



**Oduor v Akiyda (2000) Limited (Employment and Labour Relations Cause
392 of 2017) [2024] KEELRC 740 (KLR) (19 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 740 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS CAUSE 392 OF 2017**

**HS WASILWA, J
MARCH 19, 2024**

BETWEEN

GEORGE OTIENO ODUOR CLAIMANT

AND

AKIYDA (2000) LIMITED RESPONDENT

JUDGMENT

1. The Claimant herein instituted this suit by a memorandum of claim dated 27th April, 2027, alleging that the Respondent unfairly terminated his services and seeks compensation for the unfair termination. The claimant sought for the following reliefs; -
 1. Two months gross salary in lieu of notice as per the contents of the termination letter.
 2. Salary for February and March, 2017.
 3. Salary arrears from 1st November, 2016 to 31st January, 2017.
 4. Compensation for unfair termination.
 5. Certificate of service under section 51 of the *Employment Act*.

Claimant's case.

2. The claimant states that he was employed by the Respondent on 4th July, 2007 as a supervisor, known by the Respondent as Charge hand baker and deployed to Nairobi earning a gross salary of Kshs 10,799.
3. That he served the Respondent with zeal and on 1st January, 2014 he was promoted to be the Bakery manager-1 earning a gross salary of Kshs. 49,500. This pay was revised upwards to Kshs 69250 on 13th February, 2017 to take effect from 1st November, 2016 and the Claimant was to be paid in arrears.



4. On 9th March, 2017, the claimant was suspended for 14 days and on 21st March, 2017, he was served with a show cause letter on several allegations including for gross misconduct on account of negligence on the fact that he was in charge when the Respondent lost some money.
5. The claimant responded to the show cause letter via his handwritten statement and on the date of hearing he was summoned by the Operations manager, who informed him that the Respondent will rely on the handwritten statement as his defence and that no oral hearing will be conducted.
6. The claimant contends that the denial by the Respondent to allow him defend himself was in violation of sections 41 and 45 of the *Employment Act*.
7. On 31st March, 2017 the claimant was served with a termination letter. He reiterated that he did not participate in handling of money in the Respondent's employment as such money was handled by the cashier, operations manager and the accountant.
8. The claimant stated that he was the one that reported to the police that the cashier had stolen the money, as such, he had performed his duty and thus should not have been blamed for the loss of the said funds.
9. It is averred that the time of termination, the claimant had not received his salary for February and March, as such the Respondent owed him. Further, the claimant prayed to be paid salary arrears for the period between 1st November, 2016 to 31st January, 2017 when his salary had been increased from Kshs. 49500 to Kshs 69250 and not yet paid.
10. The claimant also stated that he was a member of the Respondent's pension scheme under Jubilee insurance in which he used to be deducted Kshs 4,206 and the employer could contribute a similar amount for the 9 years worked, as such the Respondent should be compel to direct the pension scheme to release to him his pension earnings.
11. During hearing, the claimant testified as CW-1 and adopted his witness statement and produced the list of documents dated 27th April, 2017 as exhibit 1 to 15 respectively. In summary he testified that on the 27th February, 2017, while he was on duty, he was informed by the Cashier that money had been stolen and he immediately took action and called the police. He testified that he was not paid his salary in full from November, 2016. He also testified that he was not given an opportunity to defend himself.
12. Upon cross examination by Waiganjo Advocate, he told this Court that he was employed as a supervisor and promoted to be the branch manager, however that his duties were not stipulated to him. He testified that he was the one that reported the theft to the police. He admitted that he was issued with notice to show cause letter, but that he was forced to sign.
13. On the material date of incident, he testified that the cash office had two doors which were locked with padlocks and that he had the key to the outer door, while the cashier had the key to the inner door. That in the evening of 26 February, 2016, the cashier locked the inner door while, he was the one that locked the outer door and on the next day, he opened the outer door as usual while the cashier opened the inner door and after few minutes he was called by the cashier who informed him that some money was missing. After investigation, it was confirmed that Kshs 1,595, 615.15 had been stolen.
14. He testified that there were no banking forms that he was expected to file daily rather that the operations manager was the one that was expected to file these cash flow forms. He testified that he was the one that had the outer padlock and never gave his padlock or key to anybody. Also, that he was the one that closed the cash office daily.



15. He stated that he was terminated on 31st March, 2017 and the reasons for termination were indicated therein, together with the terminal dues payable to him. He denied receiving the sum of Kshs 118,273 on 28/6/2017 and stated that the signature in the petty cash form is not his, he however admitted to receiving the sum of Kshs. 31,827 on the same day and signed for the same.
16. On further cross examination, he told this Court that he had loan arrears and upon termination, the Respondent informed him that the loan was subtracted from his terminal dues. He also stated that he received his certificate of service and maintained that his dues were not paid in full.
17. The claimant testified he was the custodian of the key to the outer door, in which he had to open the said door for the cashier to access his office.
18. He stated that he appealed against the decision of dismissal, in which he was invited for hearing however he was not allowed to give oral defence. He confirmed receiving Kshs 107,000 from the Respondent on the 30th June, 2017.
19. In re-examination, he testified he was not charged with any criminal offense but only called as a witness. He reiterated that he was in charge of locking the outer door and not the inner door. Also, that he could not access the inner door because the cashier was the only one allowed to have the key.

Respondent's case

20. The Respondent entered appearance on the 13th November, 2017 and filed a response to claim on the 23rd November, 2017.
21. In the defence, the Respondent admitted to employing the claimant into its employ and promoting him as illustrated in the claim, however that the claimant salary review was from Kshs 64,700 to Kshs 69,250 and not from Kshs 49,500 as such the salary arrears owed to the claimant was Kshs 4550 X 3 months, equal to Kshs 13,650 which was paid to the claimant in his February, 2017 salary as other earnings.
22. The Respondent states also that the salary for February and March, 2017 were all paid to the claimant together with his final terminal dues.
23. On the pension claim, the Respondent stated that the claimant withdrew from the mini Groups Staff Pension scheme and as a result he was paid his entitlements via cheque of the sum of Kshs 372,983, which the claimant applied for the said benefits to be paid to his personal account in Jubilee insurance. Moreover, that in accordance with the insurance policy the claimant was paid 75% of his entitlements and the balance held by the Respondent as provided for under the rules.
24. On certificate of service, the Respondent stated that the same has been ready for collection, however that the claimant has never picked the same from the respondent.
25. The Respondent stated that the claimant is responsible for the loss of the said money because, him being a manager was required to ensure the cash office was securely locked and all money were in the safe and also to ensure that the cash to bank forms were prepared and properly maintained.
26. The Respondent stated that the disciplinary committee is an administrative organ and the claimant has not demonstrated any prejudice suffer by the composition of this committee.
27. The Respondent maintained that the claimant was terminated for negligence in failing to ensure the money and cash office were properly secured and failing to maintained the cash to bank forms for more than a month, which process is crucial check and balance tool for cash management.



28. The Respondent stated further that the claimant being a manager was tasked to receiving the bank slips once they were banked and make a comparison with the money deposited to detect any malpractice. Further that the claimant only reported the loss of funds after being directed by the operations manager to report.
29. The Respondent stated that in the circumstances, the termination of the claimant was justified because the claimant abdicated his role exposing the Respondent to risk, loss and damage.
30. On terminal dues, the Respondent maintained that they paid the claimant all his dues as such nothing is owing to him as such the claim herein should be dismissed with costs.
31. During hearing, the Respondent called Stephen Wambua, the Respondent's Human Resource officer as its RW-1 who adopted his witness statement dated 11/10/2023 and produced the documents of 23/11/2017 as exhibit 1 to 15 respectively. RW-1 testified that the claimant was in the branch throughout the day and his main role with regard to cash received was to check cash flow with the cashier. He testified that the claimant was subjected to disciplinary hearing and even appealed his dismissal and given an opportunity to appear before the Appeal committee but he did not appear, hence the Appeal was dismissed and the termination upheld.
32. That upon termination, the claimant was paid his dues of Kshs 107,000 which payments he signed for on 30th June, 2017. The witness also stated that the claimant owed their Sacco some loan which petty cash money paid on 28th June, 2017 was used to pay the loan arrears, a fact that the claimant was aware of. On pension money held by Jubilee insurance, the Respondent stated that since the claimant was their permanent and pensionable member, he was paid 50% of his contributions. That he was also issued with certificate of service.
33. Upon cross examination by Maragia Advocate, the witness testified that he is the HR office. That the company lost some money and a criminal case was filed though he was not aware whether a determination of the same had been made. He admitted that the claimant was terminated before the criminal case was concluded.
34. On re-examination, he testified that the claimant was found culpable because the cashier could not access his office without the manager's presence.

Claimant's Submissions.

35. The claimant submitted on three issues; whether there was employment relationship between the claimant and the Respondent, whether the claimant was unlawfully terminated and what reliefs flow from the termination less the amount spoken to have been advanced to the claimant.
36. On the first issue, it was submitted that the same is not contested as such the *Employment Act* shall apply to the parties herein in its full force.
37. On the second issue, it was submitted that the claimant was unlawfully terminated for the reason firstly, that the grounds for termination as captured in the termination letter dated 31st March, 2017 is in conflict in material with the contents of the statement of the Respondent's witness, Stephen Wambua. It was argued that the Respondent indicated in the termination letter, that the money was stolen in bits over some time, while RW-1 stated in his statement that the said money was stolen at once. Secondly that there was no audit report prepared and presented before this Court as proof of loss of the said money. Thirdly, that the claimant was not charged with any criminal offense, rather that he was a state witness for the Respondent. Fourthly, that there were no minutes of the Appeal meeting produced in Court to ascertain indeed that the Appeal hearing took place and Lastly that as per the minutes of the



disciplinary committee, the committee resolved to terminate his services for failing to sign the Memo and not for theft as alleged in the termination letter. Therefore, that these contradictions should be construed against the Respondent.

38. It was argued that since the reasons for termination are not clear and or is conflicting, the same was not in tandem with the provisions of section 43 of the *Employment Act*, a confirmation that the reasons for termination were not proved, Hence, the termination was unfair as stipulated under section 45 of the *Employment Act*.
39. On the reliefs sought, it was submitted that the claimant's terminal dues owing are as calculated in page 3 and 4 of the Memorandum of claim all adding up to Kshs 1,151,090 and therefore if the amount allegedly paid of Kshs 107,000, Kshs 31,824 and Kshs.118, 273 is deducted from the terminal dues pay, the balance ought to be Kshs 1,000,993 which money is owing and due.
40. The claimant gave a break done of the dues owing and submitted that he is entitled to two-month notice pay as per the letter of termination of 31/3/2017, which is Kshs 138,500. He prayed for maximum compensation of 12 months of Kshs 831,000, Salary for the months of February and March, 2017 and salary arrears from November, 2016 to January, 2017 of Kshs 69,250, Kshs 69,250 and Kshs 59,250 respectively. He added that these arrears have not been disputed by the Respondent or evidence of payment tendered as evidence, as such they are due and owing.
41. In the Supplementary submissions, the Claimant reiterated his previous arguments and added that the burden of prove on the reason for termination was not surmounted from the beginning as such the burden of proof did not shift to the claimant as alleged rather that it behoved the Respondent to prove reasons for terminating the claimant's services.

Respondent's Submissions

42. The Respondent submitted on three issues; whether the claimant was employed by the Respondent, whether the termination of the claimant's employment was unfair and whether the claimant is entitled to the reliefs sought.
43. The Respondent submitted that the first issue is not contested as the claimant had produced an employment letter dated 4th July, 2007, which sets out the terms of engagement between the claimant and the Respondent.
44. On the second issue, it was submitted that on 27th February, 2017 when the Respondent lost Kshs 1,595,216.50 which money had been kept in the cashiers office, the Claimant was in charge of the branch as its manager. This fact was admitted by the claimant who reported the issue to the police, upon which the cashier was arrested and charged in Court. Subsequently, the claimant was suspended for gross negligence pending investigations and on 21st March, 2017, the claimant was served with show cause letter, which he tendered a written defence giving an account of the events leading to the said theft. That the claimant was invited to a disciplinary hearing and the allegations that he was not given a chance to speak is far from the truth. In any case that the claimant signed the attendance list and did not produce any evidence or called any witness present on the said date to ascertain these allegations as is required under section 107 of the *evidence Act*.
45. The Respondent stated that the burden of proof lie with the claimant to demonstrate violations of sections 41, 43, 43,44 and 45 of the *Employment Act*. The Respondent thus submitted that the disciplinary process was followed to the letter and the reason for termination proved that the Respondent lost money, whereby the claimant being the manager and the custodian of the cashier's office key, was responsible for the loss.



46. The Respondent argued that the basis for termination was for gross misconduct in which money was lost due to laxity of the Claimant, him being the manager. He argued that even though the claimant refused to sign the Memo, the committee preferred for his termination based on evidence table before it. He added that the claimant preferred an appeal but failed to appear before the Appellate Committee as such the Appeal was dismissed and the decision of the disciplinary committee upheld.
47. The Respondent reiterated that the termination of the claimant was justified both procedurally and substantively.
48. On the reliefs sought, it was submitted with regard to notice pay, that the employment contract at paragraph 5 provides for notice period of two months or pay of 2 months in lieu for an employee whose services is terminated having worked for more than 5 years and less than 10 years. Having worked for 9 years, the claimant was entitled to 2 months' notice, which he was given and worked till May, 2017 on full salary and then paid extra 1 ½ months' pay as such notice pay is not owing considering that the claimant was given 2 months' notice before termination and further paid 1 ½ extra months' salary.
49. On the salary arrears claim, the Respondent submitted that the claimant was paid all his dues and even signed a clearance certificate, a further confirmation that he had no arrears. Moreover, that the claimant has not indicated before this Court that he was forced to sign the clearance certificate.
50. On compensation, the Respondent submitted that compensation is not due because the termination of the claimant was justified by both reason and process.
51. In conclusion, he urged this Court to dismiss the claimant's suit with costs to the Respondent.
52. I have considered all the averments and submissions of the parties herein. The Claimant's case is that he was unfairly terminated by the Respondents and seeks a number of remedies. The Respondents on their hand aver that the termination was justified and procedurally done.
53. From the evidence on record, the Claimant was indeed an employee of the Respondent and his salary as at 13th February 2017 was Kshs 69,250/= with effect from 1st November 2016.
54. Vide a letter dated 9th March 2016, the Claimant was informed of his suspension with effect from 10th March 2017 to 25th March 2017. He was to report back to work on 27th March 2017.
55. Vide a letter dated 21st March 2017, he was served with a Notice to Show Cause to explain why disciplinary action should not be initiated against him including termination. The Claimant responded to this show cause letter denying any involvement in the fraud committed at the Respondents.
56. After this response, the Respondents proceeded to terminate the Claimant's services vide a letter dated 31/3/2017. There was no any disciplinary hearing held against the Claimant. He was not subjected to the process envisaged under section 41 of the Employment Act 2007 which states as follows;

41. (1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
57. The Claimant appealed the termination but there was no further consideration of his sentiments.



58. The Respondents had submitted that the termination of the Claimant was fair but they were silent on whether the Claimant was subjected to any disciplinary hearing. There is no evidence that they invited the Claimant to any hearing and he failed to appear.
59. In the absence of any such evidence, I make a finding that the Claimant was terminated without being accorded a hearing as per section 41 of *Employment Act* 2007 and therefore his termination was unfair and unjustified as provided under section 45 (2) of the *Employment Act* which states as follows: -
45. (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—related to the employees 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.
60. Having found the termination unfair and unjustified, the next issue to determine is on remedies available to the Claimant. The Claimant avers that he was not given any notice before termination. The Respondents averred that he was given notice of 2 months vide the letter of 31/3/2017.
61. The letter of 31/3/2017 was actually a termination letter and the termination was to take effect on 13/5/2017. The notice provided envisaged under the contract and Collective Bargaining Agreement was 2 months. Since the Claimant was not given his full notice, he is entitled to the remainder of the notice days being from 14th May 2017 to 31st May i.e 16 days during which the notice period was to end.
 $16/30 \times 69,250 = 36,932.80$.
62. He is also entitled to $\frac{1}{2}$ salary for March 2017 which salary was not paid during his suspension, = 36,932.80.
63. He indicated that he was owed salary for November 2016 to January 2017 = 3 months and was paid 49,500/= instead of 69,250/= and so was entitled to the balance = $19,750 \times 3 = 59,250/=$.
64. Given the unfair termination, I also award his salary of 8 months as compensation
 $= 8 \times 69250$
Total = 687,115.9/=
Less Statutory deductions.
The Claimant should also be issued with a Certificate of Service.
65. The Respondent will pay costs of this suit plus interest at court rates with effect from the date of this judgment.

JUDGEMENT DELIVERED VIRTUALLY THIS 19TH DAY OF MARCH, 2024.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Maragia for the Claimant – Present

Waiganjo for Respondent – Present



