



**Chebon v Wells Fargo Limited (Cause 2295 of 2017)
[2024] KEELRC 672 (KLR) (15 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 672 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2295 OF 2017
AN MWAURE, J
MARCH 15, 2024**

BETWEEN
CHARLES OTARUK CHEBON CLAIMANT
AND
WELLS FARGO LIMITED RESPONDENT

JUDGMENT

Introduction

1. The Claimant filed a Memorandum of Claim dated 15th November 2017.

Claimant’s Case

2. The Claimant avers that he was employed by the Respondent sometime in November 2020 as a security guard then promoted to the department of cash in transit sometime in 2003 and later to the position of crew commander in 2009.
3. The Claimant avers that he discharged his duties with due diligence and to the best of his ability.
4. The Claimant avers that On 07.08.2012, together with other employees and a team of police officers he was assigned to escort 149,000 US Dollars, 6,700 British Sterling Pounds and 4,065 Euros (equivalent to Kshs 13,965,460) from Eldoret to Nairobi.
5. The Claimant avers that on 07.08.2012, he was carjacked at Nairobi and he reported the incident at Karen Police Station immediately after the ordeal, and while at the station, reported to the headquarters at Eldoret.
6. The Claimant avers that to his surprise, he was arrested, detained and later charged with the offence of stealing by servant contrary to section 281 of the Penal Code in CR No. 1220 of 2012 but was eventually acquitted. The complaint was lodged by the Respondent to the police that the Claimant



- has stolen 149,000 US Dollars, 6,700 British Sterling Pounds and 4,065 Euros (equivalent to Kshs 13,965,460).
7. The Claimant avers that at the time of the unlawful arrest, he earned a gross salary of approximately Kshs 25,000 varying depending on allowance.
 8. The Claimant avers that the entire suit was malicious and was meant to unlawfully terminate him from employment.
 9. The Claimant avers that after his acquittal, the Respondent refused to reinstate the Claimant. Further, he was never given notice of termination and neither was he given payment in lieu of termination or provided a fair hearing.

Respondent's Case

10. In opposition to the Claim, the Respondent filed its response dated 14th September 2022.
11. The Respondent denied that the contents of the Claimant's memorandum of claim and put him to strict proof.
12. The Respondent admits that the Claimant was an employee of the Respondent until August 2012 when his employment was terminated.
13. The Respondent avers that it lodged a complaint to the police that the Claimant had stolen 149,000 US Dollars, 6,700 British Sterling Pounds and 4,065 Euros (equivalent to Kshs 13,965,460). The Claimant was arrested, detained and later charged with the offence of stealing by servant contrary to section 281 of the Penal Code in CR No. 1220 of 2012 but was eventually acquitted in 2016.
14. The Respondent avers that it made a genuine and valid report to the police following suspicious loss of money that was being escorted by the Claimant.
15. The Respondent avers that the Claimant was terminated in August 2012 and it merely declined to reinstate his employment after he was acquitted.

Evidence in Court

16. The Claimant (CW1) adopted his witness statement dated 13.11.2017 as his evidence in chief and produced the exhibits filed with the memorandum of claim and further payslip of October 2011 as his exhibits.
17. CW1 testified that while working for the Respondent as a group commander in Eldoret, he was told he would travel to Nairobi on 07.08.2019. He arrived at the office ready to travel with his team of 2 drivers and 2 escorts ready to go to the bank. He did not know the bank he was to go to as this was arranged by office together with the policeman.
18. CW1 testified that he was told to go to Bank of Africa, Eldoret to pick the luggage to be taken to Nairobi. They were ushered into the bank where he was given the luggage in a green bag and he did not know what was inside. The luggage was placed in the briefcase and he wrote a receipt that he received the luggage to transport to Nairobi.
19. CW1 testified that they left for Nairobi via plane and when he got to Nairobi he found a team waiting for him which was not the team to pick him. They resembled the Respondent's vehicle and team, he was ushered into a vehicle and he then realised they were robbers.



20. CW1 testified that he was blindfolded and the vehicle moved to an unknown destination for many hours. He was left in a desolate place and the vehicle left.
21. CW1 testified that he reported the matter to Karen Police Station, his former employer was informed and he was locked up. His employer came and an investigation took place and he was transferred to Airport Police Station on 08.08.2012.
22. CW1 testified that case number 1220 of 2012 at Milimani Criminal Court which was heard and he was acquitted in 2016. He went back to his former employer for further directions but he was not allowed in the compound.
23. CW1 testified that he was released on bond after one week in custody and since his release he was not allowed in the premises.
24. During cross examination, CW1 testified that he was not aware what was in the luggage and he stated the assignment was in US Dollars. He was released on bond of 2 million but he does not have the receipt of the bond.
25. CW1 testified that his demand letter he asked to be reinstated to his position and his statement of claim he stated he was terminated without reason.

Respondent

26. The Respondent's witness (RW1), Willis Ayieko Onyango, adopted his witness statement dated 01.03.2013 as his evidence in chief.
27. During cross examination, RW1 testified that he has worked for the Respondent for 8 years from 01.11.2015 and is conversant with the matters that occurred in August 2012.
28. RW1 testified that the Claimant was dismissed because of loss of funds the Claimant was to transport from Eldoret to Nairobi on 07.08.2012. The dismissal letter was dated 07.08.2012.
29. RW1 testified that the dismissal letter was not given to the Claimant as he was in the cells. The Claimant was removed out of the payroll from that date.
30. RW1 testified that the procedure when one is dismissed is as per Section 40 and 41 of the [Employment Act](#), however, the Claimant was not available to go through the disciplinary process as he was locked up indefinitely.
31. RW1 testified that the Respondent's people went to court to give evidence but the Claimant was acquitted.
32. RW1 testified that the Respondent dismissed the Claimant as it had lost money. It did not know if the Claimant was on bond or not. When one is dismissed, he/she is not refused into its premises, the Claimant needs to produce evidence that he was banned from its premises.
33. RW1 testified that there was a letter dated 18.08.2017 which was received 5 years later, the Respondent did not respond.
34. RW1 testified that the Respondent knew the Claimant was in police custody and therefore did not go to look for him. The matter was handled on 07.08.2012 at the police station where the Claimant was terminated.



35. During re-examination, RW1 testified that there was no response to the demand letter of 2017 which came 5 years after the Claimant's termination in accordance with Section 90 of the [Employment Act](#), it was time barred.
36. RW1 testified that there is no evidence that the Claimant was out on bond after 7 days.

Claimant's Submissions

37. The Claimant submitted that he was unlawfully terminated from his employment by the Respondent contrary to Section 45 of the [Employment Act](#). The Claimant was not taken through a fair procedure for termination and thus the Claimant was denied a statutory right for fair hearing as required.
38. The Claimant submitted that the Respondent did not have a valid reason to terminate his employment; it was based on mere suspicion as opposed to established facts. The Claimant was acquitted and the Respondent did not conduct any disciplinary procedures to establish the alleged theft on a balance of probabilities.
39. The Claimant submitted that his reputation was injured as a result of the unlawful prosecution from the Respondent. He relied on *Cyrus Maina Njoroge v The Attorney- General & another* [2017] eKLR which laid down the elements of malicious prosecution to be proved.
40. The Claimant submitted that based on the Respondent's internal investigations which was based on suspicion, maliciously caused him to be charged without reasonable cause so they could discharge him from his duties and unlawfully terminate the Claimant from employment.
41. The Claimant submitted that he is entitled to costs for defending the criminal suit no. 1220 of 2012. The prosecution was without reasonable cause as he was later acquitted of the criminal charges by the judgment delivered on 18.11.2016.
42. The Claimant submitted that he is entitled to 12 months compensation equivalent to his gross salary of Kshs 24,432 according to the payslip produced by the Claimant.
43. It is the Claimant's submission that the Respondent did not give the Claimant a notice of termination or make payment in lieu of termination as required under Section 35(1)(c) of the [Employment Act](#).
44. The Claimant submitted that he did not contribute to his termination and he is entitled to service pay for the period of his employment with the Respondent from year 2000 to 2012.

Respondent's Submissions

45. It is the Respondent's submission that it is evident that the termination of the Claimant's employment was effected on 07.08.2012. It relied on *Registered Trustees of the Presbyterian Church of East Africa & Another v Ruth Gathoni Ngotho- Kariuki* [2017] eKLR which stated an employer's decision to remove an employee from its payroll is a clear indication of the employer's intention to terminate the said employee's employment.
46. The Respondent submitted that the Claimant ceased to be an employee of the Respondent in August 2012. The claim having been filed outside the requisite statutory timelines, the same is time barred. As such, it would be necessary to interrogate the issues of whether or not the termination was fair.
47. The Respondent submitted that the Claimant's claim is time barred and he is not entitled to any of the orders sought in his claim.



48. The Respondent submitted that the claim for cost of the suit in Criminal Suit No. 1220 of 2012 does not meet the threshold of a special damage claim. The claim was not pleaded with any speciality and no evidence was led that he spent any money as part of his criminal trial as alleged.

Analysis and Determination

49. Having considered the pleadings, witness statements, submissions and the evidence of record, the issues for determination are:
- a. Whether the claim is time barred.
 - b. Whether the Claimant's employment was unlawfully dismissed.
 - c. Whether the Claimant is entitled to the reliefs sought.

Whether the claim is time barred.

50. The issue as to whether the case is time barred was raised by the respondent as a preliminary objection dated 21st September 2020. The court pronounced itself in its ruling dated on 4th August 2022 and stated:

“The Court is at pains to determine when time began to run in order to determine the time bar for the Claimant. Claimant was charged in Court in 2012 and was acquitted in November 2016. There being no termination letter or communication whatsoever since Claimant was arrested, I find no date to declare as the termination date and to mark time limitation.

The Respondent furthermore never gave Claimant a suspension letter or invitation to disciplinary proceedings even after he was arrested. The employee is still entitled to disciplinary proceedings even if he is incriminated in a criminal case.”

Going by the provisions of Article 50 of the Kenya Constitution of Kenya which Provides:-

- i. Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before court or, if appropriate, another independent and impartial tribunal or body.

Taking into consideration that every party is entitled to a fair hearing, I find no ground to lock out the Claimant from his constitutional right to be heard.

51. Going by the fact that the respondent did not produce a termination letter and neither did the claimant admit he received any termination letter the court still stands by its ruling that there is no date when time of termination can be said to start running in order to prove the suit was time barred.
52. The claimant was acquitted from his criminal case on 18th November 2016. He says he then attempted to go to his former employer's premises to ask for his reinstatement but says he was not even allowed to enter the premises. The court can only find that under those circumstances the claimant had no choice but to assume he had been dismissed unfairly. He wrote a demand letter dated 18th August 2017 and then filed the claim dated 16th November 2017. He did not get a response to the demand letters. The court finds the claimant was not time barred and claimant was in his right to file the claim when he received no response from the respondents.



53. As for the issue of whether the claimant was unlawfully dismissed the court will be guided by the mandatory provisions of Employment Act. Section 45(1) of the Employment Act states:

“No employer shall terminate the employment of an employee unfairly.”

54. The court is therefore dealing with the question of whether the respondent had a valid reason to terminate the claimant or not. The claimant was accused of stealing equivalent of kshs 13,965,460 which he was transporting to Nairobi from Eldoret. It is not clear on the circumstances under which the money was stolen. Nevertheless, the claimant was charged with a criminal offence in 2012 and he was finally acquitted on 18th November 2016.

55. There is no evidence that the claimant was taken through disciplinary process or even at the least given notice to show cause or even termination notice. That means there was no valid reasons given for terminating the claimant’s employment.

56. It is trite law that an employee must be taken through mandatory disciplinary process under section 41 of the Employment Act. The same 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. In the case of David Gichana Omuya vs Mombasa Maize Millers Limited (20140 eKLR the court held that the requirement of section 41 of the Employment Act have a long pedigree in administrative/public law and are referred as rules of natural justice.

58. The court finds and holds that in this instant case the procedure adopted to terminate the claimant was so flawed that it fell short of the statutory threshold. In conclusion therefore, the termination of the claimant did not satisfy both substantive justification or procedural fairness.

59. The court finds just and right to enter judgment in favour of the claimant.

Reliefs

60. Having found in favour of the claimant the following remedies are awarded to him. He is awarded 10 months compensation equivalent of his salary amounting to kshs 24,432x10= 244,320 and 24,432 being one month salary in lieu of notice.

61. The costs of the criminal case are not proved or quantified and are declined. Service pay is also not established or quantified and so is declined as well.

62. Total award amounts to kshs 268,752 plus costs of the suit and interest at court rates from date of judgment till full payment.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 15TH DAY OF MARCH, 2024.

ANNA NGIBUINI MWAURE

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 15th March 2020 and subsequent directions of 21st 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 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

