



Kirimi v Sameer Africa Limited (Employment and Labour Relations Cause 303 of 2019) [2024] KEELRC 1655 (KLR) (27 June 2024) (Judgment)

Neutral citation: [2024] KEELRC 1655 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 303 OF 2019**

MN NDUMA, J

JUNE 27, 2024

BETWEEN

GABRIEL M KIRIMI CLAIMANT

AND

SAMEER AFRICA LIMITED RESPONDENT

JUDGMENT

1. The suit was filed vide statement of claim on 13/5/2019, and replaced by an amended statement of claim dated 10th January 2022.
2. The claimant prays for the following reliefs:-
 - i. Declaration that the respondent's decision to terminate the claimant's employment was without merit.
 - ii. General damages for unlawful dismissal
 - iii. Costs and interest
3. The claimant adopted witness statement dated 3/5/2019 as his evidence in chief.
4. CW1 testified that he was employed by the respondent on 2/9/1996 and was on 19/12/2017 promoted to the position of Warehouse and Distribution Manager with effect from 1/1/2017.
5. That he served well until 20/12/2018 when the employment was terminated on allegations of negligent performance of work.
6. CW1 stated that before the termination the respondent had between April and May 2018 noted significant difference in stock levels during stock take and when the difference remained unexplained at the end of month of June 2018, the claimant's department invited stock accountant to assist with reconciliation.



7. That the reconciliation exercise revealed further rise in difference in stock levels and matter was escalated to senior management for action.
8. The management commenced an audit of warehouse operations and several recommendations and observations were made.
9. CW1 said that 1.3 million stock loss had occurred due to glaring lapses in management control systems and not due to negligence on the part of CW1 as alleged in the letter of termination.
10. That the report revealed the following lapses:-
 - i. Hurried and unplanned relocation of warehouse from a more secure location to a porous building.
 - ii. Inadequate physical security of the warehouse.
 - iii. Failure by management to act on security alerts issued by the security department and
 - iv. Uncontrolled movement of casual workers in and out of the warehouse during construction.
11. CW1 said these challenges were known to management including the CEO who acknowledged the same in email correspondence on the subject before court.
12. CW1 said he had personally raised issues on the hurried and unplanned relocation of the warehouse from a more secure location which concerns were shared by top management but nothing was done to stop possibility of stock theft. The losses occurred during the transition period.
13. CW1 said he was victimized for system failure and the suit be granted as prayed.
14. Under cross-examination, CW1 agreed that she was in-charge of operations of central warehouse.
15. CW1 said she was issued a notice to show cause (NTSC) after the audit report. CW1 said he responded to the NTSC on 29/11/2008 and a hearing was conducted to which CW1 attended in person and was not asked to bring a person of choice. CW1 said he opted to proceed alone. That the panelists were his colleagues. That he was dismissed unfairly and was paid dues in the sum of Kshs. 81,029.15. CW1 denied that he was ever negligent in his work. That the losses were all the fault of decisions made by the respondent.
16. RW1 Hannah Wanjiku adopted a witness statement dated 20/1/2023 as her evidence in chief. She was the Human Resource Consultant of the respondent. She also produced exhibits marked '1' to '19' dated 10/6/2023.
17. RW1 said the claimant's duty was to ensure that the distribution of the respondent's products was accurate and that the warehouses safety was found. That between April and June 2018 stocks valued at Kshs. 1,300,000/= got lost from the warehouse. That the claimant was issued with a notice to show cause dated 22/11/2018 to explain in writing why disciplinary action should not be taken against him. That the claimant responded by a letter dated 29/11/2018. That a disciplinary hearing was held on 17/12/2018 in which the claimant was given opportunity to explain himself.
18. That the claimant was found to have failed to take action to avert the said losses which omission amounted to negligence. The claimant was issued with a letter of termination dated 21/12/2016 and was paid final dues. That the suit be dismissed.
19. Under cross-examination by Mr. Munjla for the claimant, RW1 said the claimant was promoted to his last position due to good performance. That the claimant supervised a large staff including inventory



- clerks, warehouse supervisor; logistic clerk among others. That there were allowable margins of stock loss but the loss discovered was beyond allowable margin.
20. That the claimant failed to take any action to stem the loss from the warehouse.
 21. RW1 admitted that stock losses were reported by various staff including the claimant and stock accountant was aware of the losses. RW1 said that the reports of stock losses were made when the audit was already aware of them.
 22. RW1 admitted that audit identified various control weaknesses including lack of alarm systems and other lapses which ought to have been remedied by top management. RW1 admitted that the warehouse had moved to allow for construction and renovation of the warehouse. RW1 admitted that other people shared the area the new warehouse was located. RW1 admitted that the movement was done when the new warehouse was not ready for occupation. RW1 admitted that the relocation contributed to the losses and that movement was to allow renting the old warehouse to tenants.
 23. RW1 admitted that there were numerous issues of insecurity raised and not remedied including installation of alarm system in the new warehouse. RW1 said losses happened but was not sure to what in particular they were attributed. That the claimant was overall in-charge and therefore responsible for the stocks.
 24. RW1 admitted that the claimant had made recommendations regarding offloading of stock at the warehouse bay and had highlighted the risks involved to the management on 22/1/2017 a year before. RW1 insisted that the audit did not identify system failure but the claimant was responsible for the loss. RW1 said several officers were blamed for the lapses.
 25. RW1 said the claimant did not raise the issues of system lapses in his response to the NTSC nor did he say there was theft. RW1 said the termination was lawful and fair since claimant was given opportunity to explain himself.

Determination

26. The parties filed written submissions which the court has considered together with the evidence adduced by CW1 and RW1. The issues for determination are:
 - i. Whether the termination of the claimant was for a fair reason following a fair procedure.
 - ii. Whether the claimant is entitled to compensation
27. The claimant held the position of warehouse and distribution manager from 1st January 2017 at a gross monthly salary of Kshs. 160,000/=.
28. The audit report before court identified 152 tyres were lost worth Kshs. 1,343,378.10. The audit report concluded that tyres were removed un-procedurally without due process being followed and as such the stock policy should be effected to the concerned personnel.
29. That the warehouse had recently been relocated from a more secure location to allow letting of that space. “This may have contributed to the losses as there were many activities going on in the new location such as construction, scrap collection sharing of same paths with tenants and so on.
30. The loss may have been occasioned by the lack luster physical security resulting from “haphazard relocation from the former secure warehouse.”

“A security alert was issued by the security manager on 19th January 2018 on the security status of the warehouse but the warning was not heeded.”



“The guarding company should take its share of responsibility for this loss.”

31. Further findings were that:

“We checked tyre movement for the three categories from 1st January to 31st August 2018 and found nothing untoward. We also reviewed the security registers against AP entries from 1st January to 31st August 2018 for the then different categories and found nothing out of order.”

32. The above were specific findings on the 152 tyres of two 5.35 recorded as missing.

33. The reason given in the termination letter for the action taken against the claimant was that:

“It was found that you did not take any action as a result of the stock loss reported in the central warehouse between April and June 2018 leading to a loss of Kshs. 1.3 million. This is despite the fact that the losses had been brought to your attention.”

34. The above was said to be gross breach of company rules, core values and negligence.

35. It is the court’s considered finding upon a careful analysis of the testimony by CW1 and that by RW1 and in particular the findings in the audit report which identified the various matters that led to the loss of 152 tyres that this conclusion is not supported by any evidence before court and that major lapses that had led to loss of 152 tyres could only be remedied by a joint effort by top management with regard to the various loopholes identified in the audit report.

36. Indeed the issue of relocation; sharing warehouse with tenants; construction activities going on; security alerts not being responded to; among others were way out of the mandate of the claimant other than making sure that management was fully appraised of the situation with recommendation to take appropriate action.

37. The court finds that the respondent did not discharge the burden placed on it by section 43(1) and (2) and 45(1) (2) and (4) of the *Employment Act* to prove on a balance of probabilities that it had valid reason(s) to terminate the employment of the claimant arrived at following an objective criterion at a properly constituted disciplinary hearing in terms of section 41 of the *Employment Act*, 2007.

38. The court agrees with the claimant that he was made a scapegoat for a situation largely contributed by the decision of management to haphazardly in the words of the auditors to move the warehouse from a more secure location to a less secure location with many loopholes.

39. The court therefore finds that the termination was unlawful and unfair for failing to meet both substantive and procedural fairness.

40. The claimant is entitled to compensation in terms of section 49(1) (c) and 4 of the *Employment Act*, 2007.

41. In this respect the claimant had served the respondent from 2nd September 1996 to 21st December 2018 a period of twenty-two (22) years and had grown in rank and remuneration due to his good work.

42. The respondent had no evidence of any adverse record by the claimant during that period. Indeed RW1 praised the claimant for good work which led to various promotions. The claimant was paid terminal benefits upon termination. The court finds that the claimant did not contribute to the termination, since the losses were largely caused by ‘haphazard’ steps taken by the respondent which were beyond the control of the claimant. The court finds that the claimant had made timely reports to management



to stem the loss but management failed to take tangible steps. The claimant lost a good position; good income and future prospects of employment.

43. The claimant had not obtained alternative employment at the time of the trial. The claimant had suffered loss and damage. The claimant has incurred expenses in bringing this suit and was not paid any severance or gratuity upon termination to mitigate the loss. The claimant was at an advanced age and was unlikely to get similar opportunities in future.
44. The court has considered the Supreme Court case of *Ken freight (EA) Ltd versus Benson K Nguti* (2019) eKLR together with the facts above to award the claimant the equivalent of ten (10) months' salary in compensation for the unlawful and unfair termination in the sum of Kshs. (160,000 x 10) 1,600,000/=.
45. In the final analysis judgment is entered in favour of the claimant against the respondent as follows:
 - a. Kshs. 1,600,000/= in compensation
 - b. Interest at court rates from date of judgment till payment in full.
 - c. Costs of the suit

DATED AT NAIROBI THIS 27TH DAY OF JUNE, 2024.

MATHEWS NDERI NDUMA

JUDGE

Appearance:

Mr. Mungla for the claimant

Mr. Kamau for respondent

Mr. Kemboi, Court Assistant

