



**Muthoni v Rhomus Concrete Limited (Cause E815 of 2021)  
[2025] KEELRC 1054 (KLR) (3 April 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1054 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E815 OF 2021**

**L NDOLO, J  
APRIL 3, 2025**

**BETWEEN**

**GEORGE MUTURI MUTHONI ..... CLAIMANT**

**AND**

**RHOMUS CONCRETE LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. This dispute arises from an employment contract executed by the Claimant and the Respondent on 25<sup>th</sup> August 2018. The Claimant states his case in a Statement of Claim dated 28<sup>th</sup> September 2021 and the Respondent defends the claim by a Response and Counterclaim dated 19<sup>th</sup> October 2021.
2. At the trial, the Claimant testified on his own behalf and the Respondent called two witnesses; Maria Matheka and Joseph Nderitu. Both parties also filed written submissions.

**The Claimant's Case**

3. The Claimant was employed by the Respondent on 25<sup>th</sup> August 2018, in the position of Plant Manager, stationed at Athi River. On 30<sup>th</sup> September 2020, the Claimant was redeployed to Kiambu in the position of Technical Sales Manager.
4. The Claimant claims to have experienced personalised attacks and false accusations from the General Manager, Joseph Nderitu.
5. On 23<sup>rd</sup> April 2021, the Claimant's role was changed yet again to Key Account Manager. In response, the Claimant wrote an email dated 26<sup>th</sup> April 2021, complaining to the Human Resource Manager that the new role was out of his educational and professional ability.



6. On the night of 1<sup>st</sup> May 2021, the Claimant was assigned the duty to arrange for transportation of some concrete blocks from the Athi River Plant to Kiambu.
7. The Claimant complains that this assignment, given to him by Joseph Nderitu, was not in line with his duties as Technical Sales Manager. He adds that the assignment could not have been executed within the prescribed time.
8. By letter dated 3<sup>rd</sup> May 2021, the Human Resource Manager invited the Claimant to a disciplinary hearing on 5<sup>th</sup> May 2021. The Claimant states that as he was preparing for the disciplinary hearing, the General Manager terminated his employment by letter dated 4<sup>th</sup> May 2021.
9. The Claimant avers that he was condemned unheard and he was not paid his terminal benefits in full. He therefore claims the following:
  - a. 12 months' salary in compensation.....Kshs. 2,729,544
  - b. Unpaid dues.....162,000
  - c. General damages
  - d. Certificate of service
  - e. Costs plus interest

#### **The Respondent's Case**

10. In its Response and Counterclaim dated 19<sup>th</sup> October 2021, the Respondent admits having employed the Claimant vide a letter of appointment dated 25<sup>th</sup> August 2018.
11. The Respondent states that the Claimant was initially employed as a Plant Manager for a Plant which the Respondent had opened in Kagio, Kirinyaga County.
12. According to the Respondent, operations at Kagio did not materialise, partly due to poor management skills on the part of the Claimant. The Claimant was therefore deployed as Branch Manager at the Athi River Plant, where he is said to have performed poorly, as communicated to him vide a performance review letter dated 3<sup>rd</sup> March 2020.
13. The Respondent confirms the re-assignment of the Claimant to the position of Technical Sales Manager at the Respondent's Headquarters at Ridgeways, Kiambu, effective 1<sup>st</sup> October 2020.
14. The Respondent further confirms that on 23<sup>rd</sup> April 2021, the Claimant was assigned the role of Key Accounts Manager. The Respondent claims that this re-assignment was necessitated by numerous complaints by customers owing to the Claimant's incompetence as Technical Sales Manager.
15. According to the Respondent, the Claimant declined to take up the new role, alleging that it was not aligned to his qualifications. By letter dated 23<sup>rd</sup> April 2021, the Claimant was informed that the Human Resource Department would assist him in the new assignment, where necessary.
16. The Respondent maintains that the Claimant refused to take up the new assignment. The Respondent accuses the Claimant of blatantly disregarding his duties and assignment, contrary to his letter of appointment.
17. Regarding the incident of 1<sup>st</sup> May 2021, the Respondent states that the Claimant was only tasked to organise for a driver to transport concrete blocks, which would only have required him to make a phone call to any available driver, noting that the Respondent operates both day and night shifts.



18. The Respondent confirms that vide a letter dated 3<sup>rd</sup> May 2021, the Claimant was invited for a disciplinary hearing on 5<sup>th</sup> May 2021, arising from his refusal to take up roles and do tasks delegated to him by the General Manager. The Claimant is said to have abusively confronted Joseph Nderitu, in the presence of Maria Matheka. The following particulars are cited in this regard:
- a. The Claimant insulted Joseph Nderitu, calling him incompetent;
  - b. The Claimant insulted Joseph Nderitu, by stating that he was not qualified to be a General Manager as he was not an Engineer like the Claimant;
  - c. The Claimant told Joseph Nderitu that he was not an Engineer and could not comprehend the needs of the Respondent's customers;
  - d. The Claimant stated that his perspectives and the inferior perspectives of Joseph Nderitu were different and the two could not work together.
19. The Respondent avers that by his conduct, the Claimant frustrated any chance for an objective disciplinary hearing on 5<sup>th</sup> May 2021. The Respondent adds that it was constrained by the Claimant's abusive, aggressive, insubordinate and gross misconduct to terminate his employment on 4<sup>th</sup> May 2021.
20. The Respondent's case is that the termination of the Claimant's employment was justifiable and fair.
21. The Respondent claims to have paid the Claimant Kshs. 633,385.74 which included his salary for April and part of May 2021, leave days and 2 months' pay in lieu of notice.
22. By way of Counterclaim, the Respondent claims from the Claimant the sum of Kshs. 162,276 which the Claimant is said to have undertaken to reimburse on account of selling the Respondent's products on his own account, to one Gladys Wambui Wakimiri c/o Hon Onyonka. The Respondent also seeks accrued interest on this amount.
23. The Respondent further counterclaims the sum of Kshs. 1,682,571 which the Claimant is said to have undertaken to reimburse on account of selling the Respondent's products on his account, to Davikco Construction Company. The Respondent also seeks accrued interest on this amount.

### **Findings and Determination**

24. There are three (3) issues for determination in this case:
- a. Whether the termination of the Claimant's employment was lawful and fair;
  - b. Whether the Claimant is entitled to the remedies sought;
  - c. Whether the Respondent has made out a proper counterclaim against the Claimant.

### **The Termination**

25. The termination of the Claimant's employment was communicated by letter dated 4<sup>th</sup> May 2021, stating as follows:

“Dear George  
Termination of Employment  
This serves an official record.



We refer to incidents that occurred on 2<sup>nd</sup> May 2021. You were given a direct instruction on work to be done on the ridge ways site. You accepted the instruction and expressed that you would carry out the assigned task. Later on the same day, it was discovered that the task assigned remained undone. Further, no communication had been given on your incapacity to carry out the assigned task.

Your actions above are considered as gross misconduct. These are grounds for summary dismissal set out clearly in the [Employment Act](#) (2007) Section 44.4(c) & (e) which states that,

- (c) an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly.
- (e) an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer.

We hereby write to inform you that you are terminated from your role as the Technical Sales Manager effective today, Tuesday, 4<sup>th</sup> May 2021. We are willing to pay you in lieu of the notice period. You are required to fill a clearance form and provide a comprehensive handover report before the requisite dues are processed together with handing in.

Your final dues will be tabulated as below:

Days Worked up to 4<sup>th</sup> May 2021 All leave days accrued and not utilized up to May, 2021 160 days' notice as per Employment Contract Less any monies owed by you to the company Less all statutory deductions

You will be allowed to appeal against this decision within the period of 7 days

We take this opportunity to thank you for your valued service to the company and wish you all the best in your future endeavours.

For Rhombus Concrete Limited

(signed)

Joseph Nderitu

General Manager”

26. According to this letter, the reason for termination of the Claimant's employment was his failure to perform a specific task assigned to him, to oversee transportation of building materials to a site in Ridgeways.
27. The Claimant states that it was not humanly possible to accomplish the task within the prescribed timelines, pointing out that he received the instructions from the General Manager, Joseph Nderitu on the night of 1<sup>st</sup> May 2021, giving a delivery deadline of 2<sup>nd</sup> May 2021.
28. Prior to the termination letter, the Claimant had been issued with a letter dated 3<sup>rd</sup> May 2021, inviting him to a disciplinary hearing on 5<sup>th</sup> May 2021. This letter states in part:

“Following our discussion this morning on the incident that occurred on 2<sup>nd</sup> May 2021 during which an assigned role went undone and no information was sent to your line



manager that the task was not done, we have decided to invite you to a disciplinary hearing on Wednesday 5<sup>th</sup> May 2021 at 10.00 am at the Boardroom at the Ridgeways site to further hear your case before a disciplinary committee and make a determination on the same. The disciplinary committee will comprise of staff drawn from different departments. You are entitled to a representative from any of the staff members.”

29. For some reason that was not clear to the Court, the Respondent decided to terminate the Claimant’s employment on 4<sup>th</sup> May 2021, a day before the disciplinary hearing scheduled for 5<sup>th</sup> May 2021.
30. As held by this Court in its decision in *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR, for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness.
31. With regard to substantive justification, Section 43 of the *Employment Act* places the following burden on the employer:
- 43.
- (1) In any claim arising out of termination of 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 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.
32. In the ordinary scheme of things, the employer establishes the reason for termination at the shop floor, by adhering to the following mandatory procedure set out in Section 41 of the Act:
- 41.
- (1) Subject to Section 42(1) an employer shall, before terminating the employment of an employee on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during the explanation.
  - (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.
33. In his written submissions dated 30<sup>th</sup> January 2025, the Claimant referred to the decision in *Peter Kamwi v Standard Group Limited* [2016] eKLR where it was held that Section 41 of the *Employment Act* creates a statutory obligation upon employers to notify and hear representations from employees facing disciplinary action.
34. The Claimant further cited the decision in *Tubman Damien Ochiel v Ecobank Kenya Limited* [2014] eKLR where it was affirmed that even where an employer may have valid reasons for terminating the employment of an employee, the right to be heard must be safeguarded.



35. Finally, the Claimant relied on *ILO Convention* No. 158 and Recommendation No. 166. Article 7 of the Convention provides as follows:

The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity.

36. In this case, the procedure adopted by the Respondent, whereby the Claimant's employment was terminated ahead of the date scheduled for disciplinary hearing, is unknown in law. The Respondent defends this departure, stating that the Claimant misconducted himself in a meeting held on 3<sup>rd</sup> May 2021, making it impossible to continue with the disciplinary proceedings.

37. The Court was not convinced by the stance taken by the Respondent in this regard. First, the termination letter made no mention of any such misconduct on the part of the Claimant and second, no independent evidence was adduced to confirm the Respondent's allegations in this regard.

38. In its written submissions dated 5<sup>th</sup> March 2025, the Respondent made reference to the decision in *Kenya Plantation & Agricultural Workers Union v Kongoni River Limited* [2020] eKLR where it was held that an employee who squanders an opportunity availed by their employer to defend themselves cannot lay a claim of unfair termination of employment.

39. The *Kongoni River Limited* Case (supra) is however distinguishable from the present case, where the Claimant's employment was terminated on 4<sup>th</sup> May 2021, as he was preparing himself to appear before the disciplinary panel the following day, on 5<sup>th</sup> May 2021.

40. Ultimately, I find and hold that the termination of the Claimant's employment was substantively and procedurally unfair, and he is entitled to compensation.

### **Remedies**

41. I therefore award the Claimant six (6) months' salary in compensation. In making this award, I have taken into account the Claimant's length of service and the finding that he did not contribute to the termination. I have further considered the slim chances of the Claimant securing an alternative employment of equal stature.

42. In addition, I have taken into account the Respondent's unilateral decision to terminate the disciplinary proceedings midstream, thus denying the Claimant an opportunity to be heard.

43. The claim for terminal dues was not proved and no basis was established for the claim for general damages. These claims therefore fail and are disallowed.

### **The Respondent's Counterclaim**

44. By way of Counterclaim, the Respondent claims the sums of Kshs. 162,276 and Kshs. 1,682,571 which the Claimant is said to have received directly from two of the Respondent's customers, Gladys Wambui Wakimiri and Davikco Construction Company.

45. The Respondent did not however adduce any evidence to substantiate and support its Counterclaim. What is more, there is evidence that the Claimant was duly cleared by the Respondent with no obligations being raised against him. The Counterclaim therefore fails and is dismissed.



### **Final Orders**

46. Finally, I enter judgment in favour of the Claimant as against the Respondent, in the sum of Kshs. 1,367,112 being six (6) months' salary in compensation for unlawful and unfair termination of employment.
47. This amount will attract interest at court rates from the date of judgment until payment in full.
48. The Claimant is also entitled to a certificate of service plus costs of the case.
49. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 3<sup>RD</sup> DAY OF APRIL 2025**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Migele for the Claimant

Mr. Ng'ang'a for the Respondent

