



**Mwai v Bollore Transport & Logistics (K) Ltd (Cause E933 of 2022)  
[2024] KEELRC 1219 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1219 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E933 OF 2022  
NZIOKI WA MAKAU, J  
MAY 23, 2024**

**BETWEEN**

**MESHACK KAMAU MWAI ..... CLAIMANT**

**AND**

**BOLLORE TRANSPORT & LOGISTICS (K) LTD ..... RESPONDENT**

**JUDGMENT**

1. In the Memorandum of Claim dated 14<sup>th</sup> March 7<sup>th</sup> December 2022, the Claimant raises against the Respondent issues of wrongful dismissal and deliberate withholding of his lawful dues. He averred that he was appointed on or about 8<sup>th</sup> July 2010 as a Deputy Finance Manager at the then Respondent's South Sudan subsidiary named SDV Logistics (Southern Sudan) Limited, earning a gross monthly salary of SDF. 2,637.92 with attendant allowances and benefits. That he rose through the ranks and ultimately promoted to the position of Financial Controller at the Respondent Company on 30<sup>th</sup> June 2015, which position he held until termination of his employment from the Respondent Company. The Claimant further averred that his terms of employment under the Employment Contract of 30<sup>th</sup> June 2015 were permanent and pensionable with all the attendant benefits and that he earned a gross salary of Kshs. 477,601.36 per month until termination of his employment. His duties as per the employment terms involved, inter alia, supervisory and administrative roles over the finance department as well as making specific authorizations for payment and purchases as per the financial limit mandate set by the Respondent's Head of Finance and Board of Directors. He maintains that the processing of payments, authorization and validation involved a tiered process undertaken by various stakeholders. That once the said requisite checks and approvals have been met then the treasury team dispatches to the Country CFO or Financial Manager or the Financial Controller for the release of funds. That the validation of payment instructions was to be conducted as per the three (3) tier signatory mandate of the Respondent that required the financial manager, financial controller and the country CFO signing together. That notably, there existed circumstances in practice when officers adopted different procedures especially when dealing with approval and validation of miscellaneous



accounts. The Claimant's stance was that for all the impugned payments forming the subject of his disciplinary proceedings and his subsequent termination, all the relevant payment instructions had been made as evidenced by the requisite stamps as per the payment instructions mandate and the authority matrix. According to the Claimant, there was therefore no negligence on his part in so far as the discharge of his mandate was concerned.

2. It was the Claimant's case is that on or about 22<sup>nd</sup> June 2022, he received a letter suspending him and requiring him to show cause why disciplinary action should not be taken against him on allegations that he had been involved in the validation of irregular assorted payments to several suppliers amounting to Kshs. 12,811,388.70 between 11<sup>th</sup> May 2022 and 25<sup>th</sup> May 2022. That the Respondent further alleged that he had failed to conduct required checks and due care to confirm the account posting or approvals related to the impugned payments as per the approval matrix. Consequently, on 27<sup>th</sup> June 2022, he sought from the Respondent 15 critical documents and/or evidence necessary to enable him prepare his response to the said allegations. On 15<sup>th</sup> July 2022, the Respondent provided him with 13 documents and failed to avail two critical documents on Audit Trails of all postings for reasons that they were confidential and he nevertheless proceeded to respond to the show cause on 18<sup>th</sup> July 2022. The Claimant averred that the Respondent then invited him to a disciplinary hearing on 19<sup>th</sup> July 2022 that was held on 25<sup>th</sup> July 2022 before a Disciplinary Hearing Panel that included the complainant. That despite taking exception to the targeted disciplinary proceedings against him, he responded to every allegation levelled against him albeit in the absence of critical documents. That the Respondent proceeded to terminate his employment on account of alleged gross misconduct and improper performance of his duties. He further averred that during the suspension period, the Respondent had appointed his replacement from outside the organization disguised under a different title but undertaking the same scope of functions as his.
3. The Claimant submitted that termination of his employment by the Respondent was premeditated and actuated by malice and that the grounds set out in the letter of termination are unfair and invalid, as they were not based on any objective assessment of the evidence forming the subject of the disciplinary hearing. That the decision to terminate his employment was further in breach of the Respondent's statutory duty owed to him and in breach of the Respondent's own HR Policy Manual because the Respondent: failed to issue him with necessary warning letters; discriminated against him through targeted disciplinary proceedings yet other Respondent's officials were involved in the authorization and verification process leading to payment approvals by suppliers; failed to avail to him forensic audit evidencing the losses and/or authorized transaction; conducted shallow investigations on involvement of other third parties; and failed to constitute a review committee to hear and determine the Appeal on its own merit among other particulars. The Claimant contended that his chances of getting another employment are nil and has as such suffered loss for which he demands compensation from the Respondent. He seeks 120 unpaid leave days for 4 years and maximum compensation at 12 months' salary and prays for judgment against the Respondent for:
  - i. A declaration finding that the termination of the Claimant's employment with the respondent was unlawful and unfair.
  - ii. Special damages of Kshs. 7,641,621.76 and the amount as pleaded in paragraph 22.
  - iii. An order of reinstatement without loss or payment without loss of position, status or benefits or in the alternative payment of Kshs. (477,601.36 x 12 x 21 (60 years of age of retirement less 39 years current age of the Claimant) from the date of the suspension amounting to Kshs. 120,355,542.72.
  - iv. Certificate of service.



- v. Costs of the suit.
  - vi. Interest on (ii) and (iii) above at court rates until payment in full.
  - vii. Any other relief that this Honourable Court may deem fit to grant in the interest of justice.
4. In his Witness Statement, the Claimant asserted that his response to the allegations of gross negligence was that he approved the impugned payments to the suppliers within his mandate and procedurally as provided for under the Accounting and Control of Supplier Invoices Financial Direction. That the attached documents forwarded to him by officials of the supplier accounting department ostensibly met the threshold for approval as they all bore the requisite stamps of the CFO and/or the Financial Manager. Furthermore, the alleged payment was made through a "Miscellaneous Supplier Account", which accounts were set up by the Respondent for purposes of facilitating urgent payment to suppliers and therefore required more expedient approvals. He contended that the perpetrator of the fraud must have taken advantage of their knowledge of the inefficiencies and/or gaps in the approval and validation systems process and asserted that the alleged loss owing to fraud was therefore in no way attributable to negligence on his part. That it was actually humanly impossible and unreasonable to expect him to conduct a forensic audit and/or forensic scrutiny of all the documents brought before him for approval, which documents were prima facie in order.

### **Respondent's Case**

5. The Respondent averred in its Response to Statement of Claim dated 28<sup>th</sup> February 2023 that the Claimant had earlier on been found guilty of validating fraudulent payments to suppliers on two separate occasions within the same year. That during the first incident, the Claimant authorized irregular payments worth Kshs. 5,806,081/- but was let off the hook and given a warning letter. That when, in the second incident, he authorized irregular payments worth Kshs. 12,811,378.70, it led to the termination of his employment from the Respondent Company as he was found to be careless and negligent of his duty of care resulting to loss of money by the Company. It asserted that the issuance of the payment instructions was done in contravention of the authority matrix and that the signatures and stamps were a forgery and not belonging to the three-tier signatory mandate. The Respondent noted that the Claimant admitted to not having checked the payment vouchers for miscellaneous accounts because he presumed that they had already been checked and approved, which points to utter negligence on his part. While admitting that it did not avail two documents to the Claimant, the Respondent averred that it gave him the option of going to the office to review the documents without carrying them away with him but he did not make use of that option. That nevertheless, the said confidential documents were projected to him during the disciplinary hearing. It further averred that it was of paramount importance for the Disciplinary Hearing Panel to have the complainant present because only he understood the details of the Claimant's negligence in relation to his case and as the expert witness. That two other staff from the Treasury Section who were involved in processing the payments were also found to have been careless in performing their duties and subsequently summarily dismissed from employment.
6. The Respondent further averred that it did not appoint the Claimant's replacement during his suspension and noted that while the Claimant was a Financial Controller, the person appointed during his suspension was a Chief Accountant with roles separate and distinct from those of the Claimant's. It denied that there was no malice in the Claimant's termination of employment, contending that he did not appeal the management's decision even after the disciplinary hearing. That it did not breach any statutory duty owed to the Claimant and adhered to the law throughout his disciplinary proceedings. It argued that the Claimant's case is that of *volenti non fit injuria* because he engaged in acts of



negligence in the performance of his duties which resulted in him losing his job. That the Claimant cannot be heard demanding compensation from the Respondent because he was the author of his own misfortune. It also posited that the instant Claim is premature since the Claimant did not exhaust the avenues of appeal available to him before approaching this Court, as set out in his Contract and Termination Letter. The Respondent stated that the Claim is bad in law and filed with the intention to unjustly enrich the Claimant and prays that the same is dismissed with cost.

7. The Respondent also filed two Witness Statements both made on 20<sup>th</sup> March 2023 by Mr. John Onyango Amoke (RW1) and Ms. Elizabeth Kariuki (RW2). RW1 stated that sometimes around 26<sup>th</sup> May 2022 while going through the payments done through the Respondent's CITIBANK Account for 25<sup>th</sup> May 2022, he discovered two apparent irregular payments made to Lexan Enterprises and Rosky Suppliers, which payments he could not remember approving and the suppliers were also unfamiliar to him. That he consequently undertook a detailed review of the financial accounting system and noted six (6) additional payments that had been done through the same suspicious nature without following the due procedure for approval and effected through the miscellaneous account for Nairobi. RW1 asserted that the Claimant ought to have noted the irregular payments since he had access to the system and was the final signatory and that further, the same were evidently against the basic accounting principle of double entry. He further stated that he alerted his manager and after reviewing the documents, they engaged the Respondent's Head of Security to analyse the postings, which process unearthed a number of inconsistencies pointing towards the negligence and carelessness of the Claimant. RW1 went on to highlight the anomalies discovered in the said payments to suppliers, which he contended the Claimant did not dispute throughout the disciplinary proceedings.
8. RW2 stated in her Witness Statement that sometimes around 27<sup>th</sup> May 2022, she received complaints from the Country CFO, Mr. Amoke (RW1) regarding the said irregular payment of invoices to eight (8) suppliers approved by the Claimant. She asserted that the Claimant had previously been issued with a notice to show cause in February 2022, taken through disciplinary proceedings, and issued with a warning letter in April 2022 for irregularly approving payment to a supplier and causing the Company loss of about Kshs. 5.8 Million. That the second case, subject of the instant suit, occurred within the same year of the aforementioned first case. RW1 further stated that at the time of the Claimant's dismissal from employment, the Claimant had been consuming his leave days and the only leave days he had earned but not taken of 17.91 days as at 5<sup>th</sup> August 2022, amounting to Kshs. 285,128.01 as captured in his final dues. She explained that the Claimant was yet to be issued with a certificate of service as he did not clear with the Respondent.

### **Claimant's Submissions**

9. The Claimant submitted that Article 41(1) of *the Constitution* of Kenya provides for the right to fair labour practices while Article 47 protects the rights of citizens to fair administrative action. That the right to fair administrative action through fair hearing is further replicated in sections 41 and 45 of the *Employment Act* No. 7 of 2007. That section 41 of the Act clearly providing for the procedure to be followed during the process of termination of employees on grounds of misconduct while section 45 of the Act places the burden of proof on the employer to prove that the decision to terminate the employment relationship was both substantively and procedurally fair, and that such decision conforms to the principles of justice and equity. In support of these submissions, the Claimant relied on the decision of the Court of Appeal in the case of Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR. He noted that the right to provision of proper notice and information regarding the reasons for summary dismissal extends to any documents in possession of the employee forming the basis of the decision to terminate the employment relationship. It was the Claimant's submission that the Respondent acted in blatant disregard to the provisions of the *Employment Act* by failing to



provide him with a fair hearing prior to the decision of terminating his employment. That the non-admission of such evidence before this Court for inspection invites the presumption that if produced, they would have revealed some falsehood which is at present concealed and that this Court should find that on this basis, the Respondent has not met the tenets of procedural fairness per Nairobi ELRC Cause No. 1494 of 2017 – Reinhard Munyasya William v Bollore Africa Logistic Limited.

10. As regards substantive fairness, the Claimant invited this Court to inspect the summary dismissal letter dated 4<sup>th</sup> August 2022 containing seven (7) charges against the Claimant. He submitted that once a case has been established for unfair termination, the employer must prove justifiable cause for termination. That whilst section 45 of the *Employment Act* recognizes wilful neglect of duty and/or negligence in discharge of duties by an employee as being a valid ground for summary dismissal, section 43 of the Act places the burden of proof on the employer to prove that there was a genuine belief in the reasons for termination as at the time of termination. He argued that to this end, the Court should note from the adduced evidence and admissions of the Respondent's witnesses that owing to the nature of duties he performed, it was humanly impossible, let alone not within his job description, to conduct a forensic audit of all signatures. That the Respondent had not proved that there indeed existed any genuine belief in the validity of the reasons for termination as they were well aware of the above facts yet persisted in enforcing the already pre-determined dismissal. It was the Claimant's submission that therefore, the Respondent has failed to adequately meet the requirements of substantive justice by failing to provide accurate and clear evidence of impropriety and/or negligence on the part of the Claimant.
11. On the reliefs sought, the Claimant submitted that having found that the termination of his employment was unfair, the Court has the discretion to grant the Claimant the remedies provided for under section 49(1) of the Act. That section 49(3) also provides this Court with the powers to order the reinstatement of an employee who has been unlawfully terminated while considering the factors outlined under section 49(4) of the Act. He noted that he is entitled to reinstatement to his position as prayed and asked the Court to consider that any imputation of impropriety on an employer's integrity in the banking industry leading to termination of employment spells a death knell of such an employee's career. He referred to the case of Kenya Union of Printing, Publishing, Paper Manufacturers and Allied Workers v Timber Treatment International Limited [2013] eKLR in which the Court reiterated the position that the employee is entitled to reinstatement and/or compensation whose measure is the proportionate unpaid or withheld salary throughout that period of unlawful or unfair suspension or termination. He further submitted that the remedy of reinstatement should be considered alongside the remedy of future prospective earnings in the alternative, as affirmed in the case of Beatrice Achieng Osir v Board of Trustees Teleposta Pension Scheme [2012] eKLR (Industrial Court Cause 665 of 2011).

### **Respondent's Submissions**

12. The Respondent submitted that the statutory burden upon a person complaining of unfair termination of employment or wrongful dismissal is found in section 47(5) of the *Employment Act*. It cited the case of Galgalo Jarso Jillo v Agricultural Finance Corporation [2021] eKLR on substantive justification as under section 43 of the Act and the parameters of section 44(4)(g) of the Act as observed in Thomas Sila Nzivo v Bamburi Cement Limited [2014] eKLR. The Respondent submitted that the Claimant stated in his evidence that the Respondent did not conduct investigations prior to the disciplinary action. In this regard, it relied on the case of Patrick Abuya v Institute of Certified Public Accountants of Kenya (ICPAK) & another [2015] eKLR in which the Court held that, "an Investigation prior to the disciplinary process is not an express requirement of the *Employment Act* 2007...it is not necessarily mandatory that the employee be involved in the investigations, such investigations could not have the strictures of police investigations". The Respondent argued that in



the circumstances, it was not required to conduct some criminal investigations to confirm the forgery of the signatures as alluded by the Claimant and that this Court should find that the Respondent has managerial prerogative to discipline its employees when it has sufficient grounds. It was the Respondent's submission that it had reasonable and sufficient grounds to suspect the Claimant of having acted to its substantial detriment and was justified in summarily dismissing him under section 44(4)(g) of the Employment Act. That in the circumstances, it met the substantive justification and this Court should so find.

13. As regards procedural fairness, the Respondent submitted that the ingredients of fairness or natural justice that must guide all administrative decisions are, firstly, that a person must be allowed an adequate opportunity to present their case where certain interests and rights may be adversely affected by a decision maker; secondly, that no one ought to be judge in his or her case and this is the requirement that the deciding authority must be unbiased when according the hearing or making the decision; and thirdly, that an administrative decision must be based upon logical proof or evidence material. It argued that the Claimant was accorded due process throughout the disciplinary process and that he did not exhaust available avenues for dispute resolution prior to approaching this Honourable Court. It relied on the Court's analysis in the case of Kenya Plantation & Agricultural Workers Union (KPAWU) v Finlays Tea (K) Limited [2022] eKLR on the processes prior to dismissal from employment and prays that the Court finds that the dismissal of the Claimant's employment was lawful.
14. It was the Respondent's submission that the claim under section 49 of the Employment Act is only payable when the termination was unfair, illegal and unlawful. That the claim for unpaid leave days should fail as the Claimant never produced any document to support the claim. That this Court should exercise its discretion to reinstate the Claimant sparingly as he was put into disciplinary twice due to errors in his performance and to which he admitted culminated to a warning letter and finally summary dismissal. It relied on the analysis of the Court in Lawrence Onyango Oduori v Kenya Commercial Bank Limited [2014] eKLR in refusing to reinstate the claimant because long passage of time works against the possibility that such trust and confidence in an employment relationship can be rebuilt. In the end, the Respondent asked the Court to find that the prayer for reinstatement is not practical or reasonable while noting that the nature of work the Claimant was doing requires a high standard of trust. The Respondent further submitted that there is no provision for payment of damages to the date of retirement, as was affirmed in the case of Engineer Francis N. Gachuri v Energy Regulatory Commission [2013] eKLR. That the alternative prayer for Kshs. 120,355,542.72 is not payable as it is not provided for in law and should further fail because the Claimant's employment was not permanent. The Respondent thus prays that the Court thus finds the Claimant is not entitled to the prayers sought.
15. The Claimant was dismissed for alleged impropriety in approval of payments without basis. The Respondent did not conduct any investigations into the alleged fraudulent invoices. This puts the Respondent's reasons for termination under a cloud of doubt. If the Respondent was unwilling to unearth the mess it had in its processing of invoices, it should not have made the Claimant it's fall guy. The Respondent may have had reason for termination but did not prove justification as a reason absent some nexus with the alleged misdeed by an employee does not give an employer the right to terminate. In my considered view, the Claimant could have been warned if there was basis for disciplinary action. The Claimant was not in the financial department nor was he responsible for generating the invoices from the primary documents. He only interacted with the documents after passing through a few stages in the Respondent. He thus was dismissed with no valid reason. He seeks a raft of remedies some of which are not payable. Under the rubric of employment law, it is only some exceptional cases that can call for payment of salary and allowances to the end of the contract. This is not one such instance. The Claimant failed to attach any proof of his leave days earned and not taken. He also did not demonstrate that at any time during his employ he sought to go on leave and was denied the same. As such, the



claims on leave days are unproved and disallowed. The Claimant does not qualify for reinstatement though 3 years have not lapsed. The reason he does not qualify is that he served in a sensitive docket and the Respondent and Claimant have had an adversarial stance towards each other which would militate against their working together, at least that is what the Court believes. As such, the only remedy would be an order for compensation and a hope the Claimant will mitigate his losses by seeking alternative employment or other economic pursuits.

16. In the final analysis I enter judgment for the Claimant against the Respondent for:-

i. A declaration finding that the termination of the Claimant's employment with the Respondent was unlawful and unfair.

ii. Compensation equivalent to 10 months – Kshs. 477,601.36x 10 = Kshs. 4,776,013.60.

iii. Interest at court rates on the sum in (ii) above from the date of judgment till payment in full.

iv. Costs of the suit.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MAY 2024**

**NZIOKI WA MAKAU**

**JUDGE**

