



REPUBLIC OF KENYA



KENYA LAW
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**Masha v Kenya Ports Authority (Cause E041 of 2023)
[2024] KEELRC 913 (KLR) (18 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 913 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E041 OF 2023**

**M MBARŪ, J
APRIL 18, 2024**

BETWEEN

KENNETH GEORGE MASHA CLAIMANT

AND

KENYA PORTS AUTHORITY RESPONDENT

JUDGMENT

1. The claimant was employed by the respondent as a junior technician. His employment was confirmed as permanent and pensionable at a monthly salary of ksh.147, 447.
2. On 18 May 2023, the claimant’s employment was terminated by the respondent. The claim is that this was wrongful and unfair on the grounds that there were no good reasons, notice, or hearing. A certificate of service was not issued. The purported disciplinary hearings were conducted by a human resources committee that was not properly constituted as per clause K10 (f) of the Disciplinary Manual Handbook, 2015, and clause K.2.iv Human Resources Manual.
3. The claimant is seeking the following;
 1. Notice pay Ksh.147,447;
 2. 12 months compensation Ksh.1,769,346;
 3. Certificate of service;
 4. Costs.
4. The claimant testified in support of his claim that on 25 August 2021, he was accused of stealing copper cables in the yard. He was on the morning shift and hence reported to work at 5 am as the shift was to start at 6.45 am. He entered the premises using motor vehicle no. KCR 448M and gave a lift to his colleagues Juma, Tsuma, and Edgar. The claimant and his colleagues exited the premises at the cargo



department where the motor vehicle had been packed. At 5.37 am the motor vehicle is noted as having left the port.

5. The claimant testified that he was alleged to have been carrying copper cables with his colleagues. The police later arrested them and after a month, they were accused of theft of the cables.
6. On 16 October 2021, the respondent interdicted the claimant and accused him of theft. On 25 November 2021, he replied to the notice and agreed that the police had arrested him together with his colleagues following the theft of copper cables in the yard. He recorded his statement with the police but was not charged in court.
7. The claimant testified that he was invited to attend a disciplinary hearing and he attended. He was then dismissed from his employment. He lodged his appeal. He has not yet cleared.
8. In response, the respondent admitted the claimant was an employee of the respondent. He was appointed on 19 November 2002 as P/W Gangman. He was promoted at Artisan on 27 June 2007 and lastly served as a technician from 19 October 2017.
9. The claimant was interdicted and eventually dismissed following a disciplinary hearing. The claimant was arrested together with other colleagues and charged with vandalism and theft of a cable. He was deemed to be directly criminally liable for the offences though he was not charged in court. This was a justifiable ground for his dismissal.
10. The conduct of the claimant was gross misconduct which justified summary dismissal. This was per clause K.1 (c) (ii) of the Human Resources Manual. The responses made by the claimant were mere denials and upon interrogation he confessed there was a conspiracy to commit the crime between himself and his three colleagues. The claimant confessed to conspiracy to commit the crime amongst the four culprits. The cable was stolen from the same location where the vandalism of equipment was reported. The cable was sold and money was shared among the four culprits. The claims made are not justified.
11. In evidence, the respondent called Juma Salim Chingabwi the human resources officer (discipline), and conversant with the matter and relied on the human resources records. He testified that the claimant was an employee as technician number 5578818. Before his dismissal, the claimant was captured entering the respondent's premises on the morning of 25 August 2021 using his motor vehicle KCR 448L together with three others. The biometrics captured the claimant and his colleagues leaving the port and premises at 0537am. There was vandalism of KPA equipment, spreaders, and copper cables within the container terminal engineering area where the claimant and his colleagues were established to be involved. The claimant and his colleagues were in his workstation. The police and KPA security traced the claimant and his movements and he was arrested and he wrote a statement.
12. Mr. Chingabwi testified that through a letter dated 16 November 2021, the claimant was suspended from duty. The charges made against him were stated and he was required to respond and show cause why he should not be dismissed for gross misconduct. In his response through a letter dated 25 November 2021, the claimant noted that the police made him a prosecution witness after offering information to them regarding the theft. Criminal proceedings were commenced for the vandalism and theft by employees, in his response, the claimant confirmed that he was approached by one of the accomplices to execute the theft.
13. The claimant was accorded a fair hearing before the disciplinary committee. He was accompanied by a union representative by the name of Kokonya. The claimant was accorded a fair hearing in terms of the KPA Human Resources Management Committee. He relied on a disciplinary manual handbook



- 2015 which is unknown to the respondent. The KPA Human Resources Manual 2017 was superseded by the KPA Human Resources Policy & Procedures Manual 2021.
14. Mr Chingabwi testified that the claimant was invited to a personal hearing in July 2022 and found culpable of the administrative charges and dismissal was recommended. There are no terminal dues owing to the claimant. His pension benefits are administered by the KPA Pension Scheme which is a separate entity from the respondent. The claimant is required to clear with all departments including payment of rent due for the KPA house he occupied as noted to him in a letter dated 11 October 2022. Upon clearance, his Certificate of Service will be issued.
 15. At the close of the hearing, both parties filed written submissions.
 16. The claimant submitted that his employment was terminated unfairly. On 5 July 2022, he was invited to a disciplinary hearing on 7 July 2022. He had no sufficient notice. He felt intimidated and humiliated by the panelists who acted as prosecutors and judges at the same time. In the case of Frederick Saundu v Principal Namanga Mixed Secondary School & two others, the court held that there must be a justifiable cause to believe the employee is engaged in serious misconduct to justify an invitation for a disciplinary hearing. There was no good cause for the claimant to be invited to attend before the disciplinary panel.
 17. The claimant submitted that the respondent failed to consider that the disciplinary process of purely on malice. The panel doubled up as prosecutors and judges hence denying him natural justice. The charges made against the claimant were not the same as the ones he was dismissed on. He was accused of absconding duty yet dismissal was over alleged theft. The claimant was not informed of his charges contrary to Article 50 of *the Constitution*. He was not given sufficient evidence over the allegations made against him. In the case of Samson Ole Kisirkoi v Maasai Mara University & 3 others [2018] eKLR the court held that where the employer fails to supply the employee with evidence, the mandatory provisions for due process are violated. Section 41 of the Act demands that the employee be accorded due process which was lacking with regard to the claimant.
 18. The respondent submitted that this claim is similar to ELRC Cause No. E073 of 2022 and judgment was delivered on 30 October 2023 and urged the court to abide by similar orders. Before his dismissal on 15 August 2022, the claimant was employed by the respondent as a technician. On 9 September 2021, the head of container terminal engineering reported a case of vandalism and theft of copper cables and upon investigations, it was noted that on 25 August 2021 the claimant and three others while using motor vehicle KCR 448L accessed the yard where the vandalism took place. The police and security investigated and the claimant was arrested and based on the information he gave, he became a prosecution witness. He admitted to knowledge of the theft. He was an accomplice to the theft.
 19. The respondent submitted that there was a valid and justified reason for summary dismissal. In the case of Cooperative Bank of Kenya Limited v BIFU [2017] eKLR the Court of Appeal held that following theft, the employment relationship was broken down. In Thomas Sila Nzivo v Bamburi Cement Limited [2-14] eKLR the court held that the employer is not required to have conclusive proof of theft. Reasonable suspicions are sufficient. In the case of Diamond Industries Limited v Mwale ELRCA No. E028 of 2022 the court held that theft is a criminal act. When this happens on the shop floor, the employer is allowed to effect summary dismissal.

Determination

20. The issues for determination are whether there was an unfair termination of employment and whether the remedies sought should be issued.



21. The employment of the claimant is not contested. The claimant does not deny that on 25 August 2021, he entered the shop floor together with three others and later they were arrested for theft of copper cables. The claimant admitted that he was arrested and he wrote a statement.
22. Following his arrest, through a letter dated 16 November 2021 the claimant was suspended to allow for investigation. He was also required to show cause why his employment should not be terminated. He replied through a letter dated 25 November 2021 and he noted as follows;
 - ... that upon arrest I offered to give truthful information to the police concerning the theft that happened on the 25th of August 2021 to which Tsuma Mwangea had approached me for assistance to transfer one cable wire using my leased motor vehicle.
23. That Tsuma Mwangea indicated he had been authorized by his boss to dispose of the same, a fact that was never been disputed. He even arranged for a smooth exit from the Port premises.
24. The claimant agreed with the charges made against him about his involvement with the theft of the copper cables. He was aware of the theft that took place on 25 August 2021 as Tsuma Mwangea had approached him for assistance and his motor vehicle was used.
25. Instead of reporting this to the employer, he opted to facilitate the theft.
26. Section 44(4) (f) and (g) of the *Employment Act*, 2007 (the Act) allow an employer who finds an employee to have committed an act that is criminal in nature or an employee who is suspected of committing a criminal act to issue summary dismissal. The law provides as follows;
 - f. in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or
 - f. 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.
27. These provisions must be read together with Section 43(2) of the Act;
 - (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.
28. where the employer genuinely believes to exist a reason for termination of employment, such reason being the commission of a criminal act and which threatens the property of the employer, termination of employment is justified.
29. In the case of *Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike* [2017] eKLR the court in addressing a case similar to herein held that;

Under Section 43 of the Act, the onus is on an employer to prove the reason or reasons for the termination, failing which the termination shall be deemed to be unfair. The test is, however, a partly subjective one in that all an employer is required to prove are the reasons that he “genuinely believed to exist,” causing him to terminate the employee’s services. In the present case, it seems quite clear from the evidence on record that KPLC believed, and had ample and reasonable basis for so believing, that Wasike had attempted to steal cable wire from KPLC stores which he was in charge of. That being the case, we think the learned Judge plainly erred in entering into a detailed examination of whether or not the 300 metres of cable wire were



part of the 1,100 metres that were being legitimately removed from the store, as well as an examination of whether or not there was sufficient documentation in proof of the discrepancy and the like. It was enough, we think, that the gateman found cables that were concealed and should not have been getting out of the stores.

Wasike was unable to explain that anomaly to the satisfaction of his superiors or the disciplinary committee. That provided KPLC with a reasonable basis to act as it did and it is improper for a court to expect that an employer would have to undertake a near forensic examination of the facts and seek proof beyond reasonable doubt as in a criminal trial before he can take appropriate action subject to the requirements of procedural fairness that are statutorily required. The learned Judge was wrong to find that the termination was unfair for want of valid reasons. ...

30. In the case of *Matsesho v Newton* (Cause 9 of 2019) [2022] KEELRC 1554 (KLR) (29 July 2022) (Judgment) the court held that;

It should be noted that in proving the reasons for termination under section 43 of the *Employment Act*, the employer is entitled to plead matters that he genuinely believed to exist and which would, if they were in fact in existence, provide valid grounds for terminating the employee. In other words, situations may arise where the employer genuinely believes that a ground for terminating an employee has arisen when in actual fact it has not. For example, the employer may have strong preliminary evidence pointing to the employee having committed an offense against the property of the employer only for subsequent investigations to clear the employee. If the employer shows that he acted on such evidence out of a genuine belief that the employee had committed the act, the termination would be on valid grounds.

31. This position is reiterated in the case of *Titus Wanyonyi v Comet Health Care Limited* [2016] eKLR and *Kenya Union of Commercial Food and Allied Workers v British American Tobacco (K) Limited* [2018] eKLR that where the employee committed an act detrimental to the property of the employer, summary dismissal is allowed in terms of Section 44(4) (g) of the Act. The employee cannot justify conspiracy to commit a criminal act and be found to state that the theft was by another person. Being an accomplice creates a genuine reason to justify termination of employment.
32. In the case of ELRC, at Mombasa, Cause No. 567 of 2015, *Christian Samba Obath and Fossil Fuels Limited*, Cause No. 567 of 2015 (Mombasa) the court held that;
33. The court is satisfied the accusations against the Claimant, contained in the letter to show cause, assuming these were the same accusations the claimant was faced with on disciplinary hearing, were not established. They were not valid termination grounds.
34. Termination was not based on valid reason as required under sections 43 and 45 of the *Employment Act* 2007.
35. In this case, the claimant was notified of his misconduct and allowed a response where he admitted to being involved in the theft of copper cables. He cannot extricate himself from the act of theft on the grounds that he was not charged in court with a criminal offence.
36. Upon the disciplinary process, he was allowed another person of his choice leading to summary dismissal.
37. The sanction taken against the claimant is hereby found justified. Compensation and notice pay are remedies removed from the claimant.



38. On the claim for issuance of Certificate of Service, the claimant does not deny that he was allocated house KPA at Shimanzi Staff Quarters Block H Door 3 at a monthly rent of Ksh.5, 900. He should and ought to clear with all the relevant departments before issuance of his Certificate of Service. This is an established best practice.
39. On costs, the claim is without merit. The claimant should meet costs due to the respondent.
40. Accordingly, the claim herein is found without merit and is hereby dismissed. Costs to the respondent. Upon clearance, the claimant is to be issued with a Certificate of Service.

DELIVERED IN OPEN COURT AT MOMBASA THIS 18 DAY OF APRIL 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

