



**Ondari v National Hospital Insurance Fund (Civil Appeal
83 of 2019) [2025] KECA 687 (KLR) (11 April 2025) (Judgment)**

Neutral citation: [2025] KECA 687 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 83 OF 2019
S OLE KANTAI, A ALI-ARONI & JM MATIVO, JJA
APRIL 11, 2025**

BETWEEN

LAWRENCE NYAMICHABA ONDARI APPELLANT

AND

NATIONAL HOSPITAL INSURANCE FUND RESPONDENT

(An appeal from the Judgment of the Employment & Labour Relations Court of Kenya at Nairobi (Abuodha, J.) delivered on 28th September, 2018 in ELRC No. 1218 of 2014)

JUDGMENT

1. To contextualize the dispute, a brief overview of the relevant history will suffice. The appellant filed a statement of claim dated 7th July 2014, seeking a declaration that his termination from employment was unfair and for reinstatement back to work without loss of any benefits and allowances. In the alternative, he sought for 3 months' pay, accrued leave, salary for the remainder of the period (6 years) to his retirement, 12 months' salary as compensation for unfair termination, all totaling to Kshs. 33,002,200/=.
2. It was the appellant's case that in 1985, he was employed and appointed by the Public Service Commission as an Accountant II and deployed to the Ministry of Agriculture and Livestock; on 1st March 2000 he was transferred to the respondent as a Senior Accountant and thereafter, rose through the ranks due to his good work culminating with his confirmation on 1st December 2006, as General Manager Finance and Control. However, on 21st November 2013, he was interdicted due to an allegation of failure to exercise prudence in the execution of his responsibilities, resulting in the loss of public funds. He responded with a letter dated 2nd December 2013, exonerating himself.
3. Furthermore, in a letter dated 27th February 2014, the respondent wrote to him, raising several issues and giving him only a day to respond, which was insufficient. Nevertheless, he replied with a letter dated 28th February 2014 to the respondent's Chief Executive Officer (CEO). On 10th March 2014,



his services were terminated based on gross misconduct based on investigations done by the Efficiency Monitoring Unit, (EMU) yet the said report had exonerated him from blame.

4. The suit was opposed. The respondent filed a memorandum of response dated 25th September 2015. It was the respondent's case that the appellant was interdicted on allegations of improper performance of his duties, that the appellant's response amounted to partial admission of his failure to perform and used the other general managers and his juniors as scapegoats, and that there was actual loss of public funds in the sum of Kshs. 26,596,878/= due to the acts and omissions of the appellant; that the loss was determined from the respondent's request for 3 separate audit investigations and later a full investigation done by the EMU; that the appellant was aware of the charges against him for 3 months; was availed the EMU report several days before, he therefore had time to study the issues raised against him; that the appellant was allowed to defend himself before the board in person eleven (11) days later; that he did not ask for an extension of time; and that in all the respondent had established valid reasons for the appellant's dismissal.
5. In its judgment, the trial court was not persuaded that the appellant was not afforded a fair hearing before terminating his contract and dismissed the suit.
6. Aggrieved by the judgment, the appellant raised six (6) grounds of appeal in his memorandum of appeal dated 20th February 2019, in which he seeks that the appeal be allowed, the judgment of the trial court be set aside, and he be awarded the prayers in his statement of claim and costs of the appeal.
7. The grounds of appeal are as follows: that the learned judge erred in law and fact: by holding that the termination of the appellant's contract of employment was lawful and fair contrary to the evidence adduced and the provisions of sections 41, 43 and 45 of the *Employment Act* (the Act); in holding that it was not for the court to audit the truth of the reasons for termination of employment contrary to the requirements of section 45 of the Act and in failing to appreciate the law in evaluating the pleadings and evidence placed before him and consequently arrived at wrong conclusions; in dismissing the appellant's claim on the basis of not having been proved contrary to the evidence on record; in finding that the court was persuaded that there existed reasonable grounds for termination of the appellant's contract of employment contrary to the legal requirement of proof of valid reasons for termination and in finding that the appellant was given a fair hearing before termination thus arriving at an erroneous conclusion.
8. In support of the appeal the appellant's counsel filed submissions dated 12th September 2019, where he urged that the Act places a statutory duty upon the employer to prove the reasons for termination; that the judge erred in stating that it was not for the court to audit the truth of the reasons for termination of the appellant; that due to the statutory burden under section 43 of the Act, the employer is required to prove that the termination was fair which in this case was not done, that the court under paragraph 26 of the judgment did not interrogate the reasons for termination. The trial court merely recognized that the respondent had some reasons for terminating the appellant. However, the court did not interrogate the reasons for the termination, thus shifting the burden of proof to the appellant to interrogate the validity of the reasons for termination.
9. Learned counsel submitted further, that the learned judge at paragraph 26 of the judgment, did not apply the principles set out at section 45(4)(b) of the Act as the only role that the court was concerned with was to ensure that the reasons advanced by the respondent were reasonably believed to exist, regardless of whether the same were valid and/or proven; that the judge erred in not giving the matter a holistic approach by failing to consider whether the respondent acted by the law and equity, thereby arriving at a wrong decision, denying the appellant the right to a fair administrative action. Further learned counsel contended that the learned judge failed to consider that; -



- a. In his letter dated 2nd December 2013, the appellant gave the background of the health care providers Buruburu Health Services Anchor and Thika Road Health Services (Buruburu Health Centre), who had split from Buruburu Health Centre, hence the irregularity which was not caused by the appellant, who later remedied the situation by recommending that the two healthcare providers be issued different codes.
 - b. An internal memo dated 7th January, 2012, reference HF/A/120B VOL.1/037 from the Manager Accreditations and Quality Assurance to the effect that Buruburu Health Centre were in conformity with the requirements of the respondent and proceeded to request the appellant to provide code numbers.
 - c. The appellant, on the advice of the Manager Accreditations and Quality Assurance stated that the health care providers had complied with the requirements of the respondent, and therefore, he issued out codes to all the health providers presented, and the code serial started with 8000324 up to 8000350, and not a single code was skipped or issued irregularly.
 - d. The appellant issued the codes following the respondent's procedures, and not a single code was issued without proper procedure.
 - e. The codes in contention were issued with the knowledge of the respondent's Chief Executive Officer, as well as with his endorsement on the same authorizing the issuance of codes to the two facilities that were once a single entity but had since split into two due to family wrangles. This demonstrated that the appellant acted in good faith and the CEO ratified his actions.
 - f. The letters assigning new codes to the respective healthcare providers were sent out by the respondent's CEO.
9. In support of the assertion that the appellant was wrongly dismissed, learned counsel relied on the case of *Stephen S. Pareno vs. The Judicial Service Commission Civil Appeal No. 120 of 2004*, where the court held that the appellant was wrongfully dismissed from employment without following the laid down procedure in the disciplinary code of the Judicial Service Commission. He also relies on *Jared Aimba vs. Fina Bank Limited Civil Appeal No. 198 of 2011*, where the court stated that under sections 41 and 45 of the Act, termination for a valid reason or on grounds of misconduct is supposed to be accompanied by a fair process involving notification of the employee of the grounds and affording the employee an opportunity to be heard. He lastly relied on the *Kenfreight (E.A.) Limited vs. Benson K. Nguti Civil Appeal No. 31 of 2015*, where the court stated that the award of 12 months' gross salary was in consideration of the respondent's rank and the difficulty he was likely to face in obtaining another employment after his unfair dismissal.
 11. On the part of the respondent, learned counsel filed submissions dated 20th January 2020. He condensed his response into three issues namely; whether the trial judge erred in holding that the appellant's termination was lawful; whether the judge erred in holding that it is not for the court to audit the truth of the reasons for termination of employment; and whether the judge failed to appreciate the law when evaluating the pleadings and evidence, thus arriving at a wrong conclusion.
 12. Learned counsel relied on the case of *Association for the Physically Disabled of Kenya vs. Kenya Union of Domestic Hotels Education Hospital and Allied Workers Union & Another [2018] eKLR* where this Court referred to *Selle & Another vs. Associated Motor Boat Company Limited & Others [1968] 1 EA 123*, where this Court summarized the principles to be followed in a first appeal.
 13. On the second issue, learned counsel submitted that the finding of the trial court was based on the principle that the courts must refrain from substituting their own views with that of the employer



in determining whether or not the reasons for termination are valid and that the court's duty is to determine whether the decision to dismiss was valid and fair within the circumstances of the employer. In support, learned counsel relied on the cases of *CFC Stanbic Bank vs. Danson Mwashako* [2015] eKLR, *Reuben Ikatwa & 17 Others vs. Commanding Officer British Army Training Unit Kenya & Another* [2017] eKLR and *Samuel Kalomit Murkomen vs. Telkom Kenya Limited* [2017] eKLR. In pursuing the argument further counsel relied on the South African case of *Nampak Corrugated Wadeville vs. Khoza* [1998] ZALAC 24, where the court held that the determination of an appropriate sanction is a matter which is mainly within the discretion of the employer.

14. Regarding whether the respondent had a fair and valid reason for terminating the appellant's employment, learned counsel submitted that the termination was in line with section 43 of the Act, as the reasons for termination were matters that the respondent genuinely believed existed at the time of termination. The violations revealed by the various audit reports were matters of financial control which fell within the docket headed by the appellant. The appellant bore responsibility, and it was reasonable for the respondent to have taken appropriate sanction. Learned counsel cited in support the case of *British American Tobacco (K) Limited vs. Kenyan Union of Commercial Food and Allied Workers (KUCFAW)* [2019] eKLR, where the court held that if there are reasonable grounds for terminating one's employment, and the statutory procedure followed, an employer cannot be accused of unlawful dismissal of an employee. Learned counsel also relied on the case of *Judicial Service Commission vs. Gladys Boss Sholei & Another* [2014] eKLR, where the court referred to the decision in *British Leyland UK Limited vs. Swift* [1981] IRLR 91, and stated that if no reasonable employer would have dismissed him, then the dismissal was unfair but if a reasonable employer might have reasonably dismissed him then the dismissal was fair.
15. Regarding the discrimination claim, learned counsel contended that the same is unwarranted, as the respondent took out disciplinary proceedings and eventually terminated all the general managers whose departments were responsible for alleged violations; the submission by the appellant that the respondent's CEO ratified the issuance of the codes is misleading; further this is a new matter being raised at paragraph 24 of his submissions, which ought not to be considered as was held in the case of *Oi Pejeta Ranching Limited vs. David Wanjau Muhoro* [2017] eKLR, where the court stated that the jurisdiction of the appellate court is to look into issues that were presented before the trial court. It further noted that a court cannot be said to have erred on an issue that was never argued before it. Furthermore, the appellant's reliance on section 13 of the National Hospital Insurance Fund does not assist him, as it protects officers from liability for bona fide conduct but does not prevent the respondent from terminating an employee who has neglected or deliberately failed to perform their duties.
16. On whether the termination procedure was fair and done within the law, learned counsel cited the case of *Janet Nyandiko vs. Kenya Commercial Bank Limited* [2017] eKLR, where the court held that the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in deciding to dismiss the employee; the communication of that decision to the employee and the handling of any appeal against the decision. Learned counsel submitted that the termination procedure was fair and in compliance with section 41 of the Act and the principles of fairness in that:
 - a. The appellant was furnished with the audit report of November 2013 and was present in the board meetings of 6th and 14th November 2013, when the same were discussed;
 - b. The interdiction letter of 21st November 2013 duly furnished the appellant with the reasons that disciplinary action against him was being considered, and the appellant was given a copy of the preliminary audit report. In return the appellant submitted in writing his representations to the issues that had been raised against him on 2nd December 2013;



- c. The appellant was given a copy of the EMU Audit Report and was further invited to a special board meeting on 25th February 2014, which discussed the findings of the said report;
 - d. The appellant was thereafter issued a notice to show cause on 27th February 2014, which confirmed the charges outlined in the letter of 21st November 2013, and further specified the issues that had arisen from the EMU Report. The appellant was allowed to make written representations on 28th February, 2014, and was further invited to a hearing before the board on 10th March, 2014, to make verbal representations.
 - e. The appellant appealed against the decision to terminate his employment. The appeal was considered and declined in accordance with the provisions of the Respondent's Human Resource Procedure Manual.
 - f. The termination was handled by the respondent's board.
17. This being a first appeal, it is our duty, in addition to considering submissions by the appellants and the respondents, to analyze and re-assess the evidence on record and reach our own independent conclusions on the matter. This approach was adopted in the case of Ng'ati Farmers' Co- Operative Society Ltd. vs. Ledidi & 15 Others [2009] KLR 331 where the court stated:
- “An appeal to this Court from a trial by the High Court is by way of re-trial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that, this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect. In particular, this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”
18. We have considered the record of appeal, the parties' submissions, case law cited, and the relevant law. In our view, the case hinges on two key issues: whether the respondent had valid reasons for terminating the appellant's contract and whether the respondent was afforded a fair process.
19. From the record, the appellant, who had risen through the ranks in his career to become the Respondent's General Manager Finance and Control, was confronted with an interdiction on 21st of November 2013, following a preliminary audit report raising several concerns and alleging that he had failed to act properly and had failed to observe prudence in the execution of his duties, which inter alia included:
- i. Un-procedural and flawed accreditation of Thika Road Health Services (Buruburu Health Centre). The said facility having been assessed by a staff from a branch in whose jurisdiction it did not fall and the NHIF relevant branch not being aware of its existence.
 - ii. A healthcare provider that was gazetted in December 2012 had been allowed to provide services to Civil Servants and Disciplined Forces well before January 2012.
 - iii. The said providers were provided with unique identifier codes different from the regular NHIF system for the facilitation of payment.
 - iv. Irregular payments to one provider for the period 25th September 2012 to 30th April 2013, for Kshs. 3,792,233 though the members had been capitated at a different facility.



- v. The amount mentioned above was processed at the end of the financial year 2012/2013 on the 26th of June 2013 and released on 2nd July 2013, against the Internal Auditor's Recommendations.
20. Following the interdiction, EMU conducted an independent and comprehensive investigation. According to the appellant, the report exonerated him from the allegations; however, the respondent's position is that the EMU report confirmed the acts of omission and negligence for which the appellant was accused.
21. In his statement of claim, the appellant averred that his termination was unfair as the respondent neither did nor established a valid reason for the termination of his services, thus acting in breach of sections 43 and 45 of the Act. He further claimed that his termination was carried out in a discriminatory manner and against the principles of fair administrative action as outlined in Article 47 of the Constitution and that the allegations could not be attributed to him, nor did the respondent lose any funds.
22. In response to the claim, the respondent denied breaching sections 43 and 45 of the Act in the manner alleged or at all. Further the respondent claimed that the appellant did not exonerate himself from blame, had admitted his failure to perform his duties as required and that the acts and/or omissions on the part of the appellant resulted in loss of colossal amounts of public funds as established by three separate audit reports; a preliminary audit report; a substantive internal audit report and a full investigation by the EMU, which investigations revealed loss of over Kshs. 26,596,878.
23. Section 43 of the Act places a statutory requirement upon the employer in the following terms:
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.
24. In the letter terminating the appellant's contract dated 10th March 2014, the respondent stated in part as follows:
- “An independent investigation was further carried out by the Efficiency Monetary Unit, and the findings confirmed acts of omission and negligence as noted in the audit report...
- The report was tabled before the board in their meeting held on 25th February 2014, which resolved that you be issued with a show cause letter to answer specific charges as per the findings and recommendations of the said report. Letter ref. HF/S/0018/1/134 dated 27th February 2014, charging you with gross misconduct refers.
- You are further informed that the Board of Management, in their subsequent meeting held on 10th March 2014 deliberated and considered your written and verbal representation but found no sufficient grounds or merit to exonerate you from the charges enumerated in our letter under reference.



Accordingly, a case of gross misconduct was established against you which is in breach of clause 12.21.1(d), 12.21.1j(v) and 12.21.3(c) of the Funds Human Resource Procedural Manual.”

25. Section 43(1) of the Act requires the employer to have a valid reason or reasons for terminating employment. The respondent provided reasons for terminating the appellant’s services as stated above. We understand the appellant to be saying that the reasons given by the respondent for terminating his employment were not valid. Section 43(2) requires that, in terminating employment, the employer must genuinely believe that there are reasons to terminate employment at the time. In interpreting section 43(2) of the Act, this Court in the case of Kenya Power & Lighting Company Limited vs. Aggrey Wasike [2017] eKLR stated as follows:

“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.”

Similarly, this Court held the same view in Kenya Revenue Authority vs. Reuvel Waithaka Gitahi & 2 Others [2019] eKLR, where it stated:

“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.”

26. The interdiction letter, the internal audit report, and the EMU report all clearly state that the appellant was being blamed for failing to perform his duties with due diligence to safeguard the respondent and for causing the loss of public funds due to his acts and omissions. Finally, the termination letter gave the said reasons for terminating the appellant’s employment.
27. Upon receiving the preliminary report implicating the appellant, the respondent involved the appellant, where the report was discussed. It did not stop there; further investigations were conducted, after which the appellant was asked to respond, which he did. An independent report was commissioned and obtained from EMU, all of which implicated the appellant. If an individual is deemed negligent in their actions or fails to perform their duties, leading to the organization losing funds, what other valid reason would an employer require?
28. The law requires that employment be following fair practices.

Section 45(1) & (2) of the Act provides:

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) (ii) related to the employees conduct, capacity or compatibility; or based on the operational requirements of the employer; and
 - c. that the employment was terminated in accordance with fair procedure.



3. An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.
29. The appellant complained that the termination process was unfair; he also blamed the trial court for finding that the court's duty was not to verify the truth of the reasons advanced for terminating employment. According to him, the trial court's reasons are contrary to and contradict Section 45 of the Act. In several of its decisions, this Court has held that it has no supervisory role and is not required to substitute the thoughts of an employer, where the employer has a valid reason to terminate employment and where due process has been followed. In the case of *Kenya Airways Limited vs. Aviation & Allied Workers Union Kenya & 3 Others* [2014] eKLR, this Court stated, albeit in a redundancy case, that:
- “As long as the employer genuinely believed that there was a redundancy situation, any termination was justified, and it was not for the court to substitute its business decision of what was reasonable. The Court has no supervisory role.”
30. In the case of *Kenfreight (E.A.) vs. Benson K. Nguti* Civil Appeal No 31 of 2015 2016 KECA 688 (KLR), this Court had this to say:
- “The next and more critical question is whether the termination was unfair. It is considered unfair to terminate contract of service if the employer fails to demonstrate that the reason for the termination is valid and fair; that the reason related to the employee's conduct, capacity, compatibility or is based on the operational requirements of the employer. The employer must also prove that the termination was in accordance with fair procedure. Section 43 specifically places the burden to prove that the termination was fair on the employer”.
31. The respondent demonstrated which the appellant has not disputed, that when the audit was done the appellant was furnished with the audit report of November 2013 and was present in the board meetings of 6th and 14th November 2013, when the same were discussed; further when the respondent interdicted him, vide the letter of 21st November 2013, he was duly furnished with a copy of the preliminary audit report with reasons why disciplinary action against him was being considered. In return, the appellant submitted in writing his representations to the issues that had been raised in a letter of 2nd December 2013. After the EMU audit was done, the appellant was given a copy of the EMU audit report and was further invited to a special board meeting on 25th February 2014, which discussed the findings of the said report; the appellant was thereafter issued with a notice to show cause on 27th February 2014, which confirmed the charges outlined in the letter of 21st November 2013 and further specified the issues that had arisen from the EMU's report. The appellant was allowed to make written representations on 28th February 2014, and was further invited to a hearing before the board on 10th March 2014 to make verbal representations; when the respondent terminated the appellant's services, the appellant appealed against the decision; the appeal was considered and declined under the provisions of the Respondent's Human Resource Procedure Manual.
32. From the above chronology of events, starting with the interim audit report, which was discussed in the presence of the appellant, the appellant was given opportunities to make representations and to be heard on the allegations. In the end, the respondent found the appellant had not exonerated himself and believed that there were reasons to terminate his services. We agree with the trial court that indeed it is not for the court to interrogate the said reasons. Further, we are satisfied that the processes leading to the appellant's termination were fair.



33. In the end, we do not find merit in the appeal, we dismiss the same with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF APRIL, 2025.

S. ole KANTAI

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JUDGE OF APPEAL ALI-ARONI

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

