



**Shalimba v New Kenya Co-operative Creameris Limited (Cause
707 of 2018) [2024] KEELRC 1212 (KLR) (24 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1212 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 707 OF 2018
DKN MARETE, J
APRIL 24, 2024**

BETWEEN

LEVY IMOLI SHALIMBA CLAIMANT

AND

NEW KENYA CO-OPERATIVE CREAMERIS LIMITED RESPONDENT

JUDGMENT

1. This matter came to court vide a Claimant’s Memorandum to claim dated 23rd February, 2018. The issues in dispute are therein cited as;
 - a. Wrongful and unlawful termination of the Claimant’s services.
 - b. Failure by the Respondent to pay full terminal benefits due to the Claimant.
 - c. Discrimination for being a unionised member.
2. The Respondent in a Respondent’s Reply to Claim dated 4th September, 2018 denies the claim and prays that the same be dismissed with costs.
3. The Claimant in a Reply to Respondent’s Reply to Claim dated 8th July 2021 reiterates his case and rubbishes the response as a nonstarter.
4. The Claimant’s case is that on 1st November, 1987 he was engaged by the Respondent as a School Milk Clerk in the marketing department. He served dedicatedly in this position until 30th June, 1991. He earned several promotions in his course of employment. These are as follows; That upon the claimant’s satisfactory service in the said position, the Claimant was appointed in the position of Cashier on probation basis then permanently. The Claimant herein served in the said position diligently and dedicatedly without any complaint from the Respondent at a basic salary of Kshs.45,749.00 per month.



5. The Claimants penultimate case is that on 8th February, 2017 his services were terminated on unfounded and unproven allegations. He was not paid his full and final dues of employment on termination.
6. He therefore prays as follows;
 - i. A declaration and/or finding that termination of the Claimant's employment by the Respondent was unprocedural, wrongful, illegal and unfair.
 - ii. Compensation as calculated and specified in paragraph 23
 - iii. Compensation for unlawful termination as specified in paragraph 23.
 - iv. Costs of this suit.
 - v. Interest on the above compensation at the rate of 12% per annum from the date of termination of service until payment in full.
 - vi. Any other relief as the court may deem just and fit to grant.
7. The Respondent's case is a denial of the claim.
8. The Respondent's case is that the claimant commenced employment on 1st February, 2004 as a cashier with the Respondent. His previous employment was with the Deformak KCC which is now under receivership.
9. The Respondent's further case is that the Claimant's services were not satisfactory in that;
 - i. The Claimant has received warning letters in 2007 for neglecting his duties and omitting to report an underpayment report.
 - ii. The Claimant has faced disciplinary proceedings in 2017 for failing to verify and confirm financial figures before posting them into the system of the Respondent for which he was responsible for.
10. The Respondent brings out a case of lawful termination of employment on the following grounds;
 - i. The Claimant on 19th September 2016 was issued with a notice to show cause pursuant to anomalies in the Audit Report which revealed that fake bank deposit slips for accounting the Respondent's products amounting to Kshs.1,771.000/- were issued to the Claimant for sell from 21st July, 2016 to 7th August, 2016.
 - ii. The Claimant in the Notice to Show Cause was given notice of the hearing, a fair hearing, and grounds for the hearing.
 - iii. The Claimant on the 19th January 2017 appeared before the Disciplinary Committee and presented his case.
 - iv. The Respondent's disciplinary committee determined the matter and the evidence presented and resolved to terminate the Claimant's Employment.
 - v. The decision and the grounds for the said decision of the Respondent were immediately thereafter communicated to the Respondent on 8th February 2017.



- vi. The Claimant filed an Appeal against the decision of the Disciplinary Committee of the Respondent on 17th February 2017 and presented his appeal before the Committee on 30th March 2017.
 - vii. The Disciplinary Committee determined the appeal and communicated its decision to the Claimant that it was not convinced and that the evidence indicated that the Claimant had been negligent in his duties arising from the posting of fake bank deposit slips amount to Kshs.1,771,000/- without confirming against the statement leading to fraud.
 - viii. The decision of the Respondent was therefore founded and proven and the Claimant at about the hearing and the appeal failed to prove his innocence and admitted that he failed to verify the Bank Deposit slips.
11. The Respondent in toto denies the claim and avers that; That the Claimant has not complied with the clearance procedure of the Respondent. That the Claimant dues amounting to Kshs106,852.39 are payable upon such clearance by the Claimant. The Claimant was subjected to an open and fair disciplinary process in which he participated. He was heard procedurally and found culpable. He appealed against the decision of the disciplinary committee but this was again found unsatisfactory and the termination upheld. He had had several warning letters pertaining his conduct and work. The claimant is entitled to 47.08 accrued as interest unutilised leave days computed at Ksh.71,795.53.
 12. Again, the Respondent denies the contents of paragraph 10 of the memorandum of Claim and states that the Claimant was found negligent, careless and failed to perform his duties as he failed to give proof that he had verified the Bank deposit slips and make proper financial postings.
 12. Further, the Respondent states that the Claimant's actions were contrary to his letter of appointment, Clause on Duties of Code of Conduct, which provided that 'during the tenure of your service with the company you will observe Company rules and Regulations and will diligently and faithfully perform the duties of your position and such other duties which the company may call upon you to perform from time to time.
 13. The Respondent in response to paragraph 23 of the Memorandum of Claim denies the calculation made by the Claimant as terminal benefits and avers that payment of the Claimant's terminal dues are only subject to CLEARANCE with the Respondent and the same have been tabulated as follows;
 - a. 8 days Salary for the month of February 2017.....Kshs. 15,847.43
(Tabulated as $8 \times 55466 \div 28$)
 - b. 47.08 leave days (including accrued leave days).....Kshs.71,795.43
(Tabulated as $47.08 \times 45749 \div 30$)
 - c. 1 Month in lieu of notice Kshs.55,466.00
Total Taxable Kshs.143,108.86
Less PAYE Kshs.36,256.47
Net Pay (Owed to the Claimant): Kshs.106,852.39
 14. She therefore prays that this matter be the claimant be compelled to comply with the Respondent's clearance procedures subject to payment of termination dues. She also seeks dismissal of the suit.
 15. The issues for determination



1. Whether there was a termination of employment of the Claimant by the Respondent.
 2. Whether the termination of employment of the Claimant by the Respondent, if all, was wrongful, unfair and unlawful.
 3. Whether the Claimant is entitled to the relief sought.
 4. Who bears the cost of this cause.
16. The 1st issue for determination is whether there was a termination of employment of the Claimant by the Respondent. The parties in their written submission look at this differently.
 17. The Claimant denies negligence in the performance of duties. It is his case that for the thirty years that he worked for the Respondent, he was never summoned or warned for negligent of duty or breach of terms of service until the alleged incident of loss of Ksh.1,771,000.00.
 18. The Claimant further submits that as a cashier he was accessible to online bank records and therefore cannot be held accountable for the impugned bank slips. He was not in a position to establish if the same were falsified.
 19. The Claimant further seeks to rely on the Sections 107 of the *Evidence Act*, Chapter 8 Laws of Kenya which comes out as follows;
 - i. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists.
 - ii. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
 20. It is his case and submission that the Respondent has not substantially proven his case of negligent and the appurtenant written reprisals.
 21. The Respondent submits a case of negligence and breach of the terms of employment by the Claimant. She seeks to rely on the definition of negligence in Black's Law Dictionary which comes out as follows;

“the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs would do.”
 22. It is her case and submission that at all time, the Claimant owed the Respondent the duty of care in the performance of his duties. He was at all times duty bound to act with due care so as to obviate suffering by the Respondent.
 23. The Claimant's terms of service included the duty of receiving, verifying and posting bank slips. This was put to his notice at the onset of his employment. In this case, the Claimant breached his duty towards the company by failing to verify the banking slips he received, and proceeding to post them despite the fact that the sums involved were large.
 24. The result of the Claimant's actions was a loss amounting to Kshs. 1,771,000.00. The Respondent would not have incurred such loss if the Claimant carried out his duties as required.
 25. It is the Respondent's further case that the Claimant was awarded a fair hearing of the allegation against him in accordance with Section 4(3) of the *Fair Administrative Action Act*, 2015 and therefore cannot allege unfair termination of employment.



26. The Respondent further seeks to rely on the authorities of Kenffreight (EA) Ltd vs Benson K. Nguti [2016] eKLR where the court held as follows;

“Termination of employment will be unfair if the court finds that in all the circumstances of the case, it is based on invalid reasons or if the reason itself or the procedure of termination is itself not fair.

27. Again, in Joyce Mukolwe vs Mustek East Africa Limited [2021] eKLR, the court held thus;

“In considering the procedural fairness of termination or summary dismissal of an employee the period under consideration has to be one from the time the employer conceives the intention to terminate or dismiss, to the preparation and issuance of the termination letter, or conveyance of the decision to terminate or dismiss.”

28. The Respondent in the penultimate raises a case of procedural termination of employment where the Claimant was offered an opportunity to be heard through a Show Cause letter and disciplinary proceedings in which he participated. He was ultimately issued with termination letter of which he appealed against but again lost.

29. This case tilts in favour of the Respondent. It is without doubt that on a test of balance of probabilities and preponderance of evidence, the Respondent’s case overwhelmed that of the Claimant. A case of neglect of duty is established by the Respondent as against the Claimant. I therefore find a case of lawful termination of employment and hold as such.

30. The 2nd issue for determination is whether the Claimant is entitled to the relief sought. He is not. Having lost a case of unlawful termination of employment, he becomes disentitled to the relief sought.

31. I am therefore inclined to dismiss the claim with orders that each party bears the cost of the same.

DELIVERED, DATED AND SIGNED THIS 24TH DAY OF APRIL 2024.

D. K. NJAGI MARETE

JUDGE

Appearances:

1. Miss Abwao holding brief for Kadima instructed by Kadima & Company Advocate for the Claimant.
2. Miss Oele instructed by Lumumba & Lumumba Advocate for the Respondent.

