



REPUBLIC OF KENYA



Riungu v Geothermal Development Company (Employment and Labour Relations Cause E043 of 2022) [2024] KEELRC 3 (KLR) (16 January 2024) (Judgment)

Neutral citation: [2024] KEELRC 3 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS CAUSE E043 OF 2022**

**HS WASILWA, J
JANUARY 16, 2024**

BETWEEN

LUCY KATHURE RIUNGU CLAIMANT

AND

GEOHERMAL DEVELOPMENT COMPANY RESPONDENT

JUDGMENT

1. The claimant instituted this suit vide a memorandum of claim dated 18th November, 2022 and amended on 12th June, 2023. The main issue for contention is the termination of the claimant, which is alleged to have been done unfairly and without sufficient cause.

Claimant's case

2. It is stated that the claimant was employed by the Respondent on 29th September, 2009 as an Office Assistant in Job Group 11 and stationed in Nairobi. She was later transferred to Nakuru.
3. Upon reporting to Nakuru, she worked for a year in the same department then deployed to the Hospitality department as hospitality attendant III -Property management, Job group II.
4. That she served the Respondent diligently, causing the Respondent to promote her to the position of Hospitality attendant II -Property Management 10 and her salary and allowances were raised.
5. On 30th January, 2015, she was further promoted to be the assistant Property management III, which promotion came with further salary increase and allowances.
6. On 10th September, 2015, he was promoted to Assistant Property Management 1 and on 10th January, 2017, she was deployed to the Human Resource and Administration department, which she served until 3rd May, 2018, when she was deployed to the Security Department.



7. On 9th October, 2020, the claimant was appointed as a non-designated driver for a period of one year and reverted back to the security department, which she served until 16th June, 2021, when she was arrested and detained at Githioro Police station on allegations of handling stolen property.
8. Before the criminal matter was fully heard in court, the Respondent dropped the charges and issued the claimant with a notice to show cause letter dated 29th June, 2021, on why disciplinary action should not be taken against her for causing loss of company property allegedly found at her residence and for failing to safeguard the said company property.
9. She responded to the show cause by her letter dated 2nd July, 2021. Subsequently, she was invited for a disciplinary hearing by the letter of 18th August, 2021, scheduled for 25th August, 2021, however the meeting did not take place but two days' later on 27th August, 2021, the claimant was interdicted from employment.
10. By the Summons dated 23rd September, 2021, the claimant was invited for another disciplinary hearing scheduled for 1st October, 2021, which she appeared and defended herself. After analysis of the disciplinary case, the Respondent dismissed her from employment with effect from 2nd December, 2021.
11. She appealed against the dismissal by her letter dated 11th February, 2022, However, the Respondent upheld the dismissal and dismissed the Appeal by the letter dated 19th August, 2022.
12. The claimant stated that her dismissal was unfair because, she explained herself regarding the loss of the Respondent property that she was not the one that authorized the release of the Company property on that fateful day and that none of the said property was ever recovered at her residence. In any case that the particular house, where the goods were allegedly recovered from was still under construction.
13. The claimant stated that as per the gate pass records, the subject authorizations were done by one Panita Nafula, who authorized gate pass number 5381 and 5382, while Jeremy Rono authorized gate pass number 30612, therefore that she cannot be held accountable for the wrongs of other employees.
14. Based on the foregoing, the claimant stated that the termination was not justified for want of reason for dismissal and sought for the following reliefs; -
 - a. A declaration that the claimant was unfairly, dismissed from employment by the Respondent and the reason for dismissal as contained in the summary dismissal letter dated 2nd December, 2021 was invalid.
 - b. A declaration that the summary dismissal of the claimant from employment was disproportionate, unfair, lacked valid reason and therefore null and void.
 - c. An order for compensation for damages for unfair termination.
 - d. Terminal allowances and/or retirement benefits.
 - e. Costs and interest.
15. During hearing the claimant testified as CW-1 and adopted her witness statement of 14/10/2022 and produced the documents filed on 18/11/2022 which were marked as Claimant's exhibit 2-25 respectively. Additionally, she stated that at the time of termination she was serving the Respondent as Security Assistant Officer.
16. She testified that she was dismissed from employment due to an accusation made by the Respondent of stealing but that she was not charged with any criminal offense. That she was summoned by the



- police and shown some properties, which were allegedly found in her house. She maintained that she did not steal any property or authorized the removal of the said goods from the Respondent's premises as such the termination was unfair.
17. Upon cross examination by Amol Advocate, the witness testified that she knew Panita Wakoli as a colleague. She confirmed that the Respondent was not the one that reported the missing properties. She confirmed that when she was summoned to the police station, she was shown a box that had GDC marks but, she did not see what was inside. She stated that she did not store any items for Panita at her house but on further cross examination, she admitted to storing some items.
 18. The witness testified that she was invited for a disciplinary hearing and was heard in her defence but that the Respondent terminated her service.
 19. On re-examination, the witness testified that she did not sign the gate passes that allowed the properties out of the Respondent's premises. She added that none of the material allegedly stolen was recovered from her house in her presence.

Respondent's Case

20. The Respondent entered appearance on the 26th January, 2023 and filed a Response to claim on 26th June, 2023 admitting to the employment history narrated by the claimant in the claim and clarified that at the time of termination, the claimant was serving as non-designated driver under job group 9.
21. The Respondent stated that contrary to the narrative given by the claimant, the claimant was arrested together with one Panita Nafula Wakoli by police attached to Githioro Police station, following a report made to the said police station that the claimant and her colleague were in possession of properties marked as 'GDC', a Government property under the custody of the Respondent.
22. It is averred that upon investigation, the police traced the missing properties at the claimant's residence, leading to institution of disciplinary proceedings, which led to the termination of the claimant.
23. It is stated that prior to the said termination, due procedure was followed as the claimant was interdicted to pave way for investigations into the said allegation. The claimant was then issued with a notice to show cause and heard during the disciplinary hearing as such, due procedure for termination was followed.
24. It is stated further that the finding of gross misconduct was based on fair hearing and sound evidence.
25. The Respondent stated that the claimant admitted on 17th July, 2021 to keeping the said stolen property and thus, she was duty bound to explain how she acquired the said properties.
26. The Respondent called Daniel Mutinda, the Respondent's Senior Human Resource officer as its RW-1. The witness adopted his witness statement dated 26/6/2023 and produced the Respondents documents of even date as Respondent's evidence.
27. Upon cross examination by Mongeri Advocate, the witness testified that he has worked for the Respondent from 2013 to 2020 based in Nakuru. He testified that the Respondent carried out investigation and a report was filed, however that the Respondent did not identify the claimant as the perpetrator.
28. He testified that Panita was the one that identified goods for disposal because she was a member of the disposal Committee. He testified that the police visited the claimant's house, which was still under construction in presence of Panita only. He testified that it was discovered later that the said materials were sold by one Samuel Maina. He confirmed that Panita Nafula was dismissed for stealing



the Respondent's property. The witness testified that the claimant was blamed because the goods were found near her house, however that the said house was still under construction and no one was living in the said house. He also confirmed that the gate passes that authorised the removal of the said properties were done by Panita and Jeremy Rono and not the claimant even though the claimant was on duty.

29. On re-examination, RW-1 testified that Lucy stored some goods for Panita as confirmed at page 18, where she admitted to storing some goods for Panita. Therefore, that the claimant was dismissed because goods belonging to GDC were found in her premises.

Claimant's Submissions.

30. The claimant submitted on two issues; whether the claimant was unfairly dismissed from employment and whether the claimant is entitled to the reliefs sought.
31. On the first issue, it was submitted that the dismissal letter was to the effect that the claimant was terminated for authorizing gate passes number 5381,5382 and 30612 between 7th and 8th October, 2020 that lead to the release of the company materials from the GDC polo centre offices that were later traced at her residence. However that the internal Memo dated 23rd June, 2021, was on the contrary as it indicated that an employee by the name Panita Nafula admitted in her statement, to carrying away some materials in her personal car to the claimant's construction site and giving the caretaker, who in turn sold the said goods a confirmation that the deal herein was done between the said Panita in absence of the claimant.
32. It was argued further that Panita authorised two gate passes, while Jeremy Rono authorised one gate pass, thus the allegations that she was the one that authorised the release of the goods was without basis. Furthermore, that the Respondent in the investigations report recommended for disciplinary action to be taken against Panita Nafula and Jeremy Rono for authorizing the gate passes that lead to the release of the Respondent's goods.
33. The claimant submitted that the Notice to show cause required her to explain why she authorised the gate passes that led to the release of the Respondent's Goods, however that during hearing she was accused of theft of company property contrary to section 12.16 III (ix) of the Respondent's HR Policy of 2018, which charges were different from the one indicated in the Notice to Show cause and the claimant therefore was not given sufficient time to prepare and respond prior to the hearing, therefore that the process of termination was unfair. In this they cited the case of National Cereals and Produce Board V John Kirui Tongorei[2017] eklr and the case of MC Arighani Ltd V Mohammed Noor[2015] eklr where the Court of Appeal held that it amounts to denial of right to fair hearing for employee to introduce new matters at the disciplinary hearing or in the termination letter.
34. The claimant also relied on the case of County Assembly of Kisumu & 2 Others Vs Kisumu County Assembly Service Board & 6 others [2015] eklr, where the Court of Appeal held that;-

“Whereas the right to a fair hearing varies from one case to another depending on the subject of the matter in issue, its irreducible minimum is now well settled. In granting that right, the court or the administrative body or person concerned should not make it a charade by taking perfunctory actions for the sake of running through the motions to be seen to have complied with it. The person charged is entitled to what, in legal parlance is referred to as the right to “notice and hearing.” That means he must be given written notice which must contain substantial information with sufficient details to enable him ascertain the nature of the allegations against him. The notice must also allow sufficient time to interrogate the allegations and seek legal counsel where necessary.”



35. Accordingly, that the claimant was issued with a notice to show cause for authorising gate passes that lead to the release of the Respondent's goods and upon hearing, she was questioned on theft of the Respondent's goods, but on termination, she was terminated for the authorization of gate passes, which was not done by her as was demonstrated by the investigations reported compiled by the Respondent and tendered in evidence before this Court, He argued that the reason for termination was invalid and unjustified. To support their argument, the claimant relied on the case of Josephine M Ndungu & Others V Plan International Inc.[2019] eKLR where the Court held that:-

“Under section 47(5) of the Employment Act, the burden of proving unfair termination lies with the employee. The said burden is discharged once he establishes a prima facie case that, the termination did not fall within the fall corners of the legal threshold set out by section 45 of the Act. The said provision bars employer from terminating employee's contract of employment except for a valid and fair reason and through a fair procedure. A reason is valid and fair if it relates to the employee's conduct, capacity and compatibility or based on the employer's operational requirements. Fair procedure, on the other hand refers to, but not limited to, affording the employee an opportunity of being heard before the termination. Upon discharge of the said burden on a balance of probability, the employer assumes the burden of proof, under section 43(1), 45(2) and 47(5) of the Act, to justify the reason for the termination and prove that a fair procedure was followed.”

36. The claimant submitted further that the decision to dismiss her from employment was unreasonable considering, that the grounds for dismissal which was authorization of gate passes, was an issue that had been investigated upon and the Respondent arrived at a finding that the authorization of the gate pass was done by Panita Wafula and Mr. Rono . To support the argument that the Respondent's action was unreasonable, the claimant relied on the case of Kenya Revenue Authority V Reuwal Waithaka Gitahi & 2 others [2019] eKLR where the Court held that:-

“The standard of proof is on a balance of probability, not beyond reasonable doubt, and all the employer is required to prove are the reasons that it “genuinely believed to exist,” causing it to terminate the employee's services. That is a partly subjective test.”

37. In view of the above, the claimant submitted that it deserves the reliefs sought and urged this Court to allow the claim as prayed.

Respondent's Submissions

38. The Respondent on the other hand submitted on three issues; whether the termination of the claimant's employment was lawful and fair, whether termination of the claimant's employment was in accordance with fair procedure and who should bear costs of the suit.

39. On the first issue, it was submitted that the claimant admitted in her statement of 17th June, 2021 and during cross examination that some goods were found in her residence, further that she was on duty on the fateful day, a confirmation that the claimant committed disciplinary offense leading to the loss of the Respondent's property, which were found in her residence. Based on the foregoing, the Respondent submitted that the claimant's termination met the substantive justification as elaborated in the case of Walter Ogal Anuro V Teachers Service Commission [2013] eKLR.

40. The Respondent submitted that the actions of the claimant amounts to gross misconduct, which summary dismissal is justified as provided for under Section 44(4)(g) of the Employment Act and clause 12.16(III)(XI) of the GDC Human Resource Management Policies and Procedures manual, 2018,



which categorises theft as gross misconduct. To support its case, the Respondent relied on the case of *Galgalo Jarso Jillo V Agricultural Finance Corporation* [2021] eKLR.

41. The Respondent argued that since the claimant did not deny being in possession of the Respondent's goods at her premises but merely blamed Panita Nafula, she indirectly ascertained that she was involved in one way or another. In any event that the evidentiary burden of an employer in justifying termination is on a balance of probability and to prove that the reason for termination were reasonable and genuinely believe to exist at the time of termination.
42. Similarly, that since the Respondent's goods were recovered at the claimant's premises, the employer believed that the disciplinary offence had been committed and the claimant was the one to blame. To support this view, they relied on the case of *Kenya Revenue Authority Vs Reuvel Waitaha Gitahi & 2 Others* [2019] eKLR where the Court held that the standard of proof of whether the termination of employment is fair is on a balance of probability, the employer is required to only prove that the reasons leading to the termination were reasonably and genuinely believed to exist.
43. On whether due procedure was followed, it was submitted that section 41 of the *Employment Act* mandates every employer before terminating the employee on grounds of misconduct, poor performance or physical incapacity to follow process and accord fair hearing. This was affirmed in the case of *CMC Aviation Limited V Mohammed Noor* [2015] eKLR where the Court of Appeal cited the decision of *Kenya Union of Commercial Food and Allied Workers V s Meru North Farmers Sacco Limited* [2014] eKLR where the Court of Appeal held that; -

“ whatever the reason or reason that arise to cause an employer to terminate the service of an employee, that employee must be taken through the mandatory process as outlines under section 41 of the *Employment Act*. That applies in a case for termination as well as in a case that warrants summary dismissal.”
44. Similarly, that the burden of proving wrongful and unfair termination is on the employee and its only after the discharge of that burden that the employer is required to demonstrate reasons for that termination. It was argued that in this case, the Claimant has not demonstrated that the termination was unfair. To support this argument, they Respondent relied on the case of *CMC Aviation Limited Vs Mohammed Noor*(Supra) , where the Court held that;-

“ Section 47(5) of the *Employment Act* states as follows:(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds of the termination of employment or wrongful dismissal shall rest on the employer.”
45. The Respondent submitted that due procedure was followed from issuance of Notice to show cause, investigation, invitation to disciplinary hearing, hearing, Appeal and final termination. Hence the procedure was followed as is required under section 45 of the *Employment Act* and reiterated by the court in *Walter Ogal Anuro Vs Teachers Service Commission*(Supra) where where Ndolo J. held that there must be both substantive justification and procedural fairness.
46. Based on the foregoing, the Respondent submitted that the termination satisfied both substantive and procedural fairness and thus the claim is not merited.
47. On costs, it was submitted that costs follow event and since the Respondent has demonstrated that the termination was justified, then costs should be awarded to the Respondent.



48. I have examined all the evidence and submissions of the parties herein.
49. The issues for this court's determination are as follows;
 1. Whether the claimants termination was fair and justified.
 2. Whether the claimant is entitled to the remedies sought

Issue No. 1

50. The claimant was terminated vide a letter dated 2nd December, 2021 which indicated as follows;

“RE: Summary Dismissal

Reference is made to a show cause letter ref: GDC/CS/PM/HQ/MGR/6-03/jk/AO dated 29th June 2021, in which you were accused of authorizing gate passes 5381, 5382 and 30612 between the 7th and 8th October, 2020 which led to the release of Company materials from GDC Polo Centre offices that were later traced to your residence.

You were invited to a Disciplinary Committee hearing on Friday, 1st October, 2021 and your defense was found unsatisfactory.

In view of the above, the company hereby summarily dismisses you from its employment with immediate effect.

You are therefore required to immediately handover any company property that is in your possession to the Ag. Manager, Property Management and arrange to fill and return a duly signed Clearance Form to the Regional Human Resource Officer – Central Rift.

Kindly note that this letter is issued in duplicate. Please sign and return the second copy to the Regional Human Resource Officer – Central Rift.”

51. From the above letter, the reasons for the dismissal of the claimant was authorizing gate passes 5381, 5382 and 30612 between 7th & 8th October 2020 that led to the release of company materials from GDC Polo Centre officer that were later traced to the claimant's residence.
52. Before this dismissal, the claimant was served with a notice to show cause letter dated 29/6/2021 that required her to explain why administrative action should not be taken against her for failure to safeguard company property.
53. The details of this failure to safeguard company property were due to the release of company materials which were released through the gate passes above and which materials ended up at the claimant's residences.
54. The claimants were expected to explain a few issues as per the show cause letter.
55. The claimant responded to the show cause letter vide her letter dated 2nd July 2021 indicating that one Panita Nafula from Property Management Department called her in November 2020 requesting her to keep her building materials at her house which was still under construction.
56. She allowed her to do and gave her the caretakers to assist her.
57. The caretaker later called her and informed her that Panita Nafula had taken building materials there.
58. She also indicated Panita had told her she bought the materials from Industrial Area and she accepted to keep them in good faith at her house.



59. The said Panita also admitted that the materials belong to her vide a letter dated 18th August. The claimant was later invited to a disciplinary committee hearing scheduled on Wednesday 25th August 2021.
60. In the meantime the claimant was interdicted vide a letter dated 27th August 2021.
61. From the minutes of disciplinary hearing which was conducted on 1st October 2021 at page 32, the accusation against the claimant was theft of company property on tantamount to gross misconduct contrary to GDCS – HRPP of 2018 Section 12. 16 III (ix), misappropriate and theft of company property and CBA (KETAWU & GDC) Section 12.12.3 (e) wilful misuse or damage of company property.
62. The charges were read to her and she explained how she was asked by Panita to keep the materials for her at her premises under construction and she agreed to do so. The committee found her guilty of theft.
63. Panita Nafula also appeared before this committee and she confirmed that the items belonged to her and were bought from Industrial Area.
64. From the evidence of the RW1 one Daniel Mutunda the claimant was not the perpetrator of theft and that these materials had been sold by one Samuel Maina.
65. He also confirmed that Panita Nafula was dismissed for stealing the respondent’s property and that the claimant was blamed because the material was found near her house which was still under construction and no one was living in that house.
66. He also confirmed that the gate passes that authorized the removal of the said properties were done by Panita and Jeremy Rono and not the claimant.
67. The claimant was finally dismissed as indicated above for authorizing gate passes No.5381, 5382 and 30612.
68. The respondents witnesses distanced the claimant from this accusation indicating that the gate passes were authorised by Panita and Jeremy and not the claimant.
69. As submitted by the claimant, the claimant had been served with a show cause letter indicating that she failed to safeguard company property.
70. During the disciplinary hearing the accusation was now theft of company property for which the claimant was found culpable.
71. In the dismissal letter, there were further goal post shifting with the claimant being dismissed for authorizing gate passes that led to the release of company property.
72. My analysis of this evidence shows that the way the disciplinary process against the claimant was conducted shows denial of a right to a fair hearing where new matters are introduced at the disciplinary hearing or in the termination letter as held by the Court of Appeal in National Cereal and Produce Board Vs John Kirui Tongorei (2017) eKLR (Supra) and in MC Arighani Ltd Vs Mohammed Noor (2015) eKLR cases. (Supra)
73. This was also the holding in by the Court of Appeal in County Assembly of Kisumu and 2 others Vs Kisumu County Assembly Service Board and 6 others (2015) eKLR case. (Supra)
74. It is my finding that the disciplinary process through which the claimant was subjected to was flawed, unfair and unjustified and therefore contrary to Section 41 of the *Employment Act* 2007 which states as follows;-



“41. Notification and hearing before termination on grounds of misconduct

- (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 this 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”.

75. Given the mix up on the reasons for which the claimant was subjected to a disciplinary hearing and for which he was finally dismissed I find the dismissal infact unjustified as provided for under Section 45 (2) of the Employment Act 2007 which states as follows;

“ 45.

- (1)
- (2) A termination of employment 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”.

76. I therefore find for claimant as prayed and make a declaration that the dismissal of the claimant was disproportionate, unfair, lacked valid reasons and is therefore null and void.

Remedies

77. Having found for the claimant as above, given the time lines for quashing such a decision made against the claimant which should be within 3 years, I find that the claimant is entitled to full compensation equivalent to 12 months salary as follows;

1. $12 \times 133,472.36 = 1,601,668.32$
 2. I also award the claimant 1 months salary in lieu of notice = 133,472.36
- Total = 1,735,141/=
- Less statutory deductions



3. The claimant is also entitled to her terminal dues
4. The respondent will pay costs of this suit plus interest at court rates with effect from the date of this judgement.

DATED AND DELIVERED IN OPEN COURT THIS 16TH DAY OF JANUARY, 2024.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ogada holding brief Amol for respondent – present

Rotich holding brief for Mongeri for claimant – present

Court assistant - Fred

