



Mwangi v Nyahururu Water & Sanitation Company Limited (Cause E007 of 2023) [2024] KEELRC 549 (KLR) (8 March 2024) (Judgment)

Neutral citation: [2024] KEELRC 549 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CAUSE E007 OF 2023
ON MAKAU, J
MARCH 8, 2024**

BETWEEN

PETER KARIITHI MWANGI CLAIMANT

AND

NYAHURURU WATER & SANITATION COMPANY LIMITED RESPONDENT

JUDGMENT

1. The claimant brought this suit on 13th March, 2023 alleging that his employment contract was unfairly terminated by the respondent and prayed for the following reliefs: -
 - a. A declaration that the termination was unfair and unlawful.
 - b. A claim for a sum of Kshs.3,332,176/- being the compensation for the remaining months in the contract of employment.
 - c. Kshs.958,574.56 being service gratuity for 8 months, calculated at 31% of the basic pay.
 - d. Damages equivalent to 12 months' salary for unfair and unprocedural termination.
 - e. Payment of outstanding leave of seventy -five (75) days.
 - f. Issuance of certificate of service.
 - g. Costs of the suit.
 - h. Interest on (b), (c) and (e) above at court rates.
 - i. Any other or better relief that the Honourable Court may deem fit to grant.
2. The respondent denied the alleged unfair termination and averred that the termination was grounded on a good cause and fair procedure was followed. It further averred that the suit was filed prematurely before exhaustion of the mandatory arbitration process provided under Clause 4.9 of the Respondent's



HR Policy and Procedures Manual. Finally, it prayed for the suit to be dismissed with costs for being a tool for unjust enrichment.

Facts of the case

3. The claimant was employed by the respondent as a Technical Manager for a term of Three (3) years from 2009. He was again given another period of three (3) years in 2017. However, on 4th September 2019, he was appointed acting Managing Director by the Respondent. The position was subsequently advertised and he was competitively appointed the Managing Director for a term of three (3) years effective 8th October 2020. His gross monthly pay was Kshs.416,522.00.
4. The claimant worked until a new County Government was elected in 2022 when trouble started for him. First, the County Government of Laikipia suspended all the respondents' operations and transactions. Second, the Respondent's shareholders (County Government of Laikipia) held extraordinary General meeting that led to unlawful disbanding of the respondent's Board of Directors contrary to the Corporate Governance Guidelines given by the Water Regulators, WASREB.
5. The claimant assisted in the process of recruiting new Board Members and inducted them into office between 30th January 2023 -1st February 2023. After Board members signed the Code of Conduct, a full Board Meeting was held on 2nd February 2023. When the agenda items were finalized, the claimant and the corporate secretary were requested to step out for fifteen (15) minutes.
6. Subsequently, they were called back and the claimant was sent to a compulsory leave for sixty (60) days. He was told the reason would be contained in a letter but of importance to note, the leave was to pave way for a comprehensive audit. The reason for the intended audit was because;
 - a. The company was performing very poorly under the claimant as the Managing Director such that it was struggling to meet its financial obligations.
 - b. There were significant cash flow challenges which were confirmed by WASREB inspection feedback that was reported to the claimant that the respondent was only able to meet 61% of its obligation.
 - c. A report by the Auditor General for the year 2020/2021 had confirmed poor financial performance and gave a qualified opinion; and
 - d. The company was not up to date with remittance of statutory deductions.
7. While on leave, the claimant received a letter terminating his employment before the intended comprehensive audit was done. The reasons cited for the termination were; -
 - a. Poor performance which led to the company operating at 61% in financial performance thus failing to meet its obligations.
 - b. Failing to pay statutory obligations as and when they fall due thus exposing the company to penalties and legal sanctions.
 - c. The company's qualified opinion as per the Auditors General's Report for the year ending June 2020/2021 which was attributed to the company's poor leadership.
8. The claimant's case is that the said reasons were not valid as there was no comprehensive audit done to substantiate the same. He contended that he found the financial mess having already been done by his predecessor including pension of Kshs.17,000,000.00 not remitted. He contended that he left the company at a better financial position including reducing the unremitted pension to



- Kshs.12,000,000.00 and raising the bank account from Kshs.170,000.00 to Kshs.4,700,000.00. He contended that the alleged overcharging of clients through new water tariffs, was an error which affected all water companies and clarified that the customers were refunded over Kshs.20,000,000.00.
9. The claimant further contended that he was never subjected to any performance evaluation to measure his performance and maintained that the reason for the termination was invalid. He contended that no forensic audit was done and maintained that the termination was malicious and only intended to bring on board the team which was removed after the current Governor lost the seat to his opponent in 2017. Now that the Governor had regained the seat in 2022, he replaced the claimant with the former Managing Director who was replaced by the claimant.
 10. On cross examination he admitted that the Auditor General's Report indicated that there was over billing of customers due to effecting new tariffs in January 2020 before the effective date being 1st March 2020. He further admitted that the report also indicated that the Management spent Kshs.26,331,826.00 without authority from the Board but clarified that the money was spent before he became the Managing Director.
 11. He further admitted that the Auditor's Report for the year ending in June 2021 indicated an overspending of Kshs.31,925,602 without evidence of authority to spend. However, he clarified that it is normal for the company to spend more than revenue if there is cash flow problem. He also admitted that the Auditor found that 39.4% of the water produced was lost which was above the 25% rate of non-revenue water allowed. However, he clarified that the loss of water was due to old pipe line. However, he clarified that opinion by Auditor varies from unqualified, qualified, adverse, and then disclaimer. He stated that qualified opinion is better than adverse in opinion.
 12. He admitted that the Board he found in office was for ten (10) members and it was lawful according to the old Guidelines by WASREB. He clarified that thereafter, WASREB issued new guidelines which reduced the Board members from Ten (10) to seven (7) and he then initiated the process of reduction.
 13. He admitted that his contract provided for termination by either party by serving a notice of three (3) months or payment of 3 months salary in lieu of notice. He also admitted that the termination letter issued offered to pay him three (3) months salary in lieu of notice upon clearance with the company. He admitted that he never went to clear with the company after the termination because he had handed over everything before proceeding on the compulsory leave.
 14. On the other hand, the respondent's case is that the claimant was appointed acting manager in 2019 and found the company operating smoothly with healthy balance books of account and with no audit queries. It is further defence case that in the years ending June 2017, and June 2018, the Auditor General gave an unqualified opinion in favour of the company. It is also defence case that in the year ending June 2019, the Auditor gave an Adverse opinion followed by qualified opinion in the years ending in June 2020, June 2021 and June 2022.
 15. It averred that WASREB's Report of May 2022 indicated the company incurred a loss of Kshs.20,789,092.30. the report further indicated that there was erroneous implementation of the gazetted tariff which led to customer over billing of Kshs.25,220,920 and a further Kshs.2,517,920 through introduction of unapproved and ungazetted late payment charges. As a result of the said irregularities, WASREB issued adverse directions against the company including refund of all the unauthorised penalties to the customers equalling to Kshs.2,517,920 plus penalty payable to WASREB of Kshs.1,980,000.00 for non-compliance.
 16. Its further defence case is that, the Commercial and Finance Report for July 2022 to March 2023 showed that the company missed its revenue target by a deficit of Kshs.19.1 million and had a huge



pending bill totalling to Kshs.97,734,685.54 as at March, 2023. The respondent averred that Clause 7 of the claimant's contract provided that either party was entitled to terminate the employment by giving a three months written notice or forthwith paying the other party 3 months basic salary in lieu of notice.

17. The respondent maintained that there was a good cause for terminating the claimant's contract because he acted so negligently and performed poorly in his duties that he exposed the company to financial embarrassment and penalties. Further to that, the claimant erased the data in the office Laptop before handing it over. It is the defence case that the termination of the contract was lawful and the company has never declined to issue the claimant with a certificate of service.
18. On cross-examination the respondent's witness (current MD) stated that the claimant was required to do clearance in respect of all Cheque Books, Bank Accounts including Statements, Official Laptop with information and soft copies of correspondences and operations date. However, he admitted that when he took over the office, he found the Laptop with the Acting Managing Director. He admitted that he took over the office of Managing Director from a person who was acting as the Managing Director.
19. He further admitted that he was the claimant's predecessor in the office of Managing Director during the reign of the current Governor (Hon.Irungu) before he was voted out. He admitted that the claimant replaced him during the reign of Governor Muriithi but after he lost the seat and Hon.Irungu was re-elected, he was also reappointed as the Managing Director to replace the claimant. He admitted that the County Government is the 100% shareholder of the respondent company and the Governor is the head of the Government.
20. He admitted that Governor Irungu disbanded the respondent's Board after he became Governor and then the claimant was sent on compulsory leave by the new Board. He further admitted that the claimant's contract was terminated before forensic audit was done. He confirmed that the audit was now on-going.
21. He admitted being unaware whether the claimant was accorded a hearing before the termination. He further admitted that he had no evidence whether the claimant was even issued with warning letter during his employment.
22. He also admitted that he took over laptop, three (3) cabinets, furniture, cheque books, company seal, Articles of Association, and Audited Reports from the acting Managing Director but there was no signed handing over report. He contended that he did not know how the acting Managing Director took over the items he had handed over to him. He confirmed that the only lost thing was the data in the computer.
23. He also never asked the acting Managing Director how he was paying salaries and operations correspondences after the claimant left the office to go on the compulsory leave. He contended that when he exited the office as Managing Director on 3rd September 2019, he left all the documents there but the claimant failed to give to the Auditor General. However, when he was re-appointed he found the documents still lying there and he submitted them to Senate. He denied that he carted away the documents when he exited and returned them upon being reappointed in 2023.
24. He admitted that the claimant found bank deposit of Kshs.107,100 but stated that he could not ascertain whether the claimant raised the customer deposit to Kshs.4 million.
25. He explained that non-revenue water is caused by failure to repair the system on time and also by poor management of meter reading and billing of customers. He clarified that the duty of repairing water lines rests with the respondent. He further clarified that the Budget for repairs is never enough.



Submissions

26. The Claimant submitted that none of the grounds cited for the termination of employment were valid or justified because alleged poor performance and failure to remit statutory deductions were not substantiated. He contended that he was sent on compulsory leave for 60 days to pave way for comprehensive audit but his contract was terminated before the 60 days leave and before any audit was done. He contended that in his tenure, he improved opinion from adverse which was given to the RW1 to qualified opinion.
27. He further submitted that according to WASREB evaluation, the respondent improved during claimant's tenure from position 21 in 2019 to 18 in 2020 and then 19 in 2021 Country wide (see page 69-72 of the claimant's documents). As regards customer deposit, the claimant submitted that he found Kshs.107,000 and left Kshs.4,000,000.00. RW1 admitted that there was improvement on that item but clarified that the increase of the deposit was Kshs.1,000,000.00.
28. In view of the foregoing, the claimant maintained that his performance was not poor. He submitted that it is not possible to measure employee's performance without any performance appraisal. He further submitted that the respondent did not adduce evidence to prove the alleged failure to remit statutory deduction as and when they fell due. He cited section 43 of the *Employment Act* to urge that the termination was unfair because the employer has failed to prove existence of a valid reason for the termination.
29. He further submitted that the termination was not in accordance with fair procedure because section 41 of the *Employment Act* was not complied with. He contended that he was not given a hearing before the termination. In view of the foregoing matters, the termination of his contract was unfair and he is entitled to compensation.
30. For emphasis, the claimant cited the case of *CMC Aviation Limited v Mohamed Noor* (2015) eKLR and *Kenfreight (EA) Limited v Benson K.Nguti* (2019) eKLR.
31. As regards the Arbitration Clause cited by the respondent, the claimant submitted that the respondent submitted itself to the jurisdiction of the court and therefore it is estopped from relying on the Arbitration Clause. For emphasis, he relied on the case of *Charles Onchari Ogoti v Safaricom Ltd & another* (2020) eKLR.
32. On the other hand, the respondent submitted that the claimant executed the contract of employment dated 8th October 2020 voluntarily. The contract provided for termination by a notice of 3 months written notice or payment of 3 months salary in lieu of notice. It further submitted that by its letter dated 1st March 2023, it terminated the contract by offering to pay the claimant three months' notice. It submitted that the termination was lawful and since each party had the same right to terminate the contract under the termination clause.
33. For emphasis, the respondent relied on the case of *Kenya Revenue Authority v Menginya Salim Murgani* (2010) eKLR and *Manuel Anidos v Kinangop Wind Park Limited (In Receivership)* (2019) eKLR where it was held that a party is not required to prove the reason for termination where the termination is done by invoking the termination clause in a contract of employment.
34. The foregoing notwithstanding, the respondent submitted that the three reasons listed in the termination letter are factual and the claimant has not disputed them at all. It submitted that it produced reports by the Auditor General and WASREB to showing that there were serious acts by the respondent's management which was headed by the claimant. The acts included: -



- a. Non-compliance with the tariff approval requirements where the tariff was implemented before gazette notice and without notice to customers.
 - b. Erroneous implementation of gazetted tariff leading to overbilling of customers.
 - c. Erroneous application of sewerage tariff.
35. The respondent submitted that, as a result of the foregoing, it was forced to refund the money and pay penalties to the regulator for the irregularities. It further submitted that in the year 2021/2022 the company was falling below the projected revenue of 61% compared to 68% in the year 2020/2021.
 36. The respondent further submitted that the claimant failed to pay statutory obligations as and when they fell due and thereby exposed the company to penalties and legal sanctions. It submitted that Report of the Auditor General for 30/6/2020, Kshs.17,329,977 out of which Kshs.4,478,375 was owed to the Local Authorities provident fund and other payroll deductions. Also, PAYE for Directors was not deducted and remitted to KRA which exposed the company to heavy penalties, interest and loss of public funds.
 37. The respondent further submitted that the Auditor's Report of year ending June 2021 showed an increment in the outstanding payable to Kshs.21,479,423 and blamed the respondent's Management under the claimant for breach of the law and exposing the company to legal action and increased costs due to interest and penalties.
 38. The respondent maintained that the basis for the repeated qualified opinion by the Auditor General was due to actions and omissions by the management which was headed by the claimant. Consequently, the respondent submitted that the reasons cited for the termination were factual.
 39. In the view of the foregoing, the respondent submitted that the claimant is not entitled to compensation for unfair termination. Besides, the claimant admitted that he did not do clearance upon invitation to do so in order to receive his terminal dues.
 40. The respondent submitted that the claimant was not entitled to gratuities and salary for the remainder of the unexpired period of his contract. It submitted that salary is only paid to compensate for services rendered and not for unjust enrichment. For emphasis, he relied on *David Mwangi Gioko & 51 others v Nairobi City Water & Sewerage Co.Ltd* (2013) eKLR.
 41. The claim for outstanding leave of seventy-five (75) days was also opposed on ground that the same had not been proved. However, the claim for certificate of service was not declined.

Issues for determination

42. Having considered the pleadings, evidence and submissions, following issues fall for determination: -
 - a. Whether the termination of the claimant's contract of employment was unfair and unlawful.
 - b. Whether the Claimant is entitled to the reliefs sought.

Unfair termination

43. Section 45 (1 & 2) of the *Employment Act* prohibits unfair termination of an employee's employment in the following terms: -
 - (1) No employer shall terminate the employment of an employee unfairly.
 - (2) A termination of employment by an employer is unfair if the employer fails to prove:



- (a) that the reason for the termination is valid;
- (b) that the reason for the termination is a fair reason—
 - i. related to the employee’s conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and
- (c) that the employment was terminated in accordance with fair procedure.”

44. The foregoing provision demonstrates that for termination of employment to be fair the employer must have a valid reason and fair procedure must be followed.

Reason

45. In this case, the reasons for termination were set out in the termination letter dated 1st March, 2023 which were basically poor performance and failure to pay statutory obligations as and when they fall due. As a result of the said poor performance, the company was exposed to legal sanctions and led to qualified opinion by the Auditor General during the claimant’s term of office.

46. To prove the said offence, the respondent filed Reports by the Auditor General and Report by WASREB dated May 2022. However, the claimant denied the alleged offences and maintained that when he took over the company as Managing Director, the company had received an Adverse Opinion from the Auditor General but improved the same to a qualified opinion until he left the company. He further improved the customer deposits from Kshs.107,000.00 to Kshs.4,000,000.00; and again, he reduced unremitted payable from Kshs.17,000,000.00 to Kshs.12,000,000.00.

47. I have considered the material presented by both sides. It is clear that the financial mess on the respondent started before the claimant became its Managing Director and continued during his tenure. The mess is confirmed by the qualified Auditor General’s Reports for the year ended June 2020, and June 2021. Consequently, I find that there was a valid reason for the employer to terminate claimant’s contract of employment. He was the leader of the managerial team which persisted in financial mismanagement. It is therefore factual that the claimant presided over financial mismanagement and the employer had the right to fire him based on the reports of the Auditor General and WASREB produced by the respondent as exhibits.

Procedure

48. The respondent contended that the contract of employment provided for a termination by notice or payment of salary in lieu of notice. The claimant contended that he was not accorded any hearing before the termination.

49. Section 41 of the Employment provides that: -

- (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.”

50. In this case, the claimant’s contract was terminated for poor performance and as a result section 41 above applies to the termination of his employment. He was therefore entitled to a fair hearing before the termination regardless of the right to terminate by notices or payment of salary in lieu of notice.

51. I gather support from the case of *Kenfreight (EA) Ltd v Benson K. Nguti* (2016) eKLR where the Court of Appeal held that:-

“ Apart from issuing proper notice according to the contract (or payment in lieu of notice as provided) an employer is duty bound to explain to the employee in the presence of another employee or a union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition, the employee is entitled to be heard and his representations if any, considered by an employer before the decision to terminate his contract of service is taken.”

52. The above precedent is binding on me and it is on all fours with the facts of the instant suit. Consequently, I find that the termination of the claimant’s contract of employment was unfair within the meaning of section 45 of the *Employment Act* because it was not done in accordance with a fair procedure.

Reliefs

53. On the basis of the foregoing finding, the claimant is entitled to declaration that the termination of his employment contract was unfair and unlawful.

54. I further find that he is entitled to salary in lieu of notice and compensation for unfair termination pursuant to section 49 (1) of the *Employment Act* as read with section 50 of the *Employment Act*. The employer has already admitted that the contract provided for a notice period of three months. Consequently, I award the claimant three months salary in lieu of notice being Kshs.416,522 x 3 =Kshs.1,249,566.00.

55. He is further awarded four months salary as compensation for unfair termination considering that he served the respondent for almost 13 years. I have also considered that he contributed to the termination through poor performance. Finally, I have considered that the remaining period of his fixed term contract was just eight (8) months.

56. The claim for gratuity and salary for the remainder of the contract term being eight months is declined because the same is not supported by evidence. Besides, the claimant is adequately compensated for the unfair termination under section 49 of the *Employment Act*.

57. The claimant prayed for outstanding leave of 75 days under the contract of employment. He did not plead any particulars of the leave and substantiate the claim with evidence. Consequently, the claim for outstanding leave is declined. However, the claim for certificate of service is granted as of right under section 51 of the *Employment Act*.

Conclusion

58. I have found that the termination of the claimant’s employment contract was unfair and unlawful because he was not accorded a prior fair hearing. I have further found that he is entitled to compensatory damages under section 49 and 50 of the *Employment Act*. I have further found that he



is entitled to a certificate of service under the same Act. Consequently, I now enter judgment for him as against the respondent in the following terms: -

- a. A declaration that the termination of the contract of employment is unfair and unlawful.
- b. Salary in lieu of notice.....Kshs.1,249,566.00
- c. Compensation for unfair terminationKshs.1,666,088.00
Kshs.2,915,654.00
- d. Certificate of service.
- e. Costs and interest at court rates from the date of this judgment.
- f. The award of damages is subject to statutory deductions.

DATED, SIGNED AND DELIVERED AT NYERI THIS 8TH DAY OF MARCH, 2024.

ONESMUS N MAKAU

JUDGE

Order

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

ONESMUS N MAKAU

JUDGE

