Salim v Kenya National Shipping Line Limited (Employment and Labour Relations Cause 78 of 2017) [2025] KEELRC 879 (KLR) (13 March 2025) (Judgment)

Neutral citation: [2025] KEELRC 879 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

EMPLOYMENT AND LABOUR RELATIONS CAUSE 78 OF 2017

K OCHARO, J

MARCH 13, 2025

BETWEEN

JAZAK KHAMAS SALIM ..... CLAIMANT

AND

KENYA NATIONAL SHIPPING LINE LIMITED ..... RESPONDENT

JUDGMENT

1. By a statement of Claim dated 27th January 2017, the Claimant initiated the suit herein against the Respondent seeking the following reliefs and orders:

   I. A declaration that the decision of the Respondent to terminate the services of the Claimant was not bona fide, and unlawful.

   II. An injunctive order directing the Respondent to reinstate the Claimant to her previous position of Sales Operations Manager.

   III. In the alternative to prayer 2, an award of compensation for 11 years from the 4th of January, 2017 [84,100x12x11=11,101,200] being the gross pay for the years she was to work until retirement plus interest since the filling of the suit.

   Iv Any other relief this Honourable Court may deem fit and just to grant in the circumstances.

   v Costs of this claim.

2. The Respondent resisted the claim through its Response to the Memorandum of Claim dated 20th February 2017, denying the Claimant's cause of action and her entitlement to the reliefs sought.

3. Upon hearing the parties herein on their respective cases, this Court directed their Counsel to file written submissions. They obliged. Their submissions are on record.

The Claimant's Case

4. At the hearing, the Claimant adopted as her evidence in chief her witness statements dated 19th July 2019 and 9th December 2021, and tendered as her documentary evidence, those documents she filed under the lists of documents dated 19th July 2019[PEXH. -1-7] and 9th December 2021[PEXH.8-10].

5. It was the Claimant's case that she first came into the employment of the Respondent as a Sales Operations Manager on 23rd June 2009. She was afterwards assigned a role as a Commercial Manager in an acting capacity before being moved back to the position of Sales Manager on 1st August,2012.

6. As a Sales Operations Manager, her duties entailed inter alia, marketing cargo for imports and exports.

7. Sometimes on 23rd December, 2016 she received a letter from the Administration Manager informing her alongside other employees to be on a standby to handle issues from respective departments from 23rd to 30th December 2016.

8. Sometimes during the aforementioned period she sent an email to an officer of a company known as Sea Shores International Limited enquiring the rate at which a particular service was to be charged. The enquiry was solely limited to quotation from Sea Shore which offers agency services on inland transport.

9. Mistakenly, the office enquired of, sent the reply on the issues to the Respondent's agents in Spain and not to the office of the Respondent that had made the enquiry and as was expected. This was contrary to what she contemplated.

10. The agency to whom she had sent the enquiry offers agency services of the kind that the Respondent would normally procure to meet its inland carriage needs. She didn't see them as competitors.

11. There was no loss occasioned to the Respondent as a result of the enquiry, as the client on whose behalf the enquiry was made proceeded to enlist the services of the Respondent. The Respondent is a Sea Leg provider as per the charter creating it and does not in reality offer clearing and forwarding services the kind Sea Shore International [Agency Company] were and are engaged in, and consequently have to subcontract when services that relate to inland carriage.

12. She was mandated to make the enquiry which she made as per her job description and indeed it wasn't the first time she was making the enquiry.

13. Previously, similar enquiries had been made by her and other employees of the Respondent and no disquiet had been expressed.

14. The copy of the email of the email did by Sea Shore International Limited on the quotation issue was copied to the Respondent an indication that her correspondence with them was free of any ill motive.

15. It was her further case that the Respondent terminated her employment on 4th January 2017.

16. The Claimant asserted that the Managing Director of the Respondent had no powers to demote or terminate her employment without the approval and consent of the Board as he did. It was contrary to the Respondent's policy.

17. The Managing Director had previously taken decisions relating to her employment contract without the explicit consent of the Board of Directors and in defiance of the orders given by the Board. This is a testament of ill faith on his part.

18. No previous warning had been given to her on issues of breach of confidentiality or conflict of interest that would arise as a result of making enquiry of the kind she made nor had there been a warning given of issues relating to her performance at the place of work.

19. After being served with the Respondent's witness statement, and bundle of document's, the Claimant filed a supplementary witness statement in which she stated that the Respondent and Seashore International Limited did not offer the same services in the shipping industry. The former is a non-vessel common carrier operator or a shipping line operator without a vessel whilst the latter is a clearing and forwarding agent. Hence the two aren't competitors, rather they work symbiotically.

20. The Respondent had never given any of its staff a work manual. As a Sales & Operations Manager, it was well within her job description as contained in her contract to make the enquiries for an inland haulage quotation from a clearing and forwarding agent who had a working history with the Respondent.

21. The Respondent had an in-built check and balance system that was fool-proof, as such, the Respondent's claim that she was engaging the other company singlehandedly is baseless and unfounded.

22. There was no provision given to the Sales & Operations Manager or any other staff on appointment for declaration of conflict of interest. Moreover, the Respondent already had an existing working relationship prior to her employment.

23. She further stated that as the Sales Manager in charge of the entire commercial department, there was no time she failed to meet her targets.

24. In the morning of 4th January 2017, she was summoned to the office of the Managing Director, where she was subjected to questioning in the presence of the Administrative Manager. The Administrative manager was then asked to give her a termination letter and collect any property that belonging to the Respondent but which was in her possession.

25. Cross examined by Counsel for the Respondent the Claimant testified that it wasn't true that only employees serving under Grade M4 and above could not be dismissed without the approval of the Board of Directors. The Board's approval was also a pre-requisite for termination of the employment of Heads of Departments.

26. The Claimant further testified that on 4th January 2017, she was summoned to the Managing Director's office. She wasn't aware that the meeting into which she was being summoned, was to be a disciplinary meeting. She stated that in the meeting, she was not given an opportunity to respond. Often not allowed to complete answering to questions.

27. In the meeting, she was questioned on the email she had sent on 29th December 2016. The addressee of the email was Kabar Komoro Sospeter, her spouse. She did not copy the email to any person.

28. Under the email, she forwarded an email that had been sent on 28th December 2016 to the Respondent by Martel Montel Martamontel Works, for Romeu YCIA, who were the Respondent's shipping agents based in Spain.

29. She further stated that by forwarding the email she wasn't in any manner divulging information that was confidential. Further, on being questioned about it and the Respondent's, her answer was that she hadn't done anything out of the ordinary.

30. The Respondent didn't suffer any loss as a result of the forwarding of the email to the agents in Spain.

31. Referred to various invoices [PEHX-10] for comparison purposes, she stated that advice/invoice dated 10th January 2010, the Respondent's set forth the cost of on carriage as USD 3,900, whilst that of Sea Shore International to the Respondent dated 28th January 2010, bore USD 3,600.

32. The invoice to Gilbert Badibaseka Bukenya was for USD 4,216.

33. As such, a difference can be discerned between the invoice by Seashore International and the two by the Respondent.

34. The Claimant asserted that her letter of appointment indicated that she was to work up to the age of 60. She was employed at the age of 49. This forms the basis for her claim for the remainder of her working years.

35. In her responsibility as a marketer, she took the Respondent Company to another level. Before joining them, they didn't have shipping business, which during her tenure, they received.

The Respondent's Case

36. The Respondent presented one witness, Gerald Waithera, its Cost Controller/ Administrative Manager, to testify on their behalf. The witness adopted his witness statement dated 9th November 2021, as his evidence in chief. He produced the documents filed herein by the Respondent under the list of documents dated 17th November 2021, as their exhibits 1-12 in the order of listing.

37. The witness stated that the Claimant was an employee of the Respondent from 22nd June 2009 to 4th January 2017. Her employment was terminated under a letter dated 4th January 2017, on account of gross misconduct.

38. The witness stated the particulars of gross misconduct as:

    I. Disclosure of the company's client's /agents to on carriage competitor Seashore International Ltd through her email dated 29th December 2016.

    II. Failure to follow the Company procedure on issuance of quotations for inland transport, and consequently had Seashore International Ltd quoting transport and clearance rates directly to Kenya National Shipping Line Spain agents ROMEU YCIA S.A without Kenya National Shipping Line profitability consideration, basically undertaking marketing for Seashore International Ltd, a family outfit, and without declaration of conflict of interest.

    III. As Kenya National Shipping Line Sales and Operating Manager, the Claimant singlehandedly engaged Seashore International Ltd, a family business, thereby creating a conflict of interest and ignoring company procedures.

    Iv The Claimant failed to perform her duties in a careful and proper manner thus exposing the company to loss of revenue, essentially an act sabotage.

    v The Claimant deliberately failed to copy any of the email exchanges to other members of staff, the company only getting the information from the agents.

    VI. The Claimant was in effect working for the two entities, one being Seashore International Ltd, a family outfit, and the Respondent Company, and in the circumstances could not work in the sole best interest of the Respondent Company.

    VII. The Claimant had previous to the termination been subject to disciplinary issues and had disciplinary letters issued to her and her record was consistent with misconduct.

PARA 39.

The Claimant was accorded the right to be heard and the step to terminate was only taken after her failure to convincingly respond and exonerate herself from wrongdoing.

40. The witness stated that the termination was regularly done and the Managing Director had the mandate and authority to proceed in the way and manner he did in consultation with other officers in discharge of their administrative obligations to the company.

41. The Claimant having been subject of misconduct issues twice previously with the final act of sabotage, the Managing Director as of right had authority to dismiss her summarily but opted to terminate her services instead.

42. The Claimant has no basis in law to seek an award of compensation for 11 years at KShs. 11,101, 200.

43. The Claimant was a member of a pension scheme provided for by the Respondent Company and was not therefore entitled to any terminal dues outside the contract of employment.

44. The Respondent, on termination, was duly paid the KShs. 119, 676.20 that was due to her as per the contract of employment.

45. Cross examined by Counsel for the witness stated that the Claimant breached the Respondent's policy, as such, the reliefs sought cannot be availed to her.

46. The accusations against the Claimant stemmed from the email dated 29th December 2016. The Company to whom the email was written, deals with road transport whilst the Respondent deals with water transport.

47. There was conflict of interest when the Claimant sent the said email because the Respondent deals with both water and road transport. However, the Respondent neither owns ship or lorries.

48. He further stated that the Respondent lost business, as though the water business came to the Respondent, the road business went to the Seashore International Company. The Respondent didn't place forth the specific amount it lost out of the Claimant's Act.

49. The other reason, the basis for the termination of the Claimant's employment was that while in the employment of the Respondent, she was secretly operating a family business, Seashore International Company Limited, where the husband worked.

50. Cross examined further, the witness stated that he does not know the Directors of Seashore Company Limited or have a CR12 in respect of the Company.

51. Referred to the Claimant's exhibit 1, an email dated 17th May 2012, the witness admitted that he wrote the same directly to Seashore Company Ltd.

52. The Claimant wrote and sent the email during Christmas Holidays, when the Respondent had maintained a skeleton-staff. However, the Respondent accused her inter alia of having not copied the email to other staff.

53. The witness further admitted that on 29th November 2011, he wrote an email to Seashore International Company, asking them for the rates for clearing and transportation of cargo to Bunjumbura. It was normal for the Respondent to enquire /seek information that it didn't have from other sources on rates for clearing and transportation.

54. The witness testified further that he didn't have any documentary proof that the Claimant's husband was one of the Directors of Seashore Company Limited.

55. The witness testified that he wasn't aware that the Claimant had been previously mistreated as alleged in her pleadings.

56. The Claimant was heard before the decision to terminate her employment was arrived at. However, the Respondent didn't place the minutes in regard thereof, before this Court.

57. Lastly, the agents of the Respondent are published on its website and calendars. They are therefore public.

58. In his evidence under re-examination, the witness testified that the financial loss occurred when the Claimant failed to factor in, the "profit margin" for the Respondent.

59. The Claimant was on duty on 23rd December 2016. She was supposed to get three quotations by involving other staff. Upon getting the quotations, they were supposed to be forwarded to the agent without disclosing the name of the transporter.

60. The disciplinary meeting was in the morning of 4th January 2017. The meeting was called by the Managing Director. In the context of the Respondent's policy a hearing was not necessary, as she was summarily dismissed.

Analysis and Determination

61. I have carefully considered the pleadings by the parties, their evidence and Counsel's submissions, and the following issues, emerge for determination:

I. Whether the termination of the Claimant's employment was unfair.

II. Whether the Claimant is entitled to the reliefs sought.

Whether the termination of the Claimant's employment was unfair.

62. I delve further into this issue, I find it imperative to point out that the fundamental notion that managerial power should be exercised so as to be compatible with notions of formal rationality is reflected in ILO Convention No 158 [1982] concerning termination of employment at the initiative of the employer and the accompanying Recommendation N0 166, which has influenced the development of the unfair dismissal laws of many systems including the Kenyan.

63. Termination of an employee's employment shouldn't take place unless there is a valid and fair reason for such termination connected with the capacity or conduct of the employee or based on operational requirements of the undertaking, establishment or service. Further, in the absence of procedural fairness.

64. In the case of Pius Isindu Machafu v Lavington Security Guards Limited [2017] eKLR, the Court of Appeal stated:

> " There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligation on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/ dismissal [section 43]; prove the reasons are valid and fair [section 45]; prove that the grounds are justified [section 47[5], amongst other provisions. A mandatory and elaborate process is then set up under section 41, requiring notification and a hearing before termination. The Act also provides for most of the procedures to be followed, thus obviating reliance on the *Evidence Act* and *Civil Procedure Act*/ Rules. Finally, the remedies

for breach set out under section 49 are fairly onerous and generous to the employee. But all that accords with the main object of the Act as appears in the Preamble;

"…….to declare and define the fundamental rights of employees, to provide basic conditions of employment of employees."

Those provisions are a mirror image of their constitutional underpinning in Article 41 which governs rights and fairness in labour relations."

There is no dispute that at all material times, the Claimant was an employee of the Respondent and that the employee-employer relationship between them was terminated at the initiation of the latter. The Claimant contended that the termination was procedurally and substantively unfair.

65. In National Bank of Kenya v Samuel Nguru Mutonya[2019]eKLR, the Court of Appeal aptly stated:

> "We have considered the above observation in light of the Bank's submission that the decision to terminate the respondent's employment was taken in exercise of its managerial supervision over the respondent and was in the circumstances not amenable to the trial court's scrutiny and interference. We are in agreement with the Bank's assertion that when the bank terminated the respondent's employment, it did so in the exercise of its managerial supervisory power over the respondent in the discharge of his duties as an employee of the Bank was not amenable to the scrutiny and interference by the trial court. Such h a position in my view, would render nonsense the existence of the procedures provided for in sections 41, 43, and 45 of the Act. It is therefore our considered opinion that parliament in its wisdom when enacting the Act governing the employer /employee relationships saw the need to incorporate therein provisions for redress for grievances that may arise as between the parties with regard of their obligations under a contract of employment. This in our opinion is what forms the basis for an aggrieved party to invoke the Court's policing powers which in our view, only came into play like in the instant appeal, when there is a complaint of noncompliance with the laid down legal procedures inbuilt in the Act in the circumstances where the employer /employee relationship has gone sour."

66. Section 41 of the *Employment Act*,2007, provides a mandatory procedure that an employer contemplating terminating an employee's employment must adhere to. The procedure contemplated under the provision embodies three components: the employer must inform the employee affected of their intention and the reason[s] the basis thereof, the employer, then, must accord the employee an adequate opportunity to make a representation on the ground[s]. The employee is entitled to be accompanied during the time of making the representation, by a fellow employee of his own choice or a trade union representative if she or he is a member of a trade union, and before taking a final decision on the matter, the employer must consider the representations made by the employee.

67. The Respondent asserted that it held a disciplinary hearing in respect of the Claimant's matter on 4th January 2017, whereat the Claimant was heard on the allegations that were against her. Time and again, this Court has stated that it is not every meeting that the employer labels "a disciplinary hearing" that shall in the eyes of a Court of law, be considered a disciplinary or an appropriate disciplinary, hearing.

68. In his evidence under cross examination, the Respondent's witness stated that the Claimant was summoned into the meeting convened by the Managing Director, in the morning of 4th January 2017, the same day her employment was terminated. The witness didn't show that at the invitation, the Claimant was notified that she was being invited to a disciplinary hearing, and the accusation[s] that she was to defend herself against.

69. Undeniably, the Claimant wasn't given an adequate opportunity to prepare and defend herself against the alleged accusations against her. She asserted that in the meeting, a barrage of questions were shot at her, often not allowed to answer then duly. Even if for a moment one were to be persuaded that the meeting was a disciplinary hearing, in the absence of any minutes in regard thereof and in light of the Claimant's evidence, the safe and reasonable conclusion could be that the hearing was cosmetic and a sham.

70. The Respondent's Counsel submitted, and I hold, wrongfully so, that in view of the fact that the Claimant was summarily dismissed, a hearing for her was undeserved. This position taken is in absolute ignorance of the structure of the *Employment Act*, 2007, and the rights and protections it accords employees. It will matter not that an employee has committed a gross misconduct or a minor infraction, fair procedure must be availed to them.

71. By reason of the foregoing premises, I am persuaded that the termination of the Claimant's employment was procedurally unfair.

72. Section 43 of the *Employment Act* dictates that in a dispute regarding the termination of an employee's employment, the employer shall prove the reason[s] for the termination. In the defaulting, the termination will be deemed unfair by operation of the law, section 45 of the Act.

73. However, it is not enough for the employer to demonstrate the reason[s] for the termination. They must prove that the reason[s] were valid and fair, otherwise, the termination shall be deemed unfair. The Act hasn't defined what constitutes a valid reason. In my view, a valid reason, is one that reasonably in the circumstances peculiar to a case, can be a legitimate basis for termination of an employee's employment.

74. The genesis of the Claimant's woes, and sour relationship between the Respondent and her, was the email which she sent in the course of her employment to Seashore International Company Limited dated 29th December 2016. In the termination letter dated 4th January 2017, the Respondent derived five [5] misconducts from the act of her writing and dispatching the email it in the manner she did.

75. Among the alleged misconducts was that that she disclosed the Respondent's clients/ agents to on-carriage competitor Seashore International Limited through the email. This in my view could make sense, if it was within the Respondent's policy or practice that the identity of its clients/agents and or partners were to be kept secret at all material times, policy known to all its employees. The Respondent's witness's evidence under cross examination gives an impression that doesn't help reflect the alleged misconduct as one that would legitimately be a basis for a fair termination.

76. The witness admitted that the Company and the Respondent weren't in same business; the two had an already established working relationship; the Respondent's Clients/agents were published on the Respondent's website and calendars, and as such their identity was public; and making enquiries on information that the Respondent didn't have was a normal occurrence within the enterprise.

77. It was further alleged that the Claimant misconducted herself when she failed to follow the Company procedure on issuing of quotations, which led to Seashore International Limited quoting transport and clearance rates directly to KNSL Spain Agents [Romeu Y CIA. S.A] without KNSL profitability consideration, basically undertaking Marketing for International Ltd, a family outfit. There is no dispute that the Claimant's husband who initially worked for the Respondent, was at the material time, with Seashore International Limited. The Respondent's witness made a bald assertion, that the Claimant's husband was a Director of that company without, proof.

78. The Respondent was the party making the assertion, it was bound to prove. Nothing could have been easier for them to apply for CR12, from the Registrar of Companies to aid them prove the allegation.

79. The Respondent's witness admitted on or about 29th November 2011 and 17th May 2012, he wrote an email to Seashore International Limited enquiring rates for clearing and transportation. Paradoxically, when the Claimant in the course of her duties makes an almost similar inquiry, it becomes a misconduct and conflict of interest. In these circumstances, it isn't difficult to conclude that in the accusation and its action to allow it to be the basis for the termination, the Respondent didn't act with equity and fairness as contemplated under section 45[7] of the Act.

80. The Claimant contended that Seashore International Limited mistakenly wrote to the Respondent's agents in Spain. This evidence in my view, was not controverted. It wasn't demonstrated first, that by writing the email, the Claimant was being prompted by a desire to benefit the Company to the prejudice of the Respondent, and that the Company wrote to the agent, with the aim of having an undue benefit over the Respondent. With this, I am unable to find the Respondent's conclusion that the Claimant was technically marketing the company, a family outfit, to the prejudice of her employer, reasonable.

81. The Respondent, in my view, didn't have a procedure manual, providing for a standardized procedure for quotations, if they had, then the same was not placed before this Court. As such, I have struggled to discern the basis for the Respondent's assertion that the Claimant breached their procedures, and seen none.

82. The Respondent alleged that the Claimant's action[s] occasioned the Respondent financial loss. Their witness under cross examination, correctly admitted that neither did the Respondent set out specifics of the alleged loss in its pleadings nor him in his witness statement. Without, specificity, it can only be concluded that the Respondent merely speculated that a loss had occurred. A reason based on speculation, cannot be a valid and fair reason in the eyes of section 45 of the Act.

83. The alleged loss was specific in character, 'unfactored in profit margin'. If this loss was indeed suffered, it could have been the easiest to compute, plead and testify on. Inexplicably, the Respondent didn't do this. I cannot hesitate to make an adverse inference that there was not any financial loss suffered by the Respondent as alleged.

84. In conclusion, I find the Respondent's decision to terminate the Claimant's employment on the alleged misconducts set out on the termination letter, unfit to be characterised as valid and fair reasons, and that reflect the reliance on them as the basis for the termination of the Claimant's employment, an act of equity and justice.

85. In sum, the termination of the Claimant's employment was substantively unjustified.

Whether the Claimant is entitled to the reliefs sought.

86. The Claimant sought inter alia for an order directing the Respondent to reinstate her to the position of the Sales Operations Manager. It is now approximately seven years since the Claimant was dismissed from her employment, making it impossible for the Court to make the order sought. Section 12[3] of the *Employment and Labour Relations Court Act*, prohibits grant of an order for reinstatement of an employee, where three years have passed since the termination of the employee's employment.

87. The legislature in enacting the *Employment Act*, 2007, with the rights and protections for employees, and remedies that could be availed to an employee in a dispute concerning termination of their employment or summary dismissal, thereunder, in its wisdom, did not make compensation in terms

of salary, for the unexpired period of employment of the affected employee[s], one of those remedies. Parliament capped the award of damages for unfair termination at twelve [12] months' gross salary.

88. The value for the capping has received judicial attention in a number of cases among them, Mary Wakhabubi Wafula v British Airways PLC [2015] eKLR, which adopted the reasoning in the case of Eastwood & Another v Magnox Electric PLC; McCabe v Cornwall County Council & Others [2004] UKHL, thus;

> " In fixing the limits on the amount of compensatory awards, Parliament expressed its view on how the interests of employers and employees, and social economic interests of the country as a whole, are best balanced in cases of unfair dismissal. It is not for the courts to extend further, a common law implied term, when it would depart significantly, from the balance set by legislature. To treat the statute as prescribing the floor, and not the ceiling, would be unjust that.....it would be inconsistent with the purpose parliament sought to achieve, by imposing limits on compensatory awards payable in respect of unfair dismissal."

89. As a result, I decline to award the compensatory relief as sought by the Claimant but shall within the confines of section 49 of the *Employment Act*.

90. Section 49[1][c] of the Act bestows upon this Court the authority to grant an employee who has successfully litigated against their employer in a claim for unfair dismissal, a compensatory relief to a maximum extent of twelve months gross salary of the affected employee. However, it is imperative to state that the authority is discretionarily granted, depending on the circumstances of each case.

91. I have carefully considered how the Claimant's employment was terminated without care to the statutory dictates on procedural and substantive fairness, her length of service, the Claimant's expectation that she was going to work up to retirement age, only for the expectation to be washed out by the unfair termination at her 49th year, and her uncontroverted evidence that her employability got diminished as a result of the unfair termination of her employment, and find that she is entitled to the compensatory relief, to an extent of seven[7] months' gross salary.

92. In the upshot, Judgment is hereby entered in favour of the Claimant in the following terms;

I. A declaration that the termination of her employment was unfair.

II. Compensation pursuant to the provisions of section 49[1][c] of the *Employment Act*, 2007, seven [7] months' gross salary, KShs. 588,700.

III. Interest on the sum awarded in [II] above at court rates from the date of this Judgment till full payment.

Iv Costs of this suit.

READ DELIVERED AND SIGNED THIS 13TH DAY OF MARCH 2025.

OCHARO KEBIRA

JUDGE