



Lowoton v Board of Trustees National Social Security Fund (NSSF) (Employment and Labour Relations Cause E167 of 2023) [2025] KEELRC 1481 (KLR) (19 May 2025) (Judgment)

Neutral citation: [2025] KEELRC 1481 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E167 OF 2023**

**HS WASILWA, J
MAY 19, 2025**

BETWEEN

NICODEMUS EMURON LOWOTON CLAIMANT

AND

**THE BOARD OF TRUSTEES NATIONAL SOCIAL SECURITY FUND
(NSSF) RESPONDENT**

JUDGMENT

1. The Claimant instituted this claim vide a Statement of Claim dated 24th February 2023 and prays for judgment against the Respondent for: -
 - i. A Declaration that the Claimant's employment was terminated unfairly and unlawfully
 - ii. An Order setting aside the summary dismissal and Reinstatement to work with full pay of the Claimant's salary plus all the allowances from the date of dismissal to date of reinstatement;
 - iii. An Order for Promotion as he had qualified to be promoted.
 - iv. General Damages for loss of employment and earnings
 - V. Aggravated Damages for discrimination and unfair labour practices
 - vi. Costs and Interest at Court ratesIn the alternative;
 - i. A Declaration that the termination of the Claimant's employment was discriminating, malicious, unlawful, unfair, un-procedural and a fundamental violation of the rights of the Claimant
 - ii. Two-months' salary in lieu of notice



- iii. Unpaid leave allowance for the year 2022
- iv. 12 months' salary for unfair termination
- v. Service pay
- vi. Pension
- vii. Acting Allowance at 20% of monthly salary as provided by the NSSF Human Resource Policy and Procedure Manual
- viii. General Damages for loss of employment from date of dismissal to attainment of the retirement age
- ix. Aggravated Damages for discrimination and unfair labour practices
- x. Interest at court rates
- xi. Costs of the suit
- xii. Any other relief that the Court may deem fit to grant.

Claimant's Case

2. The Claimant avers that he was employed by the Respondent on the 27th November 2012 as a Finance Assistant – Grade 7 reporting to the Branch Accountant. At the time of his termination, he was earning a gross monthly salary of Kshs. 158,703.
3. The Claimant avers that since 2014, he approached the Respondent severally requesting to be upgraded to the position of Branch Accountant- Grade 6 but his requests were never addressed. He specifically, requested for a promotion on 27th November 2015, having served for 3 years and obtaining requisite qualifications as a certified public accountant, which request was never considered.
4. It is the Claimant's case that the Respondent discriminated upon him as he is the only employee among his peers who was not promoted and upgraded for the ten years he worked for the Respondent.
5. The Claimant avers that in 2016, the Respondent employed a Regional Accountant known as Ms. Lorna Gathage who was doing the reconciliation of the expenditure bank account till sometime in 2021 when she was transferred to another station; subsequently, he was coerced to perform the duties of a branch accountant without issuance of an authority letter.
6. The Claimant avers that he asked the Respondent to give him a written authority letter to enable him effect the duties of a branch accountant as provided under the NSSF Human Resource Policy and Procedure Manual and the Collective Bargaining Agreement between NSSF and KUFCAW but the Respondent refused and/or ignored the requests.
7. The Claimant avers that vide a letter dated 30th October 2015, he requested the Respondent to reimburse him for the several times that he was forced to perform duties of the Branch Accountant that were of a higher position than his but the Respondent refused the request notwithstanding the provisions of the NSSF Human Resource Policy and Procedure Manual and the Collective Bargaining Agreement between NSSF and KUFCAW.
8. It is the Claimant's case that he was instead served with notice to show cause letters which he responded and appeared before the Fraud Prevention and Discipline Committee but failed to appear before one



- disciplinary meeting on 27/6/2022 for being sick which fact he submitted evidence and was received by the Respondent.
9. The Claimant avers that during the disciplinary meeting on 31st October 2022, he informed the committee that he was not in a position to reconcile the expenditure bank account without a written authority letter from the Managing Trustee, the duty being a responsibility of a branch accountant and not a finance assistant.
 10. The Claimant avers that he was issued with a summary dismissal letter dated 14th November 2022 on grounds of insubordination and being disrespectful to a senior officer in word, act and demeanour.
 11. It is the Claimant's case that his summary dismissal was unlawful and without valid reason and the dismissal letter was totally flawed and in contradiction of the NSSF Human Resource Policy and Procedure Manual and the Collective Bargaining Agreement between NSSF and KUFCAW.
 12. The Claimant avers that the summary dismissal has irreparably injured his work reputation as it has strained his good standing and jeopardized his prospects of getting gainful employment in the future.

Respondent's Case

13. In opposition, the Respondent filed an Amended Memorandum of Response 15th December 2023.
14. The Respondent avers that on diverse dates in 2016, the Claimant wilfully neglected his duties by: failing to attend an official training scheduled on 29th to 31st August 2016; refusing to facilitate the driver, Charles Odhiambo, to attend training in Athi River on 27th to 29th June 2016 and delay in processing his reimbursement; not carrying out cash survey and bank reconciliation as at 30th June 2016 as instructed by Ag. FM in circular dated 30th May 2016; not submitting expenditure receipts and staff imprest forms to the RFOC for capturing on SAP on a timely manner; not carrying out suspense clearing duties and submitting relevant reports as instructed by the Acting Branch Manager on 5th May 2016 leading to the growth of suspense in the branch from 7 million to 10 million; and delaying the bank of contributions collected on 16th June, 6th July and 11th July 2016 totalling to Kshs. 7000 which were banked on 19th July 2016.
15. The Respondent avers that the Claimant had resigned on 3rd January 2017 but was later reinstated.
16. The Respondent denies that the Claimant was discriminated against and avers that in response to his letter dated 15th April 2014, it conveyed its Human Capital and Management Committee decision that the Claimant's request was not approved because he had not yet attained 3 years as per the provisions of Section 4.9 of the Human Resource Policy.
17. It is the Respondent's case that the Claimant request for upgrading vide a letter dated 27th November 2015, however, the Ministry of Labour and East African Community halted staff upgrading and salary adjustments for state corporations on 26th February 2016 which was communicated to all staff members.
18. The Respondent denied that the Claimant was coerced to perform duties outside his job description and avers that the job description provided that the Claimant would prepare end year reports for inclusion in the Fund's final accounts in conjunction with the Finance Section of Management Accounts and reconciliation of expenditure accounts was done to facilitate the same. It also provided that the Claimant would be required to perform any other duties from time to time and pursuant to sections 10.38.1 and 10.38.2 of the Human Resource Manual, he would be given various instructions to facilitate the performance of the Fund.



19. The Respondent avers that it was not required to issue the Claimant with an authority letter and/or any extra pay given that the duties were his job description.
20. The Respondent avers that on 10th February 2022, the Acting Finance Manager established that the Claimant had not carried reconciliation for the Expenditure Account- Lodwar branch for the last 6 months and reminded the Claimant it was his responsibility to carry out accounting duties, do reconciliation and submit the reports as provided in the finance procedures. The Claimant was directed to submit the reconciliation reports within 7 days.
21. The Respondent avers that the Claimant responded vide a letter dated 15th February 2022 stating that reconciliation is not his role but a management role and as at 18th February 2022, he was yet to perform the same.
22. Consequently, the Claimant was issued with a NTSC on 1st March 2022 which he refused to respond to and vide a letter dated 23rd March 2022 the Respondent issued him a reminder to respond to the NTSC.
23. The Respondent avers that vide a letter dated 17th May 2022, it invited that the Claimant to appear before its Fraud Prevention and Disciplinary Committee which he appeared alone and stated he was comfortable to proceed without a witness.
24. During the hearing, the Claimant apologised to the committee for using derogative and discourteous language and attributed the same to illness.
25. It is the Respondent's case that the Claimant's failure to submit reports as per the Finance Procedures was an offence that warranted disciplinary action as per section 11.7 (1)(v) of its Human Resource Policy and Procedure Manual.
26. It is the Respondent's case that the Claimant's summary dismissal was fair and based on valid reasons because he refused to take instructions from his manager to perform duties within his job description and further had prior indiscipline cases in 2016 as aforementioned and was issued NTSC on 19th December 2016 and 26th March 2019.
27. It is the Respondent's case that the Claimant was terminated in accordance with fair procedure and subjected to a fair disciplinary process.

Evidence in Court

28. The Claimant (CW1) adopted his witness statement dated 24th February 2024 as his evidence in chief and produced his filed list of documents as his exhibits 1-25.
29. During cross examination, CW1 testified that he has no documents to substantiate his allegation that his peers who joined in 2012 were promoted and argued that the evidence is in the public domain.
30. CW1 testified that his job description provided for any other duties assigned from time to time and clause 10.38 of the NSSF policy manual provides for other roles that may be provided to the employee. Therefore, the list is not exhaustive of the job description.
31. CW1 testified that he was asked to provide reconciliation documents of 6 months but reconciliation is done by a software which he had no authority to use. He had previously used it in Nandi Hills and was cited for insubordination.
32. CW1 testified that he was not doing the reconciliation before the 6 months and that the same was done by the Regional Coordinator, Lorna Githae but he has no documents to prove this.



33. CW1 testified that he was issued with a NTSC and invited for a disciplinary hearing which he attended
34. CW1 testified that he was not paid his terminal dues and although the Respondent produced the payslip for November 2022, he did not receive the same.
35. The Respondent's witness (RW1) Regina Mua, stated that he works for the Respondent as a Senior Human Resource Manager, Employee Relations; his role is to deal with employee's disciplinary matters.
36. RW1 adopted her witness statement dated 15th December 2023 and documents in support of the Respondent's case as her evidence in chief and exhibits.
37. During cross-examination, RW1 testified that the Claimant was never given authority to act as branch manager. There is a limitation on who can act as one; he could not act as a branch manager as he had not attained 3 years in service.
38. RW1 testified that upon attainment of the 3 years, the Claimant could not be upgraded due to a circular by the Ministry of Labour dated 11th March 2016 that froze promotions; no other employee was promoted pursuant to the circular.
39. RW1 testified that anyone working on assignments related to the system including the branch manager are given ACP rights. The Claimant was not granted the ACP rights as his role was mainly clerical in nature.
40. RW1 testified that the Claimant resigned on 3rd January 2017 and was paid his dues however he was reinstated on 16th October 2017.

Claimant's Submissions

41. The Claimant submitted on five issues: Whether the Claimant was wrongfully, unlawfully and unprocedurally terminated from employment by the Respondent and Whether the reason given by the Respondent for termination of the Claimant amounts to a fair reason; whether the Respondent observed due process to termination of the Claimant's employment; whether the Claimant was discriminated during his employment with the Respondent; whether the Claimant is entitled to compensation for unfair termination and the terminal benefits from the employment as prayed for in this Statement of Claim; and who should pay costs and interests of this suit.
42. On the first issue, the Claimant submitted that all the duties that the Respondent indicated amounted to the indiscipline cases were the duties for the Branch Accountant which the Respondent unprocedurally and in contravention to its own Human Resource Policy and Procedure Manual, forced upon the Claimant to perform.
43. It is the Claimant's submission that the decision to terminate his services was malicious as he performed all assigned that were in his capacity and scope of duty to obey and perform. However, the duties of the Branch Accountant were not within his scope of duty. He was willing and ready to perform the other duties belonging to the Branch Accountant and informed the Respondent of the same subject to being given an official authority to perform the said duties.
44. On the second issue, the Claimant submitted that the disciplinary process was unfair on grounds that despite having sufficient knowledge he was unwell, the Respondent proceeded to call the Claimant on several occasions for a disciplinary hearing disregarding his health. Further, the Claimant was neither accorded sufficient time to prepare for the hearing nor furnished with any documents to rely on.



45. The Claimant further submitted that the Respondent withheld his salary, as confirmed by RW1 who stated that the Respondent still had the cheque and had not paid the Claimant his dues 2 years later; and it did not issue him with a certificate of service as required by the law.
46. On the discrimination, the Claimant submitted that despite requesting the Respondent for upgrading twice, the same was ignored and the Respondent chose not to respond despite attaining the required 3 years of service. RW1 testified that there was a circular that halted upgrading, however, the circular was received by the Respondent on 15th March 2016, two and half months later after the Claimant requested for upgrading. Further, the Respondent knew that the Lodwar Branch did not have a Branch Accountant but chose to ignore and discriminate against the Claimant who was well qualified to be upgraded into that capacity. Their defence that a circular from the government came in effect does not hold because the request for upgrading was made way before the circular came into effect.
47. It is the Claimant's submission that the Circular froze new recruitments but did not completely halt upgrading and pay adjustments. It instead gave a leeway for upgrading, subject to special conditions, which allowed a State Corporation or a Semi-Autonomous Government Agency to only upgrade after receiving recommendations from the Salaries and Remuneration Commission after obtaining a written approval.
48. The Claimant submitted that he was discriminated against as he acted as Branch Accountant for a period of one year and without valid reason the Respondent refused to reimburse him for performing the duties belonging to the Branch Accountant. The Claimant raised the issue of the denied responsibility allowance during disciplinary process and as evidenced in his letter and the minutes but no remedy was provided by the Respondent.
49. The Claimant submitted that the Respondent denying an authority letter was discriminatory as it failed to give justifiable reasons why it was unable to issue the Claimant with an authority letter to enable him perform his duties effectively, in the acting capacity of a Branch Accountant.
50. On reliefs sought, the Claimant submitted that having demonstrated that the dismissal was substantively and procedurally unfair, he is entitled to an order of reinstatement to work with full pay of the Claimant's salary from the date of dismissal to date of reinstatement; and a further an order of promotion after reinstatement as he had qualified and was due to be promoted.
51. In the alternative, the Claimant submitted he should be awarded his terminal due, there is no evidence that notice was given prior to his termination contrary to clause 17.1 of the 2021/2023 CBA which was in force at the time of termination; it provides for termination of appointment by either party giving two months' notice or salary in lieu of notice.
52. The Claimant submitted that he was unfairly and unlawfully terminated and therefore ought to be compensated as per Section 49 of the *Employment Act*. This award is discretionary and it is usually awarded by courts based on the provisions of Sections 49 (4) of the *Employment Act* among other things such as length of time served and the way in which the Respondent terminated the employment. He relied on the case of Nairobi Cause No.471 of 2014 Elinathan G Kairu V Nakumatt Holdings Limited [207] EKLK where it was held that; "On the finding that the procedure followed did not meet the threshold set out in law, the claimant is entitled to compensation and a gross pay for 10 months is sufficient taking into account the time of service and the procedural unfairness of his termination of employment."
53. The Claimant submitted that at the time of his dismissal, he had a loan from Kenya Commercial Bank and NSSF Sacco, as shown in his payslips. These loans were defaulted and accrued penalties and interest



due to lack of employment. He therefore prays the Respondent be condemned to pay for the sum of Kshs. 2,157,732 and Kshs. 1,000,000 to the two institutions.

54. I have examined all the evidence and submissions of the parties herein. The issue for this court's determination are:-
1. Whether the dismissal of the Claimant was fair and justified.
 2. Whether the Claimant is entitled to the remedies sought.
55. On issue of the dismissal, the Claimant was dismissed from employment vide a letter dated 16/11/2022 for the reason that he failed to obey lawful instructions issued to him by his supervisor and thus was found guilty of insubordination and being disrespectful and discourteous in word, act and demeanour. Prior to his dismissal, the Claimant was taken through disciplinary measures by being issued with a NTSC letter to explain his failure to reconcile both expenditure accounts, in Lodwar. The letter was dated on 10/2/2022.
56. He responded by his dated 15/2/2022 stating that reconciliation role is a management responsibility - (Grade 6 /Branch Accountant) and since he was on Grade 7 – Clerical/Administration Assistant cadre, he couldn't do so and that he had asked for acting responsibility allowance in order to carry out the duties of the higher office and had been denied.
57. The letter was indeed worded on a derogatory, and in an insubordinate manner. He was then issued with another letter dated 1/3/2022 and asked to show cause why disciplinary action should not be taken against him. He was asked to respond in 7 days. He failed to respond to the said letter and was issued with another letter of 23/3/2022 issuing him with yet another show cause letter.
58. He was then invited for a disciplinary hearing to answer to charges of failing to reconcile bank expenditure. The disciplinary hearing was held on 31/10/2022.
59. I have looked at the minutes of the disciplinary committee held on 31/10/2022 and they show that the Claimant attended and during the hearing the Claimant admitted he had not done the reconciliation of the expenditure account for 6 months and he had stated that he did not do it because it was a management responsibility.
60. After the hearing the committee found him guilty of insubordination. He indicated the work assigned to him was not his but admitted in cross-examination that that his job description provided for any other duties assigned from time to time and Clause 10.35 of the NSSF Policy Manual provide for other roles that may be provided to the employee. Therefore, the list is not exhaustive of the job description.
61. I have analysed the chronology of events above. I note that the Claimant was accused of insubordination which he admitted that he did not do the duties assigned to him. It is also clear that he was taken through a disciplinary process as envisaged under section 41 of the *Employment Act* 2007. It is my finding that the respondent established the existence of valid reason to warrant dismissal of the Claimant and also subjected him to a disciplinary process as expected.
62. In the circumstances of the case, I find that the dismissal of the Claimant was fair and justified. I therefore find that the remedies sought cannot be granted save for his terminal dues as per his pension scheme rules. The Claimant may also be issued with a Certificate of Service. There shall be no order of costs.

READ, DELIVERED AND SIGNED THIS 19TH DAY OF MAY, 2025.

HELLEN WASILWA



JUDGE

