



Gitau v Timafloor Limited (Cause 5 of 2024)
[2025] KEELRC 1369 (KLR) (9 May 2025) (Judgment)

Neutral citation: [2025] KEELRC 1369 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU
CAUSE 5 OF 2024
ON MAKAU, J
MAY 9, 2025

BETWEEN

NICHOLAS MATHENGE GITAU CLAIMANT

AND

TIMAFLOR LIMITED RESPONDENT

JUDGMENT

1. By a statement of claim dated 7th August 2023, the claimant sought the following reliefs: -
 - a. A declaration that the claimant's termination from employment was wrong, unfair, unlawful and unconstitutional.
 - b. That the claimant be awarded general damages for unfair labour practices, discrimination and violations.
 - c. Compensation for unlawful and unfair termination equivalent to 12 months' gross salary amounting to Kshs.1,575,132/-.
 - d. Payment in lieu of notice equivalent to 3 months' gross salary Kshs.393,787/-
 - e. Severance pay amounting to Kshs.721,935.50
 - f. Unpaid leave for 26 days amounting to Kshs.113,759.50
 - g. Costs of the claim.
 - h. Interests on all the payments above, as from the date of judgment until payment in full.
 - i. Any other relief that the court may deem fit to grant in the interest of justice.
2. The respondent denied liability and averred that it dismissed the claimant for a valid reason and after following a fair procedure. It further averred that the claimant improperly performed his duties leading



to financial loss to the company. Therefore, it counter claimed for Kshs.5,712,424.80 against the claimant made up of the value of the goods lost from the stores, company loan of Kshs.606,777 and Sacco Loan of Kshs.238,183.

Facts of the case

3. The claimant was employed by the Respondent as its storekeeper on the 1st March 2011 but over the years, he was promoted to become the Head of Stores earning a gross salary of Kshs.131,261.
4. On the 13th of June 2023, the Respondent sent the claimant on suspension alleging that there were irregularities in the stores control and management including:
 - a. Accounting for new and unserviceable energizers.
 - b. Issuance of fuel.
 - c. Accounting new and old polythenes.
 - d. Allegation of soliciting and/or receiving money from suppliers and service providers.
5. The claimant was thereafter summoned to appear before a disciplinary hearing on 16th June 2023 to answer to the following allegations;
 - a. During the impromptu stock check on 25th May 2023 you were not able to account for six unserviceable energizers. You admitted that you do not keep records for the disposal of old energizers.
 - b. On 9th February 2023, you issued 800 litres of diesel fuel for two locations i.e. 400 litres to Tima 2 and Tima 6. However, the consignment to Tima 6 worth Kshs.65,600 had not been ordered for, nor was the same delivered or received at Tima 6 stores on the said date.
 - c. On the 14th of February, 2023 you issued 400 litres of diesel fuel worth 65,600 to drill a compressor yet the same had not been ordered for as no drilling was taking place on that date, no drilling was taking place on that date, nor was the issuance authorized.
 - d. On 21st March 2023, you issued another 600 litres fuel worth Kshs.98,400 for drilling compressor yet no drilling was taking place on that date nor was the issuance authorized.
 - e. During the impromptu stock check on 14th June 2023, management found a deficit of 28 rolls of 4.8 x 102 (504 UV Bock) and 11 rolls of 9.5 x 102 (Nectarine) greenhouse polythene only used in Tima 4 worth about USD 19,828.8 (Kshs.2,736,374.4)
 - f. On 27th March 2023 at about 19.30 hours, Mr.Boniface Chege, the security manager opened Tima 4 polythene store and loaded 6 small polythene rolls and 2 big polythene rolls into a pick up vehicle number KBR 576 (not confirmed) said to have been driven by a Mr.Mwaura. You never reported the loss of the above, nor accounted for how Mr.Chege came to be in possession of the store keys.
 - g. Management has received complaints from a service provider who collects waste that you have been soliciting and/or receiving cash from them in order to win favours in regard to the collection of company waste.
6. The claimant responded to the above allegations and attended the disciplinary hearing on the 16th of June 2023. He was thereafter issued with a letter from the Respondent summarily dismissing him from employment citing that the disciplinary committee had found him guilty of the above allegations. At the time he had served the Respondent for a cumulative period of eleven (11) years.



7. During the hearing the claimant testified as CW1 and called no witnesses while the respondent called four witnesses to support its defence. Both sides adopted written statements and produced bundles of documents as exhibits.
8. The claimant's evidence, basically reiterated the above facts as contained in his written statement. He then added that the audit was done in his absence and he was not given adequate time to prepare his defence to the show cause letter and the disciplinary hearing.
9. He maintained that, had he been given adequate time, he would have accounted for the alleged lost item. He contended that the alleged three lost energizers, had no value and he had no custody of the same. He further stated that all the 800 litres of diesel issued was released with the authority of the General Manager and it was delivered to the scheduled destinations.
10. As regards the loss of polythene paper, he contended that the allegation was malicious as the June 2023 stock taking used record dated 18th January 2023 and ignored all the monthly reports he had emailed to the General Manager from February to May 2023. He produced stock bin cards (Document 11 & 12) to prove that all the rolls were used.
11. As regards the rolls of small polythene papers, he stated that the thief by the name Chege, Timaflor Security officer was known and he wondered why he was being charged with offences committed by another person.
12. On cross examination, he stated that he was served with a show cause letter but he did not respond before attending the disciplinary hearing. He admitted that the letter indicated the charges against him but he never requested for extension of time to prepare defence. He further admitted that the letter also allowed him to attend the hearing with another employee but he attended alone.
13. He stated that he was never involved in the investigation. He maintained that the disposal of used energizers was done by the General Manager. He reiterated that always the General Manager authorized him to release fuel verbally or through phone calls or SMS, and that all the fuel was delivered at the scheduled destination. He maintained that as the Head of the stores he used to consolidate records all the stores.
14. He contended that the date on GRN No.58984 for 400 litres of diesel to Tima 6 was altered from 09/02/2023 TO 13/02/2023. He further admitted that there was no Delivery Note accompanying the delivery of the fuel but he explained that the recipient was supposed to generate a GRN and update the Bin Card.
15. The claimant denied allegation that he demanded money from supplier and contended that the alleged supplier was not named. He further contended that the Mpesa Statement bearing his name is a forgery and there is even no indication of the person or number sending the money.
16. Finally, he admitted that his pay slip for May 2023 showed a company loan balance of Kshs.617,643 and a Sacco loan of Kshs.191,000 which were being recovered from the pay roll.
17. In re-examination, he clarified that he used to prepare fuel issuance note and delivery note while issuing fuel while the recipient prepared a GRN using the delivery note and then update the Bin card. He further stated that GRN dated 09/02/2023 and altered to 13/02/2023, showed that goods (400 litres) were received.
18. He reiterated that old energizers were issued free of charge and the General Manager would sign gate pass. He reiterated that as the In-charge of all the stores, he used to consolidate into one report which was signed by all the store keepers before he presented it to the General Manager. He reiterated that



Mr. Chege stole polythene papers which he (claimant) was being asked to pay. Besides the issue of the polythene paper was not raised in the show cause letter but during the hearing.

19. RW1, Eunice Mumbi said she is the respondent's farm Assistant Accountant. She stated that the company has in place a contributory pension scheme and the claimant was a member. He was also a member of the NSSF and his contributions were duly remitted. She further stated that as at 16th June 2023, the claimant's gross salary was Kshs.110,622 and he had outstanding loan of Kshs.606,777 from the company. Finally, she admitted that the claimant was not paid his terminal dues after the separation.
20. RW2, Lydia Wanjiku Macharia, respondent's HR Manager attempted to produce Mpesa statements plus statements by witnesses who were not called to give evidence but the claimant successfully objected. The Mpesa statement had a disclaimer that only Safaricom could produce the same.
21. On cross-examination she stated that she worked for the respondent from 2006 to 2012 and rejoined on 1st June 2023. She further stated that she was involved in the investigations and although she was not an accountant, there was a store man/ accountant in the investigation.
22. She admitted that after the investigation, the claimant was not called to explain the missing polythene but he was served with show cause letter. She confirmed that the only stock taking done was for polythene.
23. She stated that the claimant was in charge of all the six stores but he was in charge of the main store. She further stated that there were store men in the main store reporting to the claimant. She admitted that she received a report of theft of polythene by Boniface Chege who was in charge of security.
24. She confirmed that the claimant was suspended on 13th June 2023 and he was barred from interacting with the staff in the Stores section. She stated that he was supplied with the documents he wanted during the disciplinary hearing. However, she admitted that the claimant was not provided with documents related to energizers and the particulars of the suppliers from whom he had allegedly solicited funds.
25. She clarified that the claimant was charged with failure to report theft of polythene yet he was the custodian of the key to the store. However, she confirmed that the store keeper was the custodian of the key. While the claimant was the Head of all the stores.
26. She confirmed that 400 litres destined to Tima 2 on 9th February 2023 was completed and all the documents were okay. She further confirmed that a second delivery of 400 litres destined to Tima 6 and to be received by Bernard was also received by him at Tima 6 as per the GRN dated 13/02/2023. However, she admitted that the date on the GRN had been altered to read 13/02/2023. She also confirmed that Bernard would not be a witness in this case. She admitted that fuel Issuance Book (page 28 of Respondent's Bundle) did not indicate that fuel was issued yet Bernard prepared the said GRN for 400 litres dated 13/02/2023.
27. She stated that the supplier, from whom funds were solicited by the claimant provided Mpesa statement but his details were withheld due to data protection. She further admitted that the Minutes did not provide details of the said supplier. She admitted that the complaint was not made to her but to the General Manager who has the particulars of the complainant.
28. In re-examination, she stated that the GRN prepared by Bernard lacked details of the delivery note for 400 litres. She stated that Bernard testified during the disciplinary hearing. She stated that the claimant had the custody of the main store and he never complained about disappearance of polythene.



29. As regards soliciting funds from a supplier, she stated that the claimant never denied that he received money from the supplier but merely demanded particulars of the supplier. Finally, she stated that on the day of the disciplinary hearing, the claimant said he was ready to proceed.
30. RW3, George Gitonga Inoti is the respondent's Finance Manager. On cross-examination, he stated that he joined the respondent on 1st June 2023 and on 14th June 2023 they did stock taking on the main store and in Tima 4. He stated that the main store is in Tima 9 but Tima 4 has its own separate store. He admitted the claimant was suspended on 13th June 2023 before the stock taking and there was no handing over -taking over report from him before he (RW3) took over. However, he relied on the stock cards and the periodic Reports prepared by the claimant to the General Manager. He stated that the stock taking Report was signed by the General Manager, RW2 and himself. He further stated that the claimant attended disciplinary hearing on 15th June 2023.
31. RW3 admitted that the claimant was never given any chance to go to the stores to verify the stocks. He further stated that unserviceable energizers were disposed of as scrap and they had no value except scrap value. He further admitted that there was allegation of theft of polythene by a Security officer called Boniface Chege who was being pursued elsewhere.
32. In re-examination, RW3 clarified that the stock taking they did was 100% on polythene and they confirmed 28 and 11 rolls missing. He stated that the claimant attended disciplinary hearing and he never requested for a chance to counter check the stock at the stores. He maintained that unserviceable energizers had scrap value.
33. RW4, Pier Daykin stated that he was a consultant Mechanical Engineer contractor hired by the respondent to drill Boreholes and during the drilling works, he drew diesel from the respondent's fuel pump. However, he never requested for fuel on 14th February 2023 and 21st March 2023 since he had completed his drilling in Tima 3 in January 2023.
34. On cross examination, he admitted that he used to request for fuel through the General Manager who then instructed the claimant. He confirmed that he made the requests via phone call to the General Manager and then go for the fuel personally or sometimes he sent his people to collect.
35. He disowned the signature for 400 and 600 litres of fuel for drill compressor but clarified that he did not know the signatures of his people.
36. After the hearing both sides filed written submissions. Having considered the pleadings, evidence and the rival submissions, the following issues fell for determinations: -
 - a. Whether the dismissal of the claimant was unfair and unlawful.
 - b. Whether the claimant is entitled to the reliefs sought.
 - c. Whether the respondent's counterclaim is merited.

Unfair and unlawful dismissal

37. According to section 45 (2) of the *Employment Act* provides that: -

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

38. It follows that in any legal proceedings, where an employee alleges unfair termination, the employer has a statutory obligation to show a valid reason to justify the termination, and also demonstrate that fair procedure was followed. In this case the claimant faced seven (7) charges as highlighted above and he was found guilty in all of them after a disciplinary hearing.

Reasons for the dismissal

39. The first charge was failure to account for six (6) unserviceable energizers. The claimant denied responsibility and said that he did not keep or dispose waste. He contended that such role of disposing of waste was by the General Manager.
40. Having considered the evidence before the court, there is nothing to prove that the alleged six unserviceable energizers were placed into the custody of the claimant. Page 18 of the respondent's documents, shows a typed list of nine (9) energizers of different specifications. Below that is a handwritten list of nine (9) pieces of energizers presumably, with Delivery Note from 29th June 2021 to 24th February 2023.
41. Out of the nine, two are shown as newly installed, then seven (7) replaced, one broken and in the store and six not accounted for. There is however no indication of the serial numbers of the missing energizer or some other form of identification. There is also no identification of the energizers used to replace the missing ones. Besides, the General Manager did not give evidence to deny that he disposed the alleged missing energizers. Taking all the above matters into account, I find that the respondent has not approved that the alleged six old energizers were placed in the claimant's custody and that he failed to keep records of their disposal.
42. The second charge was loss of 400 litres of diesel valued at Kshs.65,600 and which was destined to Tima 6 on 9th February 2023. The respondent alleged that there was no order for the 400 litres of diesel by Tima 6 and it was never delivered. RW2 confirmed on oath that the Tima 6 received 400 litres of diesel on 13th February 2023 vide GRN signed by Bernard. She further admitted that the date on the GRN had been altered to read 13th February 2023.
43. The claimant stated that the alteration was done with intention to accuse him of irregularities. Bernard did not give evidence before the court to rebut the evidence by the claimant. Consequently, I find that 400 litres of diesel was requested for by Tima 6 and it was received by Bernard vide GRN of even date, but it was altered to read 13th February 2023.
44. The next charge involved 400 and 600 litres of diesel for drill compressor on 14th February 2023 and 21st March 2023 which, allegedly was not requested for and not authorized, since there was no drilling that time. RW4 testified that he completed drilling works in January 2023 and therefore he did not request for the fuel. The claimant admitted that he did not know whether zero drilling was done on 14th February 2023 and 21st March 2023.



45. Having considered the evidence, I find that the respondent has proved that there was irregularities in performance of duties by the claimant with respect to the 400 and 600 litres of fuel issued to the driller on 14th February 2023 and 21st March 2023. The said fuel had not been requested for and no authority was given since by that time the drilling works had been completed.
46. In fact, the claimant confirmed that fact during cross examination when he stated that on 11th February 2023 he issued drilling materials to Tima 4 including Borehole pump, borehole motor, 280 meters of submersible pipes, control panel and spicing kit. Such materials could only be issued after drilling was complete. Whereas fuel could be for the drilling compressor to install pump and submersible pipes into the borehole, exhibit 26 (Diesel Issuance record for 9th-24th February 2023) shows that on 14th February 2023, 400 litres was issued to drill compressor but no vehicle registration number was indicated.
47. As regards the alleged deficit of 28 rolls of 4.8 x 102 and 11 rolls of 9.5 x 102 polytene discovered during an impromptu stock count on 14th June 2023, the claimant contended that he was not present during the stock taking a fact that was confirmed by RW2 and RW3 who were involved in the stock taking. I have considered the minutes of the disciplinary hearing produced and also the evidence adduced in this case.
48. There is no sufficient basis upon which to make a finding of loss of the alleged rolls of polythene by the claimant. There is, however, evidence of theft of polythene by the Head of security Mr. Boniface Chege which is being pursued elsewhere.
49. The claimant was also charged with failure to report the theft of polythene rolls by Boniface Chege. However, I find no merits in that charge since there is evidence that the theft occurred after working hours and a report was made by security officers to the security supervisor the following day.
50. Finally, the charge of soliciting funds from a service provider has not been substantiated as the alleged provider did not testify in court or during the disciplinary hearing. The General Manager who received the complaint also did not testify herein. The suppliers identity remains unknown and therefore that charge remains a mere allegation.
51. Save for the charge of unauthorized issuance of 400 litres and 600 litres to the drill compressor on 14th February 2023 and 21st March 2023 all the other allegations have not been substantiated and they did not amount to valid reasons for dismissing the claimant. The court is satisfied that the issuance of the said 1000 litres of diesel for drilling without authority to unspecified person or vehicle when the work had ended amounted to a valid reason for dismissing the claimant.
52. As regards to the procedure followed, there is no dispute that the claimant was suspended on 13th June 2023, served with a show cause letter on 14th June 2023 and finally attended disciplinary hearing on 16th June 2023. The claimant contended that the procedure was not fair since he was denied adequate time to prepare effective defence. Further that, he was not provided with opportunity to access the stores to make his case and he was not provided with some documents for use during the disciplinary hearing.
53. The respondent denied that the procedure was unfair and maintained that the claimant was served with show cause letter, and accorded a disciplinary hearing. Further that, the claimant did not request for more time to prepare his defence. However, RW2 confirmed under oath before this court that the claimant was not provided with documents relating to energizers and particulars of the supplier who accused him of soliciting money.
54. I agree with the claimant that the disciplinary process was done too fast to be fair. The claimant reported back from leave on 13th June 2023 and got suspended on the same date. Investigations and impromptu stock taking was done on 14th June 2023 when a show cause letter was written inviting



him to hearing on 16th June 2023. He was away on suspension and he had no access to the stores and employees of the department.

55. Taking into account the time factor and lack of access to documents and the stores to prepare his defence, I find that the claimant's dismissal from employment was not in accordance with fair procedure. In my view, the failure by an employee to protest against an unfair disciplinary process before dismissal does not immunize the unfair process.
56. An employer carries a legal duty to act fairly at all times and the employee has no obligation to guide the employer on how to conduct internal proceedings in order to avoid liability. In addition, an employee has the option of raising the procedural challenge before or after the conclusion of the internal proceedings and the court will be able to exercise its mandate as in this case.
57. In *Donald Odeke v Fidelity Security Limited* [2012] eKLR Ndolo J held that: -

“In the case of *Isaac Matongo Mogoi v Municipal Council of Nakuru & Another* (HC Misc case No.810 of 2005) Koome J (as she then was) held that an employee facing disciplinary action must be given adequate opportunity to respond to any charges before taking actions against them.

I agree with the learned Judge and add that it does not matter what offence the employee is accused of. If the employee is not heard the termination is *Ipso facto* unfair.”

58. I agree with the two Judges in the cited cases and add that adequate opportunity to respond to charges means compliance with the tenets of fair administrative action established in our constitution, the Rules of natural justice, statutes and internal regulations. Such tenets were not upheld in this case and I hold that the dismissal of the claimant on 16th June 2023 was unfair and unlawful within the meaning of section 45 of the *Employment Act*.

Reliefs

59. In view of the foregoing conclusion, I find that the claimant is entitled to declaration that the termination of his employment was unfair and unlawful. Accordingly, he is also entitled to damages under section 49 of the *Employment Act* including salary in lieu of notice and compensation for unfair termination.
60. The appointment letter provided for a termination notice of one month or payment of salary in lieu of notice. I award him one-month salary in lieu of notice. According to the pay review letter dated 28th March 2023 his salary was Kshs.96,193 (Basic pay) Kshs.14,428 (House allowance and Kshs.7,191 (Lunch allowance) totaling Kshs.117,812.
61. As regards the compensation for unfair termination, the claimant served for eleven (11) years which is a fairly long period, but then he contributed to his dismissal through misconduct. Consequently, I award him six (6) months gross salary as compensation for the unfair termination being Kshs.117,812 x 6 =Kshs.706,872.
62. The claim for severance pay is not merited since the claimant's employment was not terminated through redundancy. Likewise, the claim for discrimination is declined for lack of evidence.
63. The prayer for 26 leave days is granted as the employer did not rebut it. In its submissions, it computed the amount payable at Kshs.94,558 based on the claimant's basic salary plus house allowance only. The basic pay plus house allowance from March 2023 was Kshs.110,621 per month. Hence the claimant is awarded Kshs.110,621 x 26/30 equaling to Kshs.95,871.55.



64. In view of the foregoing matters the claimant is awarded: -
- Notice.....Kshs.117,812.00
- Compensation.....Kshs.706,872.00
- Leave.....Kshs. 95,871.55
- Kshs.920,555.55

Counterclaim

65. The claim for Kshs.65,600 for 400 litres of diesel issued on 9th February 2023 is declined because I have already made a finding of fact that the fuel was delivered at the scheduled destination. However, the claim for Kshs.65,600 and Kshs.98,400 for fuel issued on 14th February 2023 and 21st March 2023 to Drill Compressor is granted because as noted above, the drilling works had ended in January 2023 and no one requested for the same, no approval was given by the management, no driver received the fuel and no vehicle was indicated.
66. The claims for polythene rolls and old energizers not accounted for are declined for the reasons highlighted above. However, the claim for company loan of Kshs.606,777 is granted because the claimant admitted the same, and there is evidence to support it.
67. As regards the claim for Sacco loan, there is no basis shown why the respondent should involve itself in the business of the Sacco. The alleged Sacco has not been named in the pleadings and as far as this court is concerned the Sacco remains mysterious and no nexus has been demonstrated as between the loan and the case before me. Consequently, I decline the claim and refer the parties to the relevant forum which is clothed with jurisdiction over Sacco loans.
68. The foregoing notwithstanding, I find merits in the counter claim in the following terms: -
- Diesel 400 litres issued on 14/2/2023.....Kshs.65,600.00
- Diesel 600 litres issued on 21/3/2023.....Kshs.98,400.00
- Company loan.....Kshs.606,777.00
- Kshs.770,777.00

Conclusion

69. I have found that the dismissal of the claimant from service was unfair and unlawful within the meaning of section 45 of the *Employment Act*. I have also found that the claimant is entitled to an award of Kshs.920,555.55 while the respondent has proved Kshs.770,777 in his counter claim. The end result is a judgment entered for the claimant against the respondent in the following terms:
- i. Declaration that his dismissal was unfair and unlawful.
 - ii. Payment of Kshs.920,555.55 less Kshs.770,777 =Kshs.149,778.55
 - iii. The claimant is awarded interest at court rates from the date of the judgment because the award was largely a discretionary award of compensation.
 - iv. The award is also subject to statutory deductions.
 - v. Each party to bear own costs because both sides succeeded in their claims.

DATED, SIGNED AND DELIVERED AT NYERI THIS 9TH DAY OF MAY, 2025.



ONESMUS N MAKAU

JUDGE

Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

onesmus n makau

judge

