



**Rotich v Agricultural Finance Corporation (Cause 53 of 2020)
[2024] KEELRC 1675 (KLR) (28 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1675 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE 53 OF 2020
MA ONYANGO, J
JUNE 28, 2024**

BETWEEN

VINCENT KIPLANGAT ROTICH CLAIMANT

AND

AGRICULTURAL FINANCE CORPORATION RESPONDENT

JUDGMENT

1. The Respondent is a state corporation incorporated in Kenya under the provisions of the [Agricultural Finance Corporation Act](#) Cap 323 Laws of Kenya.
2. The Claimant was until 21st September 2018 an employee of the Respondent.
3. In his statement of claim dated 13th October 2022, the Claimant avers that he was confirmed on 23rd December 2013 to the position of Assistant Accountant earning a basic salary of Kshs 50,529 per month among other allowances after successfully completing his 6 months probationary period. He states that he was admitted to the Respondent's pension scheme on the 14th January 2013 whereupon his contribution of 5% of his basic salary was deducted and remitted to the aforementioned pension scheme.
4. It is the Claimant's case that the Respondent carried out an audit on the posting of cash which the Claimant had made following which he was suspended without pay on 10th April 2018.
5. The Claimant avers that while on suspension, he received a show cause letter dated 23rd April 2018 from the Respondent formally charging him with loss of funds.
6. The Claimant states that he responded to the said letter vide a letter dated 27th April 2018 and that on 8th May 2018, he received a letter inviting him to a disciplinary hearing. It is the Claimant's allegation that he attended the disciplinary hearing on 11th May 2018 which hearing was replete with bias and conflict of interest exposing him to unfair hearing and the subsequent decisions. He avers that he was



- invited to another disciplinary hearing vide a letter dated 4th July 2018 on allegation that there were additional charges which he was required to respond to and that he attended the hearing on 16th August 2018 at the Respondent's head office.
7. The Claimant states that on 21st September 2018, he received a letter terminating his employment. That the letter informed him that he had a right to appeal within 14 days. He contends that he appealed against the said decision vide his letter dated 26th September 2018.
 8. The Claimant maintains that the said appeal has to date never been set for hearing and that any inquiries by the Claimant about the reasons for the delay have been ignored by the Respondent hence necessitating this suit.
 9. It is the Claimant's assertion that the Respondent terminated his services without due regard to the procedures set out in the Employment Act and that the dismissal was illegal, unfair and unlawful.
 10. The Claimant therefore prays for the following reliefs in his Statement of Claim dated 13th October, 2020 and filed on 18th December, 2020:
 - a. Declaration that the Claimant's termination from employment was unlawful, unprocedural and unfair and in the circumstances the Claimant is entitled to compensation as prayed herein above
 - b. Reinstatement with full salary, benefits and continuity of service and/or in the alternative an award of Kshs 1,630,786 as tabulated
 - c. Aggravated damages
 - d. Costs of this suit and interest at court rates from time of filing this suit until payment in full
 - e. Any other relief that the honourable court may deem fit to grant
 11. In its response to the Claim dated 26th March 2021, the Respondent denied that the termination of the Claimant's employment was unfair. It was the Respondent's contention that an audit was carried out following which the Claimant was charged, subjected to a robust disciplinary process which found him culpable and was thereafter served with a letter of termination of his employment. The Respondent avers that it paid the Claimant his terminal dues made up of 2 months' salary in lieu of notice, salary withheld from April to September, 2018, and pension, less statutory deductions. The Respondent denied that the Claimant is entitled to any of the prayers sought in the Claim.

The Evidence

12. The Claimant testified on 15th June 2023 as CW1. In his testimony the Claimant reiterated that his employment was terminated unfairly, unprocedurally and unlawfully on the grounds of fraud on his part. He stated that he was suspended vide a letter dated 10th April 2018 and on 23rd April 2018, he received a notice to show cause letter. He stated that he was thereafter invited to disciplinary hearings on 11th May 2018, 19th July 2018 and 16th August 2018, which he attended.
13. The Claimant stated that the invitation letters indicated that he was to appear for the disciplinary hearings with evidence which he did not have as he had not been supplied with the data regarding loss of funds.
14. The Claimant testified that in all the disciplinary meetings, the disciplinary committee was comprised of the same panelists. He maintained that he was issued with a termination letter on 25th September



- 2018 and that he appealed against the said decision but up to date, has not been called to prosecute the appeal.
15. On cross examination by Counsel Mabonga, the Claimant admitted that from the audit, there was a reasonable cause to believe that there were some financial malpractices in his station.
 16. The Respondent called Charles Muli, the Respondent's Senior Human Resource Officer, who testified as RW1. He adopted his witness statement recorded on 14th October 2022 as his evidence in chief.
 17. On cross examination by Counsel Ogongo representing the Claimant, RW1 told the court that there were reports made by auditors from Head Office that funds had been lost at the branch. That a special audit was carried out following which the Claimant was taken through disciplinary process.
 18. RW1 explained that he was not able to know if a client complained against the Claimant because this incident happened at the Branch while he operates from Head Office. That from the audit report he can confirm that there were complaints from clients.
 19. He stated that the special audit report recommended disciplinary action against the branch accountant. That the Branch Manager was also under investigation. He stated that the report in court was for a special audit done on 17th April, 2018.
 20. RW1 testified that the amount alleged to have been lost at the time of suspension was Kshs 8,750,133.00. That after other audits were carried out the amount increased to about Kshs 12 million.
 21. RW1 testified that he was part of the disciplinary panel. That the Claimant asked for documents and was given access to the system. He further testified that the Claimant attended 3 hearings. That he requested for some documents during the 1st and 2nd hearings that necessitated the 3rd hearing.
 22. He stated that the audit report recommended that the branch manager and accountant be subjected to disciplinary process. RW1 stated that at the time the Claimant was suspended, the amount alleged to have been lost was Kshs 8,750,133 which figure is different from the subsequent amounts in terms of financial loss. According to him, this was due to the several audits that were done as the investigations were ongoing.
 23. RW1 also maintained that the Claimant made a formal request to be allowed to access the system in preparation for his defence and that he was given the right of access to the system 3 times. According to RW1, the Claimant was not given the documents but was allowed to view the documents from the system. RW1 conceded that the Claimant was served with the invites for the disciplinary hearing on very short notice. He stated that the Respondent has a staff policy and regulation manual. With regard to the disciplinary hearings that were conducted, RW1 explained that there were three sittings which related to the alleged loss of money and that in the first two hearings, the Claimant requested for some extra information so that he could address a certain area of concern and that prompted the third sitting.
 24. RW1 stated that the audit report was prepared by one Betty Suge who also attended the disciplinary hearing. He stated that the said Betty was not supposed to sit in the disciplinary hearing as per clause 12(2)(c) of the Respondent's Staff Policy and Regulation Manual.
 25. RW1 also testified that although the Claimant appealed against the decision to terminate his employment vide a letter dated 26th September 2018 the Claimant was not given a verdict on the appeal. He also stated that the Claimant was not called to appear before the Appeal Committee. He explained that the said appeal is yet to be determined by the Appeals Committee.



26. RW1 further stated that regulation 12.3.4 requires that investigations are concluded within a maximum of 2 months. He testified that the Claimant was suspended on 10th April 2018 and his services terminated in September 2018.
27. On cross examination by counsel Aseso, RW1 stated that at least four employees of the Respondent were taken through the disciplinary hearing and also, that the criminal proceedings against the Claimant in respect to loss of money were ongoing.
28. With regard to the allegations of loss of Kshs 6,000,000 from the account of Paul Kipyego and the loan repayment by Musa of Kshs 2,266,000 and Kshs 4,000,000, RW1 stated that the account holders did not make formal complaints and did not appear as witness in the disciplinary hearing. When referred to the letter dated 23rd April 2018, RW1 stated the client applied for a loan of Kshs 4,000,000 and that based on what is on record, the loan was not disbursed. He stated that he did not know if the client received the money.

The Claimant's submissions

29. In his submissions filed in court on 5th September 2023, the Claimant identified the issues for determination to be:
 - i. Whether the services of the Claimant were unlawfully, unprocedurally and unfairly terminated by the Respondent;
 - ii. Whether the Respondent had any valid and fair reason to terminate the services of the Claimant;
 - iii. What reliefs are available to the Claimant;
 - iv. Whether the Claimant is entitled to an award of certificate of service;
 - v. Who should pay the costs and interests of this suit.
30. On whether the Claimant's services were terminated unlawfully, unprocedurally and unfairly by the Respondent, it is the Claimant's submissions that the Respondent never afforded the Claimant both procedural and substantive fairness. According to the Claimant, his employment was terminated on the sole reason that there were monies that could not be accounted for in the Respondent's Eldoret Branch. It is submitted that an internal audit was conducted which resulted into investigations being carried out by a group of personnel employed by the Respondent. It is the Claimant's submission that the Respondent's witness, RW1, clarified that no independent audit was done to compliment the internal audit. The Claimant has also submitted that the members involved in the investigation were also part of the committee in the disciplinary proceedings. It is thus submitted that since the team conducting the investigation was the same team that prosecuted the Claimant, the Claimant stood no chance of having a fair hearing.
31. On the second issue, the Claimant reiterated that the he was dismissed on the sole reason of monies being unaccounted for in the Eldoret Branch. The Claimant submitted that the Respondent did not commission any external audit to independently verify if at all there was any loss of funds and if so, who was responsible for such loss. According to the Claimant, the Respondent's reason for dismissing him is not fair as he was never afforded a sober opportunity to defend himself as the prosecutor of his case was equally the investigator and the Judge thus compromising the impartiality and soundness of the outcome of the disciplinary committee hearings.



32. The Claimant contends that he was not authorized to perform actions/transactions above Kshs 3,000,000.00 that allegedly led to the loss of the Respondent's funds if at all.
33. It is thus submitted that the Respondent had neither valid nor any fair reason to terminate the services of the Claimant.
34. On reliefs sought by the Claimant, he urged the court to award him his unpaid allowances, maximum compensation of 12 months as well as aggravated damages.
35. The Claimant also sought to be issued with a certificate of service as well as the costs of this suit.

Respondent's submissions

36. The Respondent in its submissions framed the issues for determination to be:
 - i. Was the termination of the employment of the Claimant unlawful, unprocedural and unfair?
 - ii. Is the Claimant entitled to the reliefs sought?
 - iii. Who bears the costs of this claim?
37. On the first issue, the Respondent submitted that the termination of the Claimant's employment was procedural for reasons that there was suspicion of financial malpractice at the Respondent's Eldoret Branch; that the Claimant was subjected to a robust disciplinary process; he was afforded reasonable opportunity to explain and defend himself before the disciplinary committee before a decision was reached to terminate his employment.
38. On whether the Respondent had a valid reason to terminate the Claimant's employment, it is submitted that the Respondent terminated the Claimant's employment in accordance with Section 44(4)(c) and (g) of the Employment Act. The Respondent submitted that it was only required to have a reasonable and sufficient ground to terminate the employment of the Claimant which it did.
39. On the issue regarding the appeal by the Claimant, the Respondent submits that an appeal was made on 26th September 2018 but the Claimant was arrested on 16th October 2018 before the appeal was set down for hearing.
40. With regard to the reliefs sought by the Claimant, the Respondent submits that the Claimant was paid two months' salary in lieu of notice, the withheld salary, the unpaid leave allowance as well as the unpaid transport allowance. According to the Respondent, the Claimant has failed to discharge his burden of proof under section 47(5) of the Employment Act and having unequivocally admitted to committing some of the offences, he is not entitled to the prayers in the Memorandum of Claim.

Analysis and Determination

41. From the pleadings, the oral testimony of the parties and their rival submissions, the issues that fall for this court's determination are:
 - i. Whether the Respondent had a valid and fair reason for terminating the Claimant's employment;
 - ii. Whether due process was followed in terminating the Claimant's employment;
 - iii. Whether the Claimant is entitled to the remedies he is seeking.



42. The law on termination of employment is provided for in the *Employment Act*. It is trite law that before an employer terminates an employee's employment, the employer must not only prove that it had valid reasons for the said termination but must also ensure that the laid down procedure has been followed.
43. Section 45(2) of the *Employment Act* provides that termination of employment by an employer is unfair if the employer fails to prove valid reason and fair procedure. The burden of proof in employment claims as stipulated in Section 43 of the *Employment Act* is on the employer to prove the reason for the termination as valid in any legal proceedings.
44. Section 43(2) of the *Employment Act* defines reasons for termination to be matters the employer at the time of termination genuinely believed to exist, and which caused the employer to terminate the employment of the employee.
45. In the instant case the Claimant avers that his employment was terminated on false allegations that he had failed to account for money lost and that he had converted the unreconciled money to his personal use.
46. On its part, the Respondent averred that there were irregular transactions posted to cash security deposit account which affected the vault and the loan funds as revealed by the special Audit report dated 17th April 2018. In support of its claims, the Respondent produced the audit report dated 17th April 2018. According to the Respondent, the Audit report revealed and confirmed that there were some questionable transactions and loss of money involving the Claimant. That the Claimant had posted unusual transactions in cash security deposit account, loan funds and vault.
47. The Audit Report is the document marked AFC7 in the Respondent's bundle of documents. The recommendations at page 5 of that report reads:
 - i. The Branch Accountant Mr. Vincent Rotich should be held responsible for irregular postings or unusual transactions in Cash security deposit Loan funds and the Vault.
 - ii. The Branch Accountant Mr. Vincent Rotich should be held personally responsible for creating a fictitious loan of Kshs 6,000,000.00 in RIM No 2839.
 - iii. The Branch Accountant should be held to account for the loss of Kshs 6,000,000.00 purportedly withdrawn in respect of RIM No. 2839. The Accountant withdrew the amount on client's account on 30th June, 2017. This amount reduced the vault cash. He later reposted the same on 4th July, 2018 through creation of a fictitious loan to make funds available for the client. The client later withdrew the funds in the normal manner of Kshs 5,017,000.00 leaving a balance of Kshs 983,000.00 in his RA1 account.
 - iv. The Branch Accountant Mr. Vincent Rotich should be held to account for unreconciled amount of Kshs 537,357.00 in cash security deposit account. This is the amount that affected the vault from the irregular transactions posted.
 - v. The Branch Manager and Branch accountant should be held liable to account for Kshs 2,266,000 reportedly brought by the client in cash to the office for his loan repayment. They should also be held responsible for creating a fictitious loan to make funds available for client's loan repayment.
 - vi. The Branch Manager Mr. Godfrey Fwamba should be held accountable for failing to supervise the branch transactions, the movement of loan funds and the vault for these specific cases.



- vii. The Branch Manager Mr. Godfrey Fwamba and the branch Accountant Mr. Vincent Rotich should both be held responsible for giving misleading information on their response to memo; AFC/FIN/6.0 sent by the Chief Accountant on 26th March 2016. They both quoted irrelevant old receipts to explain irregular postings in Cash security deposit account.
- viii. The two officers, Mr. Godfrey Fwamba and Mr. Vincent Rotich should go through a disciplinary process as guided by the Human Resource policies
48. The Claimant averred in his testimony that he was charged in a criminal case over the loss of funds which case is still ongoing and in which he was put on his defence.
49. From the above set of facts, I find that the Respondent had valid grounds to terminate the Claimant's employment. There was sufficient evidence to point to gross misconduct by the Claimant warranting the steps taken by the Respondent.
50. On the second limb the employer is required to prove fair procedure. Section 41 of the Employment Act provides for fair procedure thus:
- Notification and hearing before termination on grounds of misconduct
1. Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
 2. Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.
51. The Claimant has faulted the procedure followed by the Respondent leading to the termination of his employment. He stated that he was taken through three disciplinary hearings, that the disciplinary committee was not properly constituted and that the Respondent did not consider the Claimant's appeal.
52. The Respondent on its part explained that the Claimant was taken through the first two disciplinary hearings based on the finding of the audit report and that the third disciplinary hearing was necessitated by the Claimant's request to be furnished with certain documents to enable him make a detailed response.
53. I have looked at the minutes of the disciplinary hearings forming part of the Claimant's further list of documents. From a perusal of those minutes, the Claimant appeared before the disciplinary committee with a representative from the Union and was given an opportunity to defend himself.
54. With regard to the allegation that the disciplinary committee was not properly constituted, I have noted that RW1 in his evidence confirmed that the Respondent's Auditor was estopped by the Respondent's Human Resource Manual from sitting in the disciplinary committee. Unfortunately, neither of the parties furnished the court with the said manual. There is therefore no basis for the court to determine whether the composition of the disciplinary committee excluded the auditor. Again from the minutes of the committee there is nothing to show that the proceedings were not impartial because of the attendance by the Auditor. The Respondent's witness however testified that the Auditor was not



supposed to have attended the disciplinary hearing. I therefore find that this was a lapse in the hearing procedure which tainted the procedure followed by the Respondent.

55. As explained by the Respondent, the Claimant's appeal was not concluded following the arrest of the Claimant for criminal charges that are still ongoing.

Remedies

56. The Claimant prayed for several remedies in his Statement of Claim. I will address them in separate heads.

- a. Declaration that the Claimant's termination from employment was unlawful, unprocedural and unfair and in the circumstances the Claimant is entitled to compensation as prayed herein above.

Having found that the disciplinary process followed in terminating the Claimant was flawed, I make a declaration that his termination was unfair in terms of procedure.

- b. Reinstatement with full salary, benefits and continuity of service and/or in the alternative an award of Kshs 1,630,786 as tabulated

Having found that there was valid reason and that it was only the procedure that the Respondent did not fully comply with, I decline to grant the prayer of reinstatement. The remedy is further not available to the Claimant as it is only available within 3 years of termination as provided for in section 12(3)(vii) of the [Employment and Labour Relations Court Act](#), which period is long past.

- c. Aggravated damages

The Claimant is not entitled to this prayer which is only available where it is proved that there was malice as was held in [Rooks v Bernard](#) [1964] UKHL 1 where Lord Devlin pronounced the circumstances when punitive damages are applied. He stated that the only three situations in which damages are allowed to be punitive, i.e. with the purpose of punishing the wrongdoer rather than aiming simply to compensate the claimant, are in cases of (1) oppressive, arbitrary or unconstitutional actions by the servants of government; (2) where the defendant's conduct was "calculated" to make a profit for himself; (3) where a statute expressly authorises the same.

- d. Costs of this suit and interest at court rates from time of filing this suit until payment in full

Having found that the Respondent had valid reason to dismiss the Claimant but instead terminated his employment with full benefits, further having found that the Claimant was charged with the offences relating to the loss of the funds that are the subject matter of this dispute and was placed on his defence, I find that he is not entitled to costs merely because there was a minor procedural lapse in the disciplinary process which in fact did not materially affect the outcome of the process.

57. The suit is accordingly dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 28TH DAY OF JUNE, 2024

MAUREEN ONYANGO

JUDGE

