



**Njinju v Kisii Bottlers Limited & another (Cause 1125 of 2016)
[2024] KEELRC 955 (KLR) (25 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 955 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1125 OF 2016
MA ONYANGO, J
APRIL 25, 2024**

BETWEEN

JAMES NGANGA NJINJU CLAIMANT

AND

KISII BOTTLERS LIMITED 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

JUDGMENT

1. The Claimant herein instituted the instant suit vide a Memorandum of Claim dated 9th June 2016 and filed in court on 10th June 2016 against the Respondents jointly and severally for;
 - a. A declaration that the 1st Respondent's termination of the Claimant's employment was unfair and unlawful.
 - b. A declaration that the Claimant's prosecution in Kisii Criminal Case No. 646 of 2013 was malicious, unwarranted and an affront to the constitutional rights of the Claimant.
 - c. General damages for false imprisonment and malicious prosecution
 - d. Special Damages of Kshs 350,000
 - e. General discrimination against the Claimant
 - f. Loss of future earning Kshs 18,138,960
 - g. Damages for wrongful dismissal Ksh 1,813,896
 - h. Unpaid salary and leave as at July 2013 Kshs 453,215
 - i. Salary in lieu of notice Kshs 151,158



- j. Costs of this suit
 - k. Interest on (c),(d),(e),(f),(g),(h) and (i) at Court rates
2. It is the Claimant's averment that he was an employee of the 1st Respondent engaged as an I.C.Y administrator until his employment was terminated vide a letter dated 4th July 2013.
 3. According to the Claimant, pursuant to a complaint made by the 1st Respondent to the police on 7th June 2013, he was arrested and incarcerated overnight at the Kisii Police Station until the following day when he was released on a police bond.
 4. The Claimant further avers that on 10th June 2013, he was arraigned in the Chief Magistrate's Court at Kisii where he was charged with the offence of stealing contrary to section 281 of the Penal Code.
 5. The Claimant contends that the 1st Respondent then suspended him vide a letter dated 11th June 2013 with half pay but his services were finally terminated vide the dismissal letter dated 4^h July 2013.
 6. The Claimant avers that his dismissal by the 1st Respondent was unfair, unlawful and in breach of the express provisions of the [Employment Act](#), 2007.
 7. It is further contended that after the close of the prosecution's case, the Claimant was acquitted under section 210 of the Criminal Procedure Code.
 8. The Claimant states that he was greatly injured in his credit, character and reputation and suffered severe mental anguish and pain.
 9. The 1st Respondent filed a statement of Response on 4th August 2016 denying the allegations made by the Claimant that his dismissal was unfair, unlawful and in breach of the provisions of the [Employment Act](#) 2007.
 10. According to the 1st Respondent, the Claimant's arraignment and prosecution vide Kisii CM Criminal Case No. 646 of 2013 was the culmination of investigations undertaken by the State and an opinion was arrived at based on the sufficiency of evidence to prefer and sustain criminal charges against him. The 1st Respondent denied that it influenced the State to prefer charges against the Claimant and averred that the decision about who is to stand trial for theft thereof is a preserve of the State.
 - a. It is the 1st Respondent's case that it was justified to summarily dismiss the Claimant from its employment pursuant to Section 44(4)(g) of the [Employment Act](#) following a hearing which took place on 24th June 2013 at which the Claimant appeared before its Staff Advisory Committee. That at the disciplinary hearing the Claimant was manifestly rude to members of the Staff Advisory Committee refusing to co-operate during the hearing; deliberately refused to respond to certain questions posed by members of the Staff Advisory Committee; failed to give a reasonable explanation for the loss of the 1st Respondent's programmer; walked out of the Staff Advisory Committee meeting, and used insulting language to members of the Staff Advisory Committee during the hearing of 24th June 2013.
 11. The 1st Respondent avers that its criminal complaint lodged with the State was founded upon the actual loss of its programmer which was committed to the custody of the Claimant. That as such the 1st Respondent had lawful basis for making a report of theft to the state.
 12. It is the 1st Respondent's contention that the termination Claimant's employment was regular as he was dismissed upon being heard.
 13. The Court was urged to dismiss the case against it with costs.



14. The 2nd Respondent's response to the Memorandum of Claim was filed on 11th October 2017. In its response, the 2nd Respondent averred that it carried out meaningful investigation of the facts before it and also carried out proper research of the law to which the action to arrest and prosecute the Claimant was considered tenable.
15. The 2nd Respondent in its response particularized its statutory duty as:
 - a. Effecting an arrest where there is probable cause to suspect that an offence has been committed.
 - b. Conducting investigation upon receipt of a complaint or on receipt of information that an offence has been committed; and
 - c. Detaining a person on suspicion that he has committed an offence.
16. The 2nd Respondent urged the court to dismiss the suit with costs.

Evidence

17. On 22nd June 2021, the Claimant testified as CW1 and relied on his witness statement recorded on 10th June 2016 as his evidence in chief. He also relied on the bundle of documents he filed with his Memorandum of Claim in support of his case.
18. On being cross examined by Mr. Nyamurongi, Counsel for the Respondent, the Claimant stated that he was in charge of the ICT Department while in the 1st Respondent's employment. He stated that among his responsibilities was safety and security of the Respondent's property in his custody.
19. He testified that a P.G Programmer got lost. That it had been shown to him before he left for a seminar at Sameta Lodge. That the 1st Respondent made a complaint to the police after which the Claimant was arrested and arraigned in court.
20. The Claimant stated that he was taken through a disciplinary hearing but was not afforded an opportunity to defend himself adequately. He stated that he was not issued with a show cause letter prior to the disciplinary hearing.
21. On further cross examination by State Counsel Oyugi, the Claimant told the court that he was arrested on allegations that a programmer had gotten lost in his office. He faulted the police for arresting him and not the other employees of the Respondent yet, according to him, the programmer got lost when he was away. That other employees had spare keys to the Claimant's office.
22. In re-examination, the Claimant stated that there was no evidence that he removed the machine from the office. He further stated that he was invited to shed light on the loss of the programmer and that the said invitation was not for a disciplinary hearing.
23. CW1 told the court that the 1st Respondent has a security guard who frisks its employees whenever they leave the office. It was his evidence that he was not found with the alleged lost programmer.
24. The 1st Respondent on its part called Caleb Amugamwa who testified on 24th February 2022 as RW1. He introduced himself as the former security officer of the 1st Respondent. RW1 adopted his witness statement recorded on 19th November 2021 as part of his evidence in chief. He also relied on the documents filed in court by the 1st Respondent.
25. RW1 testified that he attended the disciplinary hearing and the Claimant refused to respond to questions posed to him in respect of the lost programmer stating that the matter was already in court.



- RW1 also told the court that at the disciplinary hearing the Claimant was asked why he directed official emails to his private email account but he refused to explain or give a concrete answer.
26. On cross examination by State Counsel Oyugi, RW1 stated that upon realizing that the programmer was lost, he together with the Claimant and the Claimant's assistant reported to the General Manager and thereafter to the Police Station. That upon conducting investigations the police left with the Claimant and his assistant for further interrogation.
 27. On cross examination by Counsel Burugu, RW1 stated that the Claimant had a clean record prior to the incident. RW1 maintained that the Claimant cooperated with investigations regarding the lost machine. He told the court that the Claimant was on duty on 4th June 2013 and that there was no evidence that he left with the machine. He further stated that on 5th and 6th June 2013, he attended the seminar at Sameta Lodge with the Claimant but could not tell whether the Claimant visited the offices on the said dates. He stated that a Mr. Karanja, the Claimant's assistant had accessed the office on 5th June 2016.
 28. When referred to the letter dated 19th June 2013 addressed to the Claimant by the 1st Respondent, RW1 informed the court that the said letter was inviting the Claimant to attend a committee hearing on account of the lost programmer and that the said letter did not spell out what the Claimant was required to respond to.
 29. RW1 when referred to the letter dated 19th June 2013, stated that there was no reference to the emails directed to the Claimant's personal email account. He stated that the issue of the emails was discovered later, after the Claimant had been dismissed from service,
 30. RW1 also stated that it is only the Claimant who was summarily dismissed from employment as a result of the loss.
 31. On re-examination, RW1 told the court that the Claimant had a responsibility as the ICT administrator to ensure the safety of the machines in his custody. RW1 maintained that the Claimant's office was a high security office and the 1st Respondent undertook measures to ensure that it was very secure.
 32. According to RW1, the company installed two locks, a union lock and a secure lock. He stated that after the theft incident he conducted investigations and discovered that the lock was working but the secure lock was not. He stated that upon examining the lock, he noted that it had been damaged from the inside, that part of it was missing from the Claimant's office. He stated that the Claimant did not report when the secure lock got damaged and that when RW1 asked him why he did not report, the Claimant did not give him an answer.
 33. RW2, was Gillian Jepkemboi, the HR Manager of Almasi Bottlers, a company formed to clean bottles for the 1st Respondent and its sister companies Rift Valley Bottlers and Mt. Kenya Bottlers. She adopted her witness statement recorded on 20th January 2021 as part of her evidence in chief. She also relied on the documents filed by the 1st Respondent in support of its case.
 34. RW2 relied on the minutes of 24th June 2013 and stated that the Claimant did not satisfactorily explain the loss of the Programmer and that he walked out of the meeting.
 35. It is RW's evidence that the Claimant had overall control over the programmer as ICT Manager. She stated that the purpose of the meeting was for the Claimant to explain the issue of the faulty lock and other circumstances surrounding the loss of the programmer.



36. On cross examination by the 2nd Respondent's Counsel, RW2 reiterated that upon the discovery that the programmer was missing, the matter was reported to Kisii Police Station. That the police went to the plant and investigated the incident and took in the Claimant and his assistant. According to RW2, the arrest was not malicious as there was a loss and the police were conducting their duties.
37. On cross examination by Counsel Burugu, RW1 told the court that the value of the lost programmer was never recovered from the insurance.
38. The 2nd Respondent called Police Constable Alfred Nasio who testified as RW3. RW3 stated that in the year 2013, he was stationed at Kisii Police Station. He stated that on 7th June 2013, RW1 made a report that a programmer was lost. That he went to the 1st Respondent's premises with other officers and established that one of the two locks in the Claimant's office was faulty and that it had been broken from the office way before the incident happened. RW3 stated that he was told by the 1st Respondent's management that a report on the broken lock had not been made.
39. He stated that he arrested the Claimant and his assistant and upon doing investigations, the Claimant was thereafter arraigned in court. According to RW3, the arrest and prosecution of the Claimant was in accordance with the law.
40. On cross examination by Counsel Nyamurongi, RW3 maintained that the 1st Respondent had a reason to lodge the complaint after the loss of its programmer which was valued at Kshs 600,000 at the time and was in the custody of the Claimant.
41. He further stated that the Claimant was arrested after investigations were done and the decision to charge the Claimant was made on the advice of the Director of Public Prosecutions.
42. In cross examination by Counsel Burugu, RW3 stated that it was brought to his attention that Mr. Karanja, the Claimant's assistant had a set of keys to the Claimant's office.
43. On the proposition by the Claimant's counsel that the cleaners had access to the office, RW3 maintained that he was informed during investigations that the Claimant used to close his office and that it could not be cleaned when he was absent.
44. At the close of the 2nd Respondent's case, the Court directed parties to file written submissions. The Claimant's submissions are dated 18th August 2022, the 1st Respondent's submissions are dated 19th September 2022 whereas the 2nd Respondent's submissions are dated 29th September 2022.

The Claimant's submissions

45. In his submissions, the Claimant framed the issues for determination to be;
 - i. Was the termination of the Claimant by the 1st Respondent from employment unfair and unlawful, and if so, is he entitled to compensation
 - ii. Was the Claimant discriminated against and is so, is he entitled to compensation
 - iii. Was the Claimant falsely imprisoned and was his subsequent prosecution in Kisii Chief Magistrates' Court Cr Case No. 646 of 2013 without a reasonable and probable cause and malicious, and if so, is he entitled to compensation.
46. On the 1st issue, the Claimant submitted that he received the letter of suspension dated 11th June 2013 and was later served with a letter dated 19th June 2013, referenced, "invitation to attend a staff advisory committee hearing on account of loss of the new PG Programmer". According to the Claimant, the letter dated 19th June 2013 did not comply with the provisions of section 41 of the [Employment Act](#)



- as it did not lay out the charges against the Claimant. The Claimant avers that the said letter did not mention that the Claimant was entitled to appear at this meeting with a fellow employee or a representative of the union. It is the Claimant's submission that the said letter was a mere invitation to a meeting to discuss the issues set out in the letter. It is on this basis that the Claimant submits that the 1st Respondent failed to comply with the provisions of section 41 of the *Employment Act*.
47. The Claimant further submitted that the 1st Respondent did not prove that it was justified in terminating the Claimant's employment. It is the Claimant's case that the machine that disappeared from the Claimant's office was stolen during his absence on 5th and 6th June 2013 when he was away attending a work-related seminar. According to the Claimant, the Respondent's witness RW1, confirmed that the Claimant did not leave with the machine.
48. It is further submitted that RW1 told the court that Mr. Karanja, the Claimant's assistant had access to the Claimant's office and that even the cleaners had access to the office. It is therefore submitted that RW1 having confirmed that there existed a duplicate key that could open the Claimant's office, any of the persons with access to the said office could have removed the machine from the Claimant's office during his absence.
49. On the 2nd issue, the Claimant submitted that he was taken through a disciplinary process that culminated in his dismissal notwithstanding the fact that he was absent when the loss occurred. The Claimant submitted that it is recorded in the minutes at paragraph 3 that four other people who handled the machine were all issued with show cause letters but the Claimant who was not issued with the show cause letter was instead terminated from employment.
50. The Claimant proposed that an award of Kshs 10,000,000 would be adequate compensation. In support of this, reliance was placed on the case of *OI Pejeta Ranching Limited v David Wanjau Muhoro* [2017] eKLR and *GMV v Bank of Africa Limited* [2013] eKLR.
51. Lastly on whether the Claimant was falsely imprisoned and subsequently prosecuted without reasonable and probable cause, the Claimant submitted that he was charged with theft by servant. He submitted that RW1 was PW5 in the criminal case against him. That in the witness statement recorded at the police station, RW1 stated that, "He is the only custodian of the keys to his office. He doesn't share with anybody. The office was not broken into." This statement according to the Claimant, is what formed the basis for the Claimant's arrest and subsequent prosecution. The Claimant submitted that the investigating officer did not have a reasonable and probable cause to believe that the Claimant had stolen the machine between 4th and 6th June 2013 as the prosecution witnesses did not testify that they saw the Claimant leaving with the said machine. That in any case, he was away attending a seminar on the said days.
52. The Claimant submitted that malice must have informed the prosecution of the Claimant because from the findings of the trial court, it is clear that several other persons could have accessed the Claimant's office while he was absent and stolen the machine. The Claimant wondered why the other persons were not arrested and charged with the offence of theft together with the Claimant. It is therefore the Claimant's submissions that it was not rational to charge the him alone and let the other persons who had access to the office when the machine was stolen go scot free. In this regard, the Claimant sought for an award of Kshs 7,500,000 as adequate compensation for his alleged false imprisonment and malicious prosecution.
53. In summary, the Claimant submitted that he had proved his case on a balance of probabilities and that he should be awarded the sums sought together with costs and interests.



The 1st Respondent's submissions

54. On its part, the 1st Respondent has identified the issues for determination to be;
- i. Whether the Claimant's termination was lawful
 - ii. Whether the Claimant was falsely arrested and confined and his prosecution which ensued malicious
 - iii. Whether the Claimant sustained injury to his reputation
 - iv. Whether the Claimant was discriminated upon
 - v. Whether the reliefs sought ought to be granted.
55. The 1st Respondent submitted that the claim of defamation as pleaded by the Claimant is unavailable in view of section 4(1) of the [Limitation of Actions Act](#).
56. It is the 1st Respondent's submission that in determining a complaint or suit under the [Employment Act](#) involving wrongful dismissal or unfair termination of an employee the court shall be guided by the provisions of section 49.
57. On the issue raised by the Claimant that he was falsely and maliciously prosecuted, the 2nd Respondent submitted that it had a right in law to make a complaint to the police following the theft of its programmer. It was submitted that the evidence by the Claimant and the Respondent was in agreement that the 1st Respondent indeed lost its programmer through an act of theft. The 1st Respondent cited the cases of Catherine Wanjiku Kariuki v Attorney General & Another (2011) eKLR and Douglas Odhiambo Apel & Another v Telkom (K) Ltd CA 115/2006 in support of the position that the Claimant was not falsely and maliciously prosecuted as he alleged.
58. On the issue raised by the Claimant that he was discriminated upon when he was charged with the theft of the programmer, the 1st Respondent submitted that it does not have prosecutorial powers over its own complaint which is a duty that is a preserve of the state.
59. The 1st Respondent submitted that RW2, in her witness statement stated that disciplinary measures were taken against 4 other employees of the 1st Respondent over the loss of the programmer.
60. Lastly on the issue whether the Claimant was wrongfully dismissed, the 1st Respondent submitted that the Claimant was suspended vide the letter dated 11th June 2013 and thereafter invited to a staff advisory committee which took place on 24th June 2013 vide a letter dated 19th June 2013 where he was required to shed light on the loss of the programmer. It is submitted that from the minutes of the said meeting, the Claimant was rude to members, refused to answer questions put to him, and eventually walked out on them. It is the 1st Respondent's submission that the summary dismissal was justified per section 44 of the [Employment Act](#). It is further submitted that the dismissal letter dated 4th July 2013 was the aftermath of the events of 24th June 2013
61. On the issue of the unpaid salary and leave, the 2nd Respondent submitted that the Claimant has not cleared with the 2nd Respondent and that any accrued terminal benefits will be paid to him thereafter.
62. The court was urged to order each party to bear its own costs considering the circumstances under which the parties parted ways.



The 2nd Respondent's Submissions

63. The 2nd Respondent in its submissions set out the issues for determination to be:
- i. Whether the Claimant's averments amount to malicious prosecution;
 - ii. Whether the Claimant is entitled to the reliefs sought.
64. On the first issue, the 2nd Respondent submits that it is trite law that for a claim for malicious prosecution to succeed, the Claimant must particularly prove the presence of the constituent grounds as outlined in the cases of *Kagage & Others vs AG & Another* (1969) EA and *Muruga vs AG* (1982-88) KLR 133 to be:
- i. The prosecution was instituted against the Plaintiff by the defendant
 - ii. That the prosecution was terminated in favour of the Plaintiff
 - iii. That the prosecution was instituted without reasonable and probable cause; and
 - iv. That the prosecution was actuated by malice
65. The 2nd Respondent submitted that all the grounds above must be proved in order to succeed in a claim for damages for malicious prosecution. It is the 2nd Respondent's case that on element (i) and (ii) above, it is not in dispute that the prosecution of the Claimant was instituted by the 2nd Respondent's agent, following a complaint lodged by the 1st Respondent, and that the prosecution was terminated in his favour. However, the decision to prosecute was solely based on evidence gathered after proper investigations were conducted.
66. It is the 2nd Respondent's submission that it is only after the Claimant had been put to his defence that he was then acquitted and this implies that there was enough factual basis necessitating the prosecution of the Claimant herein and thus the said prosecution cannot be termed as malicious.
67. On the element of reasonable and probable cause, the 2nd Respondent submits that there was reasonable and probable cause to believe that a crime had been committed by the Claimant since, a complaint was made by the 1st Respondent, investigations were carried out into the complaints, sufficient evidence was gathered that indicated a probability of the Claimant's guilt and that the evidence in question was tendered before a Court of law and lastly the Court in *Kisii Criminal case No. 646 of 2013* found that a prima facie case had been established by the prosecution against the Claimant herein and he was placed on his defence.
68. It is therefore submitted that the Claimant has not proved his sufficiently under this limb as there was no malice in his prosecution. It is further submitted that the law is clear that the mere fact that a person has been acquitted of the criminal charge does not necessarily connote malice on the part of the prosecutor. In support of this position, the 2nd Respondent cited the cases of *Susan Mutheu Mutua* (2018) eKLR and *Nzoia Sugar Company Limited v Funguti* (1988) KLR 399.
69. The 2nd Respondent submitted that the Claimant has not shown that his arrest was directed by improper and indirect motive on the part of the 2nd Respondent and thus it follows that malice has not been proved. It is therefore submitted that this Claim cannot stand as the threshold for malicious prosecution has not been satisfied.
70. On the last issue, it is submitted that the Claimant did not prove any malice on the part of the police officer is not entitled to general damages for false imprisonment because he has failed to prove the same. It is the 2nd Respondent's submissions that to the evidence tendered before this court for a



false imprisonment and malicious prosecution has not been proved by the Claimant as against the 2nd Respondent.

71. The 2nd Respondent submits that the Claimant's lacks merit and should therefore be dismissed with costs to the 2nd Respondent.

Determination

72. I have considered the pleadings, evidence and submissions on record. The only issue that falls for my determination is whether the termination of the Claimant's employment was unfair and if he is entitled to the prayers sought.

73. The statutory burden upon a person complaining of unfair termination of employment or wrongful dismissal is provided in section 47(5) of the Employment Act and it provides: -

For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

74. The Claimant in the instant case has argued that his dismissal was unfair on the basis that the 1st Respondent did not prove a justifiable reason to terminate his employment. According to the Claimant, his employment was unfairly terminated following his malicious prosecution on account of the lost programmer, a property of the 1st Respondent.

75. The 1st Respondent has on the other hand maintained that the Claimant was first issued with a suspension letter on 11th June 2013 after he was charged in Kisii Magistrate's Court on 10th June 2012 over the alleged lost programmer which got lost in the custody of the Claimant.

76. It is further submitted by the 1st Respondent that vide a letter dated 19th June 2013, the Claimant was invited to a Staff Advisory Committee to discuss the circumstances surrounding his suspension on 24th June 2013.

77. The Claimant's letter of dismissal is reproduced below

Kisii

Bottlers Limited

July 4th, 2013

Mr. James Ng'ang'a Njinju,

Box 58196,

Kisii

Dear Mr. Ng'ang'a,

RE: Summary Dismissal

Reference is made to your suspension from employment on June, 11, 2013 to deliberate on your disciplinary case. You were suspended from employment due to:-

1. Loss of the PG Programmer which got lost from your office and yet the machine was under your custody.



2. Inability to explain the circumstances under which you were seen reporting back to the office on Friday 7th June, 2013 with an empty bag whereas you did not leave with any gag the day prior to the kickoff of the seminar at Sameta Lodges. You knowing that the door to your office had a faulty lock yet you did not report or take any action(s) to ensure its repair considering that your office and the adjacent server room hold valuable items like laptops etc. Your negligence in leaving the expensive machine in your office without the necessary documents of receipt nor without properly handing it over to your assistant given your prior knowledge that you would be away from duty for some time. Your action of diverting official company emails to your Gmail account thereby resulting in you receiving copies of other employee's emails without their authorization during your suspension period.

On June, 24, 2013 you were given an opportunity by the Staff Advisory Committee to shade some light on the above issues. During the deliberations the committee received submissions from yourself and after your submissions, the committee came up with the following observations:-

1. You were not cooperative and you were rude to the committee members' probing questions.
2. You deliberately refused to respond to some questions posed to you by committee members as a way of discouraging further questions from members of the committee.
3. You failed to explain to the committee in detail about the circumstances that led to the disappearance of the PG Programmer machine from your office.
4. You used an unfriendly language when responding to the probing questions from members of the Staff Advisory Committee.

Considering that the committee took time to deliberate and come up with the above mentioned observations and you were given an opportunity to shade light on the issues surrounding the disappearance of the machine, you are hereby declared guilty of the charges labeled against you and accordingly you are charged for gross misconduct. As you are aware, your conduct is against clause 44, subsection (4) (g) of the [New Employment Act, 2007](#) which is reproduced below for your benefit:-

5.
 - (g) "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, then he/she is liable for Summary Dismissal."

In view of the above observations, the Management has decided to summarily dismiss you from employment of the Company with effect from 5th July, 2013.

In line with the foregoing management decision, you will be paid any outstanding remuneration due to you, including your pension dues in accordance with the Retirement Benefits Scheme regulations, any outstanding earned leave days and proportionate leave allowance. You are required to clear with the organization as per the Staff Clearance policy before payment of your final dues is done.

Yours Faithfully,

for: Kisii Bottlers Limited



Signed

John A. Baswet

Ag. Human Resources Manager

Cc: Managing Director, Finance Manager, Payroll Section, Personal File

78. The letter gives the reasons for dismissal. It is evident that these were valid reasons for which the 1st Respondent was entitled to dismiss the Claimant. The Claimant's averments that there were no valid reasons for the termination of his employment is not supported by the evidence on record. It is common ground that the 1st Respondent lost an expensive programmer whilst it was in the custody of the Claimant. It is on record that the Claimant was negligent in not handing over the expensive equipment for safe custody before he left the office on 4th June 2013, knowing that he would be away for 2 days. He further does not deny that the door to his office had 2 locks, one a regular union lock and the other a more secure lock. It was discovered after the loss of the programmer that the secure lock was damaged from the inside of the Claimant's office yet he had not reported the same so that the lock could be repaired. It was therefore not farfetched to suspect the Claimant for the theft of the programmer.
79. The investigation report filed by the Respondent further pointed out that the negligence of the Claimant and recommended disciplinary action against him.
80. Section 44(4) of the *Employment Act* provides that reasonable suspicion of commission of a criminal offence against or to the detriment of an employer is justifiable ground for summary dismissal of an employee.
81. I thus find that the Respondent had valid and justifiable grounds to dismiss the Claimant.
82. With respect to fair procedure the Claimant averred that the Respondent did not comply with fair procedure. He avers that he was never taken through disciplinary process. That he was called to a meeting to shed light on the circumstances leading to the theft of the programmer.
83. The Claimant further avers that he was never given an opportunity to attend the meeting with either a union official or a colleague of his choice.
84. It was the 1st Respondent's case that the Claimant was first issued with a letter of suspension and later invited for a hearing before the decision to terminate his employment was made.
85. section 41 of the *Employment Act* requires an employer inform the employee of the grounds for disciplinary action and give the employee an opportunity to defend himself against the charges. The section provides that at such hearing the employee is entitled to be accompanied by a fellow employee of his choice or a union shop floor representative.
86. In the instant case the Claimant was aware that the meeting before the Staff Advisory Committee was a disciplinary hearing. During cross examination the Claimant admitted as much when he stated; "I was subjected to disciplinary hearing by the 1st Respondent and I was dismissed from service. I was afforded opportunity to defend myself but not fully. I was not given a free hand to explain myself. After the hearing the 1st Respondent did not express that it had lost faith in me but dismissed me from service."
87. under Re-Examination the Claimant again stated:

"I told the court I was taken through disciplinary process"



88. section 41 does not prescribe the process that a disciplinary hearing should take. It merely requires an employee to be given a hearing. This can take different forms in different organizations or circumstances.
89. In the instant case the Claimant was given a hearing and it is clear from the minutes of the hearing that he understood it for what it was. The only issue that is not clear is whether he was given an opportunity to bring a colleague with him to the hearing. The minutes mention that “Mr. Ng’ang’a presented himself to the committee without any witness.” This in my view means the committee was aware about this requirement and although the evidence does not state that the Claimant was given that opportunity, the members of the committee were aware about the same.
90. The minutes further observe at page 2 paragraph 2 that:
- “After categorical clarifications from each member of the Staff Advisory Committee, Mr. James Ng’ang’a declined to respond to more questions expressing his anger over the whole scenario. He was given a chance to give his submissions for consideration but he bitterly stated that he had no submissions to give. Mr. James Ng’ang’a left the Boardroom and members were left to deliver their final verdict on the case.”
91. Section 45(2)(c) of the [Employment Act](#) requires that an employer proves that it complied with the requirements of fair process in terminating the services of an employee. The 1st Respondent is required to justify that there were fair and valid reasons to terminate the services of the Claimant. In the case herein, the reasons for the Claimant’s termination can only be inferred from the circumstances.
92. The Court of Appeal in the case of Janet Nyandiko v Kenya Commercial Bank Limited [2017] eKLR while dealing with the issue on fairness in termination of employment summarized as follows: -
- “Section 45 of the Act makes provision inter alia that no employer shall terminate the employment of an employee unfairly. In terms of the said section, a termination of an employee is deemed to be unfair if the employer fails to prove that the reason for the termination was valid; that the reason for the termination was a fair reason and that the same was related to the employee’s conduct, capacity, compatibility or alternatively that the employer did not act in accordance with justice and equity.
- The parameters for determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to dismiss the employee; the communication of that decision to the employee and the handling of any appeal against the decision. Also not to be overlooked is the conduct and capability of the employee up to the date of termination, the extent to which the employer has complied with the procedural requirements under section 41, the previous practice of the employer in dealing with the type of circumstances which led to the termination and the existence of any warning letters issued by the employer to the employee.
93. I find that the Respondent complied with the requirements of section 45 of the Act and the dismissal of the Claimant was therefore valid both procedurally and substantively.
94. On the issue of malicious prosecution or defamation. The both the 1st and 2nd Respondents submitted that there were justifiable grounds to charge the Claimant based on the evidence available at the time. It was their submission that the Claimant did not prove malicious prosecution or defamation.



95. i find no evidence of either malicious prosecution or unlawful arrest as both the arrest and prosecution in this case were justified by the information that was available to the Respondents. The mere fact that the Claimant was arrested, prosecuted and the outcome of the prosecution was in his favour are not sufficient proof of malicious arrest and false imprisonment. The Claimant did not prove that there was spite in any of the persons who reported the matter or carried out the arrest or prosecution.
96. from the foregoing I find that the Claimant has not proved his case against the Respondent. The is thus not entitled to any of the prayers sought except his terminal dues which the 1st Respondent is directed to release to him forthwith.
97. The claim is accordingly dismissed. Each party shall bear its cost to the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 25TH DAY OF APRIL, 2024

MAUREEN ONYANGO

JUDGE

