



**Muchiti v Wildebeest Eco Camp Limited (Cause 2155 of 2017)  
[2024] KEELRC 179 (KLR) (8 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 179 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 2155 OF 2017  
JK GAKERI, J  
FEBRUARY 8, 2024**

**BETWEEN**

**ANASTACIA MUCHITI ..... CLAIMANT**

**AND**

**WILDEBEEST ECO CAMP LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant commenced this suit by a Memorandum of Claim filed on 31<sup>st</sup> October, 2017.
2. The Claimant avers that she was employed by the Respondent on 1<sup>st</sup> February, 2009 under a written contract of service and served diligently and dutifully until 21<sup>st</sup> June, 2017 when she was accused of being involved in theft and exchange of fake US Dollars at the Respondent's Camp and was called upon to show cause, responded but was sent on paid leave vide letter dated 23<sup>rd</sup> June, 2017, invited for hearing by letter dated 25<sup>th</sup> July, 2017 and appeared with one Winnie Ouka but was not accorded an opportunity to present her case and her employment was terminated vide letter dated 31<sup>st</sup> July, 2017.
3. It is the Claimant's case that the alleged theft was reported to the police at the Hardy Police Station where she was summoned, interrogated but not charged.
4. The Claimant avers that the termination of employment was unfair and prays for;
  - a. A declaration that she was not accorded a fair hearing as the dismissal lacked the procedural fairness envisaged by the *Employment Act*, 2007.
  - b. A declaration that the dismissal from employment by the Respondent was substantively unfair.
  - c. The sum of Kshs 569,500.00 comprising;
    - i. One month's salary in lieu of notice.



- ii. Equivalent of 12 months' salary.
- iii. Pro rata leave not taken (10 days).
- iv. Service pay for 9 years.
- d. Certificate of service.
- e. Costs.
- f. Interest on (c) and (e) above.

### **Respondent's case**

- 5. In its response, the Respondent admits that the Claimant was its employee as alleged and avers that the Claimant was involved in a scheme to steal the Respondent's clients' money from their rooms and also replace the clients' currency with fake American Dollars.
- 6. That the Respondent had received numerous complaints of stolen American Dollars from its clients dating back to January 2017.
- 7. It is the Respondent's case that the case was reported to the police and it engaged a private investigator.
- 8. That the investigator conducted investigations and found the Claimant culpable.
- 9. It is the Respondent's case that the summary dismissal was conducted in accordance with the provisions of the *Employment Act*, 2007.
- 10. The Claimant filed a Reply to the Respondent's response stating that all tents had safes and only Directors and the Accountant had the secret code and she was never found with fake dollars and no client complained about her. She denied having been interrogated by the investigator and was thus condemned unheard.
- 11. That her original letter was signed and retained by Allan.
- 12. That there was no CCTV footage as it was not produced.
- 13. That the Respondent ought to have awaited completion of the police investigation.

### **Claimant's evidence**

- 14. On cross-examination, the Claimant confirmed that she was aware of the allegations about theft and exchange of US dollars, was questioned by the police and the investigator and received a notice to show cause, responded and was given an opportunity to defend herself.
- 15. The witness confirmed that although she was invited for a hearing and informed of the right to be accompanied by a representative, but did not choose one Winnie to attend.
- 16. It was her testimony that the letter of termination set out the reason for termination and she received it.
- 17. The witness confirmed that National Social Security Fund deductions were being paid as evidenced by copies of payslip on record and she had an NSSF number.

### **Respondent's evidence**

- 18. RWI, Mr. Allan Wickman confirmed that he was the Managing Director of the Respondent and his statement was undated.



19. According to him, theft started in 2015/2017 and he engaged an investigator named Peter and he was in the camp during the investigation but not present when the Claimant allegedly threatened her colleagues and the theft was not reported to the police.
20. He testified that he had no copy of the termination letter.
21. The witness confirmed that the camp had CCTV footage although it was not filed and he did not give the Claimant the investigation report.
22. On re-examination, the witness testified that he signed the witness statement.
23. That the unnamed staff who had collected US dollars was a security guard.
24. RWII, Lyniita Harris confirmed that there was a disciplinary hearing but did not have the minutes and those on record were neither signed nor dated.
25. It was her testimony that the employees who had complained about the Claimant were not present during the hearing and did not record statements for purposes of the hearing.
26. That the Claimant had a representative at the hearing and called her.
27. The witness testified that she was unaware of whether the Claimant was charged for a criminal offence.
28. That the Claimant was summarily dismissed for breach of the employment contract.
29. It was her testimony that Celine was one of the accusers of the Claimant and hearing took place on 27<sup>th</sup> July, 2017.
30. That the witness instructed the Claimant to look for a witness and she obliged.
31. RWIII, Mr. Peter Kinyanjui, the investigator, confirmed that he was a licenced investigator of 3½ - 4 years and held a Bachelors Degree in Criminology, Investigation and Forensics from Masinde Muliro University of Science and Technology.
32. He admitted that the Report had typing errors on dates as the date in question was 28<sup>th</sup> May, 2017.
33. That it took him two weeks to interview 5 persons including the Claimant and relied on interviewing only and had no witness statements from the interviewees.
34. RWIV, M/s Winnie Awuor confirmed that she worked at Reservations and Help Desk and the Respondent had 4 house keepers and was interviewed by the investigator.
35. It was her testimony that guests informed her about the issues they faced at the camp and she informed the Manager who called the police and the investigator.
36. That she was called by the Manager to attend the disciplinary hearing, one Judy and was told that she would represent the Claimant and at the table the Claimant told her to be her witness.
37. It was her testimony that the Claimant had not talked to her about the representation.
38. On re-examination, the witness testified that Judy had walked to her desk and requested her to proceed to the meeting.
39. Finally, it was her testimony that any matter affecting guest was reported at the Reservations and Help Desk.



### Claimant's submissions

40. The Claimant's counsel submitted on validity and justification of the reasons for termination of employment and entitlement to the reliefs sought.
41. As regards the reason for termination of the Claimant's employment, counsel submitted that as the allegations made against the Claimant were weighty, thorough investigation was necessary including involvement of the police but the Respondent by-passed the police and used a private investigator who did a shoddy job and the investigation did not find the Claimant culpable.
42. Reliance was made on the sentiments of the court in *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR and *Mary Chemweno Kiptui v Kenya Pipeline Co. Ltd* (2014 eKLR and the provisions of Section 43 of the *Employment Act*, 2007 to urge that the employer must have a substantive justification or valid reason(s) to terminate the employment of an employee.
43. On procedural fairness, counsel relied on the sentiments of the Court of Appeal in *Postal Corporation of Kenya v Andrew K. Tanui* (2019) eKLR to underscore the elements of Section 41 of the *Employment Act*, 2007.
44. Counsel submitted that the Claimant was not given the opportunity to face her accusers or their statements.
45. Sentiments of the Court in *Charles Kinyua & another v Meru Central Dairy Co-operative Union Ltd* (2015) and *Libema v Masinde Muliro University of Science and Technology (MMUST)* (2022) eKLR were relied upon to urge that the disciplinary process was not procedurally fair.
46. Counsel submitted that the Respondent hounded the Claimant out of employment without any valid reason.

### Respondent's submissions

47. As to whether termination of the Claimant's employment was unfair, counsel cited Section 41 of the *Employment Act*, 2007 to urge that it was fair in that after the Respondent realised that guests were loosing cash and genuine US dollars were being exchanged with fake ones, it launched investigations and identified the Claimant as the prime suspect, issued a notice to show cause and she was sent on paid leave during which time no loss or exchange of dollars took place.
48. Counsel submitted that the Claimant was invited and attended a disciplinary hearing with a witness and employment was terminated thereafter.
49. The decision in *Mkalla Chitavi v Malindi Water & Sewerage Co. Ltd* (2013) eKLR was cited to buttress the submission that termination of the Claimant's employment was fair.
50. On entitlement to compensation, counsel urged that the Claimant was not as she was summarily dismissed for gross misconduct pursuant to the provisions of Section 44(4)(g) of the *Employment Act*, 2007.
51. On service pay, counsel submitted that as the Claimant was a member of the National Social Security Fund (NSSF) and service pay was unavailable by virtue of Section 35(6)(d) of the *Employment Act*, 2007 as held in *Peter Maina Wandu v Unigbir Ltd* (2017) eKLR. Similarly, the Claimant confirmed that the Respondent was remitting NSSF deductions.
52. The decision in *Osota Paul Osiemo v Inter Security Services Ltd* (2021) eKLR was relied upon to reinforce the submission.



## Findings and determination

53. The issues for determination are;
- i. Whether termination of the Claimant's employment by the Respondent was unfair.
  - ii. Whether the Claimant is entitled to the reliefs sought.
54. It is common ground that the Claimant was an employee of the Respondent effective 1<sup>st</sup> February, 2009 under a written contract of service, a copy of which the Respondent did not avail.
55. The Claimant testified that she was a house keeper and RWIV confirmed that at the time, the Respondent had 4 housekeepers including the Claimant.
56. It is also not in contest that the Claimant's employment was summarily terminated by the Respondent on 31<sup>st</sup> July, 2017.
57. Both the provisions of the *Employment Act*, 2007 and case law are unambiguous that for a termination of employment to pass the fairness test, it must be proved that the employer had a valid and fair reason to terminate the employment and conducted the termination in accordance with a fair procedure.
58. In *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR, Ndolo J. captured it exquisitely as follows;
- “ . . . However, for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness . . . ”
59. The Court of Appeal expressed similar sentiments in *Naima Khamis v Oxford University Press (EA) Ltd* (2017) eKLR.
60. The provisions of Sections 41, 43, 44, 45 and 47(5) of the *Employment Act*, 2007 set out the prerequisites of a fair termination of employment including the respective burden of proof of the parties.
61. On the question of termination, counsels have adopted opposing positions with the Respondent's counsel urging that owing to the gravity of the misconduct, the summary dismissal of the Claimant was fair. The Claimant's counsel submitted otherwise

## Reason for termination.

62. From the evidence adduced in court, it is discernible that the Respondent had received complaints from its guests that money was being lost at the camp and fake US Dollars were being exchanged with genuine US Dollars gotten from the guest's bags during their absence.
63. RWIV confirmed on cross-examination that the loss and fake dollars was reported to her at the Reservation/Helpdesk and she informed the Manager.
64. It is however, unclear as to when the complaints started but due to the frequency, the Respondent reported the same to the police and engaged an investigator.
65. The Claimant admitted that the matter was reported at the Hardy Police Station and she was summoned and interrogated by the police but was neither arrested nor charged with any offence.
66. The Claimant admitted that while in the Respondent's employment, there were allegations of theft and exchange of US dollars at the Respondent's place of business.



67. The investigator, Mr. Peter Kinyanjui testified that he interviewed 5 employees of the Respondent and came to the conclusion that since Claimant had accessed Room 4 as a cleaner, she was responsible for the loss of client's US dollars.
68. The investigator found that one Celine, a cleaner had confirmed having seen the Claimant enter Room 4.
69. The Claimant did not deny that she entered Room 4 or did not clean it.
70. The investigator also found that the employees feared the Claimant.
71. Although the Claimant alleged, in the reply to the response to the claim that she was not interrogated by the private investigator, she admitted on cross-examination that she was interviewed by the investigator among other staff of the Respondent.
72. Strangely, the investigator did not review the CCTV footage at the camp or attach the statements made by the witnesses.
73. This far, the court is persuaded that the allegation of loss and exchange of dollars with fake ones was real and both the Claimant and Respondent were aware of them.
74. RWII testified that when the Claimant was sent on paid leave, no loss and/or exchange of fake US dollars took place.
75. Similarly, RWI confirmed that they had CCTV footage which was not filed.
76. In determining whether the Respondent had a valid and fair reason for termination of the Claimant's employment, the court is guided by the provisions of Section 43(2) of the [Employment Act](#), 2007 and judicial pronouncements.
77. Section 43(2) of the [Employment Act](#), 2007 provides that;
- “The reason or reasons for termination of a 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.”
78. This provision has been construed to mean that all that the employer is required to demonstrate is that it had reasonable grounds for genuinely believing that the grounds existed. (See [Galgalo Jarso Jillo v Agricultural Finance Corporation](#) (2021) eKLR.)
79. Similarly, in [Kenya Revenue Authority v Renwel Waitihaka Gitahi & 2 others](#) (2019) eKLR, the Court of Appeal was emphatic 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 partially subjective test.”
80. The foregoing sentiments comport with the band of reasonableness test highlighted by Lord Denning in [British Leyland \(UK\) Ltd v Swift](#) (1981) I.R.L.R 91 as follows;
- “The correct test is; was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, the dismissal was unfair, but if a reasonable employer



would have dismissed him the dismissal was fair. It must be remembered, in all these cases that there is a band of reasonableness within which an employer might reasonably take one view; another quite reasonably take a different view . . .”

81. The court is guided accordingly.
82. The Notice to Show Cause dated 21<sup>st</sup> June, 2017 accused the Claimant of being involved in the theft and exchange of US dollars at the Respondent’s camp.
83. Although the Claimant denied involvement, she referred to an incident where a guest allegedly complained of missing USD 200, in tent 16 and the Claimant and one Emily did the house keeping. She also referred to another case where guests had fake US Dollars.
84. The summary dismissal letter dated 31<sup>st</sup> July, 2017 accused the Claimant of loss and exchange of fake currency when she was on duty, had accessed the client’s room and gave contradictory testimony.
85. While the last three reasons were not included in the notice to show cause, the 1<sup>st</sup> and principal reason was.
86. It is common ground that the allegations made against the Claimant were very serious as demonstrated by the report to the police and the engagement of a private investigator.
87. Although the Respondent does not appear to have followed up the matter with the police, it appreciated its gravity and relied on the investigations report.
88. Section 44(4)(g) of the *Employment Act*, 2007 confer upon the employer the right to dismiss an employee summarily, if;  

“an employee commits, or on reasonable and sufficient grounds is suspected of having committed a criminal offence against or to the substantial detriment of his employer or his employer’s property.”
89. The employer appear to have had reasonable and sufficient ground to suspect the Claimant of having been involved in criminal activities to its substantial detriment as it relied on foreign guests for its business.
90. The fact that the police did not investigate the matter does not deny the Respondent the right to investigate the same and act accordingly as it was not bound to await the outcome of the police investigation.
91. For the foregoing reasons, it is the finding of the court that the Respondent has on a balance of probabilities shown that it had a valid and fair reason to terminate the Claimant’s employment.

## **Procedure**

92. On procedural propriety, while the Claimant’s counsel submitted that the termination was procedurally unfair, counsel for the Respondent submitted that the prescribed procedural safeguards were complied with as the Claimant was informed of the charges, invited for a hearing and was heard in the presence of a witness.
93. As held in *Pius Machafu Isindu v Lavington Security Guards Ltd* (2017) eKLR, Section 41 of the *Employment Act*, 2007 prescribes an elaborate and mandatory procedure to be complied with by an employer in the termination of employment.



94. In *Postal Corporation of Kenya v Andrew K. Tanui* (*supra*), the Court of Appeal itemised the elements of procedural fairness as follows;

“Four elements must thus be discernible for the procedure to pass muster:-

- i. an explanation of the grounds of a termination in a language understood by the employee;
- ii. the reason for which the employer is considering termination;
- iii. entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination are made;
- iv. hearing and considering any representations made by the employee and the person chosen by the employee.”

95. The salient issue for determination is whether termination of the Claimant’s employment met the threshold of procedural fairness.

96. Evidence on record shows that the Claimant received a notice to show cause dated 21<sup>st</sup> June, 2017 stating that investigations had revealed that she was the principal actor in the exchange of fake US dollars and theft and was invited for a disciplinary hearing vide letter dated 25<sup>th</sup> July, 2017.

97. The invitation letter informed the Claimant the charges against her, right to be accompanied by a colleague of her choice and the opportunity to present her case.

98. It is noted that the Claimant was accorded only one full day to respond, which, is in the court’s view too short.

99. Significantly, in her written statement, the Claimant states that she was not accorded a fair opportunity to defend herself as the Respondent harassed and intimidated her and Winnie Ouka.

100. Relatedly, it is apparent that the Respondent relied exclusively on the investigator’s report to find the Claimant culpable and did not avail a copy to the Claimant which is inconsistent with the principles of fair hearing.

101. Availment of the evidence or documents to be relied upon in a disciplinary hearing is a cardinal precept of the right to fair hearing.

102. The Respondent furnished the Claimant with neither the investigator’s report nor the statements of the witnesses. RWI confirmed as much on cross-examination.

103. The foregoing finds support in the sentiments of the Court of Appeal in *Postal Corporation of Kenya v Andrew K. Tanui* (*supra*) as follows;

“ . . . The Board had in its possession the very document that formed the basis of the charges framed against the Respondent but kept it away from him. Even in criminal trials, which are more serious in nature, an accused is entitled to the statements that support the charges laid against him. That is the essence of fairness even outside a judicial setting. The Respondent faced serious indictment which could torpedo his entire career and destroy his future.

104. Similarly, although both the Claimant and defendant are in agreement that the Claimant was invited and attended a disciplinary hearing on 27<sup>th</sup> July, 2017, the Respondent did not avail a copy of the minutes of the meeting and RWII confirmed as much on cross-examination.



105. The witness further confirmed that a document entitled “A Copy of Minutes of Disciplinary Hearing dated 27<sup>th</sup> July, 2017” was neither signed nor dated and thus lacked authenticity for reliance as evidence of the proceedings.
106. Intriguingly, however, in her written statement, the Claimant admitted that she was accompanied by her colleague Winnie Ouka to the Disciplinary Proceedings.
107. On cross-examination, the Claimant testified that she did not choose Winnie Ouka as her representative.
108. RWII confirmed that the Claimant called the representative of her choice.
109. However, RWIV, Winnie Ouka confirmed that she had not been invited to the meeting but was called by the Manager to attend and was told that she would be the Claimant’s representative and at the table, the Claimant requested her to be her witness. She admitted that she clarified issues on behalf of the Claimant.
110. Since the Claimant attended the hearing alone and neither requested for time to search for a witness nor protested the imposition of the witness by the Manager, and in light of her contradictory evidence on the issue of representative, nothing turns on this point.
111. In sum, it is the finding of the court that the Claimant has demonstrated that disciplinary process employed by the Respondent was flawed in that the Respondent failed to furnish the Claimant with documents it relied upon as evidence and accorded the Claimant a single day to prepare her defense and search for a colleague to accompany her.
112. For the foregoing reasons, it is the finding of the court that the termination of the Claimant’s employment by the Respondent was unfair for want of procedural propriety.

### **Reliefs**

- a. Having found that termination of the Claimant’s employment by the Respondent was unfair on account of procedural flaws, a declaration to that effect is merited.
- b. Declaration that the dismissal was substantively unfair.
113. Having found that the Respondent has demonstrated that it had a valid and fair reason to terminate the Claimant’s employment, the declaration sought is declined.
  - c. One (1) month’s salary in lieu of notice
114. Having found that termination of the Claimant’s employment by the Respondent was justifiable, the claim for salary in lieu of notice is unsustainable and is declined.
  - d. Pro rata leave earned but not taken
115. Neither the Claimant’s written statement dated 16<sup>th</sup> October, 2017 nor the oral testimony adduced in court make reference to the 10 days pro rata leave.

In the absence of relevant particulars, the prayer is declined.

  - e. Service pay for 9 years
116. The Claimant tendered no evidence to prove entitlement to service pay as neither the written statement nor the oral testimony adduced in court make reference to it.



117. Similarly, the Claimant confirmed, on cross-examination that NSSF deductions were being made as evidenced by the NSSF payment receipts on record.
118. In a similar vein, the Claimant admitted that the NSSF number on record was hers.
119. As correctly submitted by the Respondent's counsel and illustrated by relevant case law such as *Peter Maina Wandu v Unigbir Ltd* (*supra*) and *Osota Paul Osiemo v Inter Security Services Ltd* (*supra*), Section 35(6)(d) of the *Employment Act*, 2007 disqualifies beneficiaries of NSSF from service pay. Consequently, the prayer for service pay is dismissed.
- f. Certificate of service
120. The Claimant is entitled to a Certificate of Service by virtue of the provisions of Section 51 of the *Employment Act*, 2007.
- g. 12 months' salary compensation
121. Having found that termination of the Claimant's employment by Respondent was procedurally unfair, the Claimant is entitled to the relief under Section 49(1)(c) of the *Employment Act*, 2007.
122. In determining the quantum of compensation, the court has taken into consideration the following;
- i. The Claimant was an employee of the Respondent for 8 years and 5 months, which is not too long.
- ii. The Claimant had no previous record of misconduct or warning.
- iii. The Claimant did not express her wish to continue in the Respondent's employment or appeal the Respondent's decision.
- iv. The Claimant substantively contributed to the summary dismissal.
123. In the circumstances, the court is satisfied that the equivalent of 3 months' gross salary is fair.
124. In the upshot, judgement is entered in favour of the Claimant against the Respondent as follows;
- a. Declaration that termination of the Claimant's employment was unfair.
- b. Equivalent of 3 months gross salary, Kshs 76,500/=.
- c. Certificate of service to be issued within 30 days.
- d. Costs of this suit.
- e. Interest at court rates from date of judgement till payment in full.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 8<sup>TH</sup> DAY OF FEBRUARY 2024**

**DR. JACOB GAKERI**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions



of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

**JUDGE**

