant having dragged the Respondent to this Court for a claim she has blatantly failed to prove should be ordered to pay the costs the Respondent has incurred in defending the meritless claim. According to the Respondent, it has no funds of its own but is a trustee of public resources and therefore the costs incurred are public resources that should be returned to the public coffers.
38. In summary, the Respondent submitted that the reasons for discipline were lawful, reasonable and genuinely believed to have existed at the time, while the fair procedure laid down in the Employment Act, 2007 was followed in the termination of the Claimant from employment.
39. The court was thus urged to dismiss the suit with costs.

### **Determination**

40. From the pleadings and the evidence adduced in court as well as the rival submissions of the parties, the issue that falls for the court's determination is whether the Claimant was unfairly, unprocedurally and unlawfully terminated from employment.
41. Section 43 of Employment Act 2007 provides inter alia:

“ 43. Proof of reason for termination



- (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.
  - (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee"
42. The burden of proof in termination of employment is on the employer who is required to prove that the reasons for the termination was valid and the procedure was fair.
43. Section 45(1) of the *Employment Act* provides that:

“No employer shall terminate the employment of the employee unfairly. A termination of employment by an employer is unfair if the employer fails to prove: -

  - a) That the reason or reasons 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 was that the Employment was terminated in accordance with fair procedure”.
44. The Claimant in her testimony stated that her employment was terminated without any reason. According to her, the reasons advanced by the Respondent for terminating her employment are not valid. It was her evidence that the Respondent based the termination on her issuing gate passes which according to her was work that she was ordinarily mandated to do and had even been instructed to perform by her supervisor.
45. The Respondent on its part disputed that the Claimant had been authorized to issue gate passes for the specific material that were transported from the Respondent’s premises. According to the Respondent, the Claimant unlawfully diverted the Respondent’s property to her private premises which were found by the police after a report was made by a member of the public.
46. The Respondent in its testimony stated that the police notified the Respondent who immediately sent its representative. The Representative confirmed that the items recovered were the Respondent’s and neither the Claimant nor her colleague were authorized to have them in their private premises.
47. From the Respondent’s evidence, it is alleged that the Claimant was arrested and charged and also, that after conducting its investigations, it found her culpable as a result of which she was issued with a notice to show cause and subsequently terminated from employment.
48. As stated by the Respondent, it was informed by the police that items branded with its mark had been recovered from the Claimant. It was the case of the Respondent that the Claimant submitted a statement regarding the allegations of theft of the Respondent’s property in which she admitted taking the company property without authorization.



49. From the documentation filed in support of the Respondent's case, there was no copy of the police report showing that indeed the Claimant was charged or that she made a statement admitting that she had taken the materials without authorization.
50. It is also worth noting that neither the police nor the member of the public who is said to have made the report was called to give evidence or write a statement to prove that indeed the stolen materials were found with the Claimant leading to her being charged for possession of stolen property. In fact, in her testimony, the Claimant denied that the stolen materials were found in her premises but maintained that they were found at her colleague's house.
51. From an analysis of the evidence on record there seems to be a contradiction as to where the alleged stolen materials were found. This contradiction in my view, renders the reason advanced by the Respondent for the termination invalid. Without any evidence linking the Claimant to the alleged stealing of materials, it is not clear upon what evidence the Respondent made a determination that the claimant was guilty.
52. There is further the issue whether or not the items alleged to have been stolen were part of waste that was supposed to be disposed of or items that the Respondent still intended to put to use.
53. Finally, the reason for dismissal according to the letter of summary dismissal is that the Claimant authorized gate passes which led to release of company materials that were later traced to a residence of a GDC staff member. According to the minutes of the disciplinary hearing the charges she was required to answer were for theft of company property. The specific charges according to all the minutes and notes of the disciplinary hearing are that: "The staff was accused of theft of company property an act tantamount to gross misconduct which contravenes the provision of GDC's HRPP of 2018 section 12.16 III (xi) "Misappropriation and theft of Company's property" & CBA (KETAWU& GDC) section 12.12.3€ "Willful misuse or damage of Company's property." These are the charges that the Claimant was called upon to respond to and that she was subjected to at the disciplinary hearing.
54. The findings of the disciplinary committee are framed as follows: The staff having personally accepted being in possession of GDC materials recovered in the police station and being the one entrusted to handle those materials is found culpable of the charge presented to her and is hereby found guilty as charged
55. Consequently, I find that the Claimant has proved that the termination of her employment was without valid reason. The termination was therefore unlawful and unfair and I declare accordingly.
56. The other limb that I need to address is whether the Respondent complied with fair procedure.
57. Section 41 of the *Employment Act* provides as follows: -
- "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."
58. RW1 in his testimony maintained that due process was followed before the Claimant was terminated from employment. The Claimant on her part averred that she was not accorded a fair hearing as she was not furnished with all the documents to enable her appropriately defend and respond to the allegation raised against her. She also averred that she was not accompanied by a union member or representative during the disciplinary hearing.



59. I have had the advantage of looking at both the minutes of the disciplinary meeting held on 1<sup>st</sup> October 2021 and of the Ad Hoc Appeals Disciplinary Committee. From the minutes of 1<sup>st</sup> October 2021, it is evident that the Claimant was accompanied by her colleague Mr. Christopher Ngolo and she gave a comprehensive response to the allegations levelled against her. From the foregoing, it is evident that the Claimant was accorded a fair hearing as provided by section 41 of the Employment Act and that as such, the termination was done in accordance with a fair procedure as required by section 45(2)(c) of the Employment Act.
60. Although the Respondent has proved that it followed the due procedure in terminating the Claimant from employment, as I have mentioned earlier, the Respondent failed to prove the existence of valid reasons that led to the Claimant's termination from employment. The Claimant is therefore entitled to compensation for the unfair termination.
61. The Claimant in her Memorandum of Claim had prayed for Kshs 3,104,179.18 as terminal dues comprising 1 month's pay in lieu of notice, salary arrears for the months of August to December 2021, leave dues for the year 2021, service pay and 12 months' compensation for unlawful termination. I will address the prayers under different heads as hereunder:

**a. One-month pay in lieu notice**

Having found that the termination of the Claimant's employment was unfair, she is entitled to pay in lieu of notice. From the Claimant's pay slip of 26<sup>th</sup> July 2021, the Claimant was earning a basic salary of Kshs 101,257.80 which I hereby award her as one month pay in lieu of notice.

**b. Salary arrears for the months of August 2021 to December 2021**

The Claimant submitted that she was not paid salaries from August to December 2021. The Respondent's witness disputed this allegation and maintained that the Claimant was paid all her dues. RW1 further stated that they would supply the court with evidence showing that the Claimant had indeed been paid. However, this was never done. In the absence of any documentation evidencing that the Claimant was paid the said salaries, I am inclined to grant the Claimant this prayer. I therefore award him salaries of August, September, October, November and December 2021 which translates to Kshs 506,289

**c. Leave dues for the year 2021**

The Claimant told court that she did not take her leave and sought to be paid leave dues for the year 2021. This evidence was not rebutted by the Respondent. I award the Claimant Kshs 101,257.80 as leave dues for the year 2021.

**d. Service pay**

Service pay is only due when the employer fails to abide by the provisions of Section 35(5) and (6) of the Act. From a perusal of the Claimant's copy of payslip, the Claimant was a beneficiary of NSSF and as such, she is not entitled to this prayer.

**e. 12 months' compensation**

The Claimant sought maximum compensation for the unlawful termination. Noting that the Claimant had worked for the Respondent for over 11 years, I am of the opinion that 10 months' compensation would be reasonable taking into account all the relevant factors under section 49(4) of the Employment Act. I therefore award the Claimant Kshs 1,012,578.00

62. Consequently, Judgment is entered in favor of the Claimant in the following terms: -



- a. A declaration be and is hereby made that the termination of the Claimant's employment by the Respondent was unlawful and unfair.
  - b. The Claimant is awarded payment of her dues as follows:
    - i. One-month's salary in lieu of notice -Kshs 101,257.80
    - ii. Salary arrears for months of August 2021 to December - Kshs 506,289
    - iii. Leave dues -Kshs 101,257.80
    - iv. 10 months' compensation -Kshs 1,012,578.00  
Total - Kshs 1,721,382.60
    - v. The Respondent to issue the Claimant with a Certificate of service.
63. The Claimant is awarded costs and interest which shall accrue at Court rates from the date of Judgment until payment in full.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 17TH DAY OF OCTOBER 2024**

**MAUREEN ONYANGO**

**JUDGE**

