



**Mutua v Gulf Energy Limited (Cause 1454 of 2018)
[2025] KEELRC 238 (KLR) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 238 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1454 OF 2018
K OCHARO, J
JANUARY 30, 2025**

BETWEEN

MARK KITHUKA MUTUA CLAIMANT

AND

GULF ENERGY LIMITED RESPONDENT

JUDGMENT

Introduction

1. By Statement of Claim dated 15th October 2018, the Claimant sued the Respondent seeking the following reliefs;
 - a. Compensation of 12 months' salary for unlawful termination @Kshs.605,345.83.
 - b. KShs. 3,329,402.00 being service pay calculated from the basic pay of 15 days for eleven (11) years of service paid 50% on the termination date.
 - c. Interests on (a), and (b) above
 - d. Costs of the suit
2. The Respondent resisted the Claimant's Claim through a Statement of Response dated 14th November 2018. The Respondent avers that the Claimant was lawfully and justifiably summarily dismissed from his employment and that the orders sought cannot be availed to him in the circumstances.

Claimant's case

3. At the hearing, the Claimant adopted his witness statement filed herein as his evidence in chief. He stated that he first came into the employment of the Respondent as a Consumer Sales Executive on 1st October 2007. He was later promoted to the position of Aviation Operations Manager on 1st November 2012, on a permanent basis.



4. He asserted that at all material times, he worked dedicatedly and for the good interest of the Respondent, targets. These earned him the promotion above stated and bonus.
5. The Respondent encountered significant financial challenges, including a loss of 7,000 metric tonnes of Heavy Furnace Oil at its Mombasa depot, prompting it to initiate cost-cutting measures across all departments, including the Claimant's.
6. To address the financial crisis, the Respondent convened a meeting between the management team and the board of directors to develop a recovery strategy. As part of this strategy, the management team was verbally instructed to reapply for their positions. He did not reapply for his role, as in his view, the instructions were without procedural propriety. Instead, on 20th June 2018, he wrote to the Managing Director proposing an amicable separation and a continuity plan for the Aviation Department.
7. Subsequently, the Respondent's Human Resources Department sent him a Release and Mutual Separation Agreement on July 3, 2018, for review and execution. However, he found the agreement to contain punitive and restrictive clauses unfavourable to his career prospects, particularly in the energy sector. He returned the agreement with proposed amendments. The Respondent rejected his proposal leading to the collapse of the bid for a mutual separation. Thereafter, he was subjected to hostile working conditions. This hindered his ability to perform his duties effectively.
8. The Claimant stated that to his surprise, the Respondent issued him with a letter dated 10th July 2018 that served as a suspension notice and invitation for him to a formal disciplinary and grievance hearing. He was accused of intentionally concealing a client's [East African Safaris Limited (Fly Sax) and Five Forty Aviation Ltd (Fly540)] post-dated cheques and refusing to present them for banking on their due dates.
9. The accusations were not founded. According to his records, the subject cheques had been collected from the Client by courier and transmitted to the Respondent's treasury accountant, Ms Joy Muita.
10. He asserted that he was involved in email correspondence with the Respondent's customers on bounced cheques. Such cheques were replaced through Real Time Gross Settlement [RTGS]. The action was undertaken in response to the communication from the Finance Department on the bounced cheques. The customers confirmed the replacement via email.
11. Through his letter dated 13th July 2018, he denied the accusations that the Respondent had levelled against him and tendered a resignation. The resignation was intended to take effect immediately. Further, it set in with an immediate commencement service of a three-month notice period. The service was to facilitate a smooth handing over of his role and responsibilities as per his contract.
12. On the 13th of July 2018, the Respondent rejected the resignation. According to him, the rejection was null and void as he had ceased to be its employee on the date of his resignation letter.
13. He alleged that without notice, he was summarily dismissed from employment by the Respondent, through its letter dated 20th July 2018. In the letter, the Respondent indicated that it had decided to summarily dismiss him from employment on four counts.
14. Through the said letter, the Respondent offered to pay him his terminal benefits thus; KShs 470,231 being salary for the month of July up to 20th July 2018, KShs, 196,737.39 being accrued but untaken leave days as of 20th July 2018.
15. Cross-examined by Counsel for the Respondent, the Claimant testified that under Clause 8 of the appointment letter, on becoming permanent and pensionable, he entered into a pension scheme.



Further, he was a member of the National Social Security Fund. At all material times, he was remitting contributions to the Fund.

16. He further stated that he first sought a mutual separation from the company on 20th June 2018. This followed a discussion between the Respondent's Chief Executive Officer and him. The Chief Executive Officer urged him to seek an amicable separation.
17. On being asked to reapply for their roles, three other Heads of Department, and him declined to. The Respondent's assertion that they were asked to write commitment letters is untrue. If that were true, nothing could have impeded him from committing. In the various meetings that were held to come up with a strategic framework to pull the Respondent from the financial crisis, the Heads of Departments, including him, had made commitments.
18. He had a job description. Part of his responsibilities was to report on activities within the aviation space. Additionally, he was to reconcile Customers' accounts.
19. East Africa Safari Air Limited was one of the Customers under his docket. Just like other Customers, the Company had a credit limit. The Aviation Manager, the CEO and the accounts department could jointly oversee these accounts.

Respondent's case

20. The Respondent presented one witness, Paul Limoh to testify on its behalf. The witness adopted his statement filed herein as his evidence in chief. He stated that by a letter dated 7th September 2007, the Respondent employed the Claimant as its Consumer Sales Executive with effect 1st October 2007. Later by its letter dated 29th October 2012, the Respondent appointed the Claimant as the Aviation Operations Manager. This second contract provided for one month's termination notice.
21. The terms of the Claimant's employment were amended by a letter dated 4th February 2013 to provide for three months' termination notice.
22. In his role, the Claimant was charged with the responsibility of managing the accounts of the Respondent's customers, proactively recovering debts, and taking care of the Respondent's commercial interests.
23. On May 31, 2018, the Respondent convened a meeting bringing together its Board and Management team to deliberate on its performance, recovery, and turn-around strategy. The Claimant was present at the meeting. During the discussion, the Board sought confirmation of the management team's commitment to their roles and asked for their proposals to support the turn-around strategy. The Claimant, with two other managers, did not submit the requested statements or proposals.
24. The witness stated that the Claimant and the other managers were not verbally instructing the management team to re-apply for their jobs.
25. By a letter dated 20th June 20, 2018, the Claimant requested an amicable separation. Consequently, the Respondent prepared a release and separation agreement, however, the parties failed to reach an agreement on the terms of separation. The mutual separation bid collapsed, as a result.
26. In or about June 2018, it came to the Respondent's notice that two of its customers, East African Safaris Limited and Five Forty Aviation Limited, were significantly indebted to it. The situation was partly attributed to the Claimant's failure to ensure that his team banked post-dated cheques from the customers as and when they were supposed to.



27. It was further discovered that the post-dated cheques were not banked after the Claimant had unprocedurally agreed to the customers' requests not to. As a result of his negligent discharge of his duties, the two customers exceeded their credit limit.
28. Following the premises, the Respondent suspended the Claimant from employment on July 10, 2018, and invited him to a disciplinary hearing scheduled for July 16, 2018. Instead of responding to the suspension letter, the Claimant submitted an undated resignation letter on July 13, 2018, giving three months' notice.
29. Due to the Claimant's two-day sick leave, the hearing was rescheduled to July 18, 2018. However, the Claimant declined to participate, asserting that he was no longer an employee of the Respondent and, therefore, not subject to its disciplinary processes.
30. The Respondent gave the Claimant a third opportunity to attend the disciplinary hearing, which he also did not seize.
31. The Respondent's letter dated 10th July 2018, clearly informed him of; the reasons forming the basis of the disciplinary action; the date and time for the disciplinary action; his right to be accompanied by a fellow employee of his own choice; and the right to produce written statements and to invite witnesses to give evidence in support of his defence.
32. The witness stated that as a result of the Claimant's failure, to respond to the issues raised in the Respondent's letter dated 10th July 2018, and attend the disciplinary hearing, and upon considering the facts that formed the basis for the disciplinary process, the Respondent decided to dismiss him summarily from employment. The decision was communicated through its letter dated 20th July 2018.
33. Following the termination, the Respondent paid the Claimant terminal dues amounting to KShs. 666,968.39 and issued him with a certificate of service.
34. Cross-examined by Counsel for the Claimant the witness stated that the Claimant didn't state anywhere in his correspondence to the Respondent that he feared that the disciplinary process wasn't going to be fair.
35. His job description placed on him, inter alia the responsibility to ensure that the customers didn't exceed their credit limits.
36. As evidenced by his email dated 9th July 2018, he could follow up on the cheque collections from Fly 540 Limited.
37. The email dated 19th November 2018, by one Nyakundi confirmed that the reconciliation process didn't reveal any discrepancies. Further, any disputes.
38. In reaction to the Respondent's proposed mutual separation agreement, the Claimant protested Clause 8.2, the restrictive clause as in his view, the same could inhibit his ability to get another job and more especially within the industry.
39. The Respondent ended up filing a suit against the customer for compensation for the loss that it suffered.

Analysis and Determination.

40. I have carefully considered the pleadings by the parties, their evidence and submissions, and the following issues emerge for determination;



- I. Whether the Claimant ceased to be an employee of the Respondent on 13th July 2018.
- II. Whether the summary dismissal against the Claimant was fair.
- III. Whether the Claimant is entitled to the reliefs sought.

Whether the Claimant ceased to be an employee of the Respondent on 13th July 2018.

41. There was no dispute that by his letter undated but received by the Respondent on 13th July 2018, the Claimant wrote;

“I would like to submit my resignation from my position of Aviation Operations Manager with effect from 13th July 2018 and commence serving 3[three] months’ notice as stipulated in the amendment of my employment contract agreement dated 4th February 2013, since my working environment has made my job untenable.....”

It becomes imperative at this juncture for this Court to pronounce itself as to whether this letter brought to the termination of the employer-employee relationship between the Respondent and the Claimant effective the 13th of July 2018, thus removing the latter from under the jurisdiction of the former for purposes disciplinary proceedings.

42. The necessity flows from the fact that on 19th July 2018, the Claimant wrote to the Respondent asserting that having resigned on 13th July 2018, he no longer was an employee of the Respondent, and therefore couldn’t present himself for the disciplinary hearing that had been slated for that day.
43. The Claimant’s Counsel didn’t address this Court on this point in any sufficient manner, notwithstanding its centrality in this matter. The Respondent’s Counsel on her part submitted that the Claimant’s position that after 13th July 2018, he was no longer an employee of the Respondent and, therefore, not subject to disciplinary procedure is inaccurate. Counsel placed reliance on the case of Kennedy Obala Oaga v Kenya Ports Authority [2018] eKLR. which reiterated the decision of the Labour Court of South Africa in Mtati v KPMG [Pty] Ltd [2017] BLL 315 [LC], that;

“If the employee has given notice, and is serving a notice period, the employer retains jurisdiction to discipline the employee until the notice takes effect.”

44. Inarguably, resignation is one of those ways that an employer-employee relationship can be terminated at the initiation of the employee. As to when the such termination takes will always depend on how the employee has expressed his intention. Where the employee’s intention to resign is expressed through a document, the entire of the document must be read. Neither paragraph nor line should be read in isolation from the others.
45. Employee resignation often presents one of these two scenarios, where it causes an immediate termination of the employment relationship or where the termination is effective a future date.
46. In the first scenario, often, the termination is without the contractual or statutory notice. It equates a repudiatory breach of the employment contract. The employee will be liable to pay damages in form of notice pay for the breach. In the second scenario, the resignation document act as a termination notice, with the termination taking effect on the last day of service in the notice period. I have no doubt in my mind that during the notice period, the employee remains in, the employment, the control, and subject to the internal processes, of his employer. During the notice period, the contract remains alive.



47. By reason of the foregoing premises that I reject the Claimant's postulated position that upon issuing the undated "resignation letter" he ceased to be an employee of the Respondent and therefore not subject to its disciplinary processes while serving the notice period. As a result, I hold that the termination of the Claimant's employment didn't take effect on 13th July 2018. But for the summary dismissal, the termination could have taken effect on the last day of the notice period.

Whether the Summary dismissal against the Claimant was unfair.

48. Section 45 of the *Employment Act*, as rightly submitted by Counsel for the parties prohibits unfair termination of an employee's employment. According to the provision, an unfair termination of employment is one that has been reached without adherence to the tenets of procedural fairness and, based on a valid and fair reason[s].
49. The duty to prove that the termination was procedurally fair and anchored on a valid and fair reason[s] is always on the employer. See *Pius Machafu Ishindu vs Lavington Security Guards Limited* [2017] eKLR.
50. The Claimant's Counsel argued that the summary dismissal was procedurally unfair as the Claimant was not heard. In the context of Section 41 of the *Employment Act* which provides for a mandatory procedure that must be conformed to whenever an employer contemplates terminating an employee's employment, I am challenged to understand the submissions on want of procedural fairness in the process that led up to the decision to dismiss.
51. For the employer to successfully argue that the termination of an employee's employment or summary dismissal of an employee from employment was procedurally fair, they must demonstrate that; the employee was notified that a disciplinary action was contemplated against him and the grounds the basis for the action; the employee was allowed adequate opportunity to prepare and make representations on the grounds; and that they considered the representations before making the final decision.
52. From the material presented before this Court, it is clear that the mandatory procedure was complied with. By its letter dated 10th July 2018, the Claimant was informed of the accusations against him and invited to a disciplinary hearing where he could defend himself against the accusations. Misguidedly, the Claimant failed to seize the opportunity accorded to him to defend himself, on the premise that he was no longer an employee of the Respondent to be subject to its disciplinary processes. Knowingly or unknowingly, he visited on himself a grave prejudice. He cannot be heard to blame the Respondent.
53. Where an employee is availed an opportunity to be heard on his defence against the accusations against him but nonetheless fails to utilise the opportunity as was in this case, the employee will be estopped from contending that he wasn't heard.
54. In the upshot, I find that the Summary dismissal against the Claimant was procedurally fair.
55. The Respondent believed that the Claimant had misconducted himself in the manner that was set out in the letter dated 10th July 2018. The believe could only be disabused at the disciplinary hearing by the employee rendering his defence against the allegations against him. Otherwise, on the basis of the material that stirred the belief, the employer will reasonably arrive at the decision to terminate the employment of that employee who failed to present a defence. In the circumstances of this matter, any reasonable employer could terminate the Claimant's employment as did the Respondent, his employer.
56. In conclusion, the summary dismissal against the Claimant was procedurally and substantively fair.



Whether the Claimant is entitled to the reliefs sought.

57. Having failed to demonstrate that the summary dismissal against him was unfair, the compensatory relief sought pursuant to the provisions of section 49[1][c] of the Employment Act cannot be availed to the Claimant.
58. The Claimant didn't controvert the Respondent's evidence that he was per his contract of employment a member of a pension scheme. Further, he wasn't a member of NSSF. In light of the unrebutted evidenced, Section 35 of the Employment Act cannot allow this Court to award service pay in favour of the Claimant.
59. In the upshot, I find the Claimant's claim without merit. It is hereby dismissed. Each party to bear its own costs.
60. Orders accordingly.

READ SIGNED AND DELIVERED THIS 30TH DAY OF JANUARY 2025.

OCHARO KEBIRA

JUDGE

In the Presence of:

Mr. Nyachio for the Claimant.

Mr. Oloo for the Respondent.

