



**Hamisi v Modern Coast Express Limited (Cause E071 of 2023)  
[2024] KEELRC 1557 (KLR) (13 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1557 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE E071 OF 2023**

**M MBARÚ, J  
JUNE 13, 2024**

**BETWEEN**

**MWAZITO MOHAMED HAMISI ..... CLAIMANT**

**AND**

**MODERN COAST EXPRESS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The respondent employed the claimant on 2 April 2012 as head of information technology (IT) within Mombasa County. He worked in numerous satellite regions within the country and eastern Africa on a salary of Ksh. 61, 989 per month with several increments lastly earning Ksh. 86, 532 per month.
2. On 4 July 2020, the claimant was suspended from duty for a month on allegations of poor performance and incompetence. The suspension was with effect from 6 July to 6 August 2020.
3. While serving the suspension period, the claimant was served with a notice to show cause dated 27 July 2020 and informed to attend a disciplinary meeting on 28 July 2020 at the main human resources office at Kokotoni Yard. The disciplinary meeting did not take place owing to the COVID pandemic within the country.
4. On 7 August 2020, the claimant reported back to work as required after serving his suspension period. He found his workstation cleared and occupied by another person who he later learnt was to be his replacement. He asked and was informed that he should clear and wait for further directions from the human resources office.
5. The claim is that later, the claimant was called on the phone and summoned by the respondent to meet the human resources manager, Astrid Bock who directed him to hand over all IT software including each password domain, admin credentials, QuickBooks accounting and others in his possession. He was to hand over to the person who had replaced him.

6. While the claimant was on the phone, he was not aware that he was on a conference call with the human resources officer Ms. Ayesha Zia and IT manager Daniel Mboya who made various accusations against the claimant under the guise of holding a disciplinary hearing. The secretary had prepared minutes for the meeting and the claimant was required to sign an acceptance of the proceedings but he declined as he had no notice of the disciplinary proceedings. He was then issued with a letter dated 7 August 2020, a summary dismissal letter on account of gross misconduct.
7. The claim is that the claimant had not been invited to a disciplinary hearing or accorded the opportunity to call another employee of his choice leading to unfair termination of employment. There was no payment of terminal dues and is claiming the following;
  - a. Compensation of 12 months' pay Ksh. 1,038,384;
  - b. Notice pay Ksh. 86,532;
  - c. Service pay for 9 years worked Ksh. 449,300.80;
  - d. Leave pay for 9 years Ksh. 778.80;
  - e. Public holidays for 9 years Ksh. 658,974.50;
  - f. Certificate of service; and
  - g. Costs of the suit.
8. The claimant testified in support of his case that he was employed by the respondent in the IT department and worked to support other stations within the east Africa region and the over 40 branches of the respondent. His main duties were to install cameras and train staff. On 4 July 2020, he was suspended without prior notice for a month. No reasons were given and he was required to resume back after 6 August 2020.
9. The claimant testified that on 28 July 2020, he was issued with a notice to show cause but refused to accept or sign it because this was punishment without a hearing. Since he was to report back on 6 August 2020 he would respond then while back at work. He was then invited to a disciplinary hearing on 28 July 2020 but this did not take off due to Covid prevalence at the time.
10. The claimant reported back to work on 6 August 2020 but was told to wait at the reception for the human resources manager. He was called and directed to hand over his duties immediately. He went to his former office and found the persons who had replaced him and handed them over to him. He was then called from the head office and told to defend himself in the conference call. Present were the head of human resources, IT officer, and Assistant human resources. The claimant had no prior knowledge that this was a disciplinary hearing and after the call, he was issued with notice of summary dismissal.
11. The claimant testified that he was unfairly treated, he had no time to prepare himself for the disciplinary hearing and was not informed to bring another employee of his choice and his claim should be allowed with costs.
12. Upon cross-examination, the claimant admitted that the procedure for handing over required every department to clear him and to be issued with a clearance form which he did not obtain. He also declined to sign for the notice to show cause as this indicated he had already been found guilty. He also refused to answer several questions during the disciplinary hearing due to how the questions were asked. To him, it was not a disciplinary hearing but a phone call to the head office. He was shown the disciplinary minutes by the secretary but declined to sign as such would have to confirm the record which he contested. Immediately after the hearing, he was issued with a notice of summary dismissal.

13. The respondent also admitted that he was required to report to his office at 8 am but on several occasions, he reported at 11 am after attending to an issue that had been reported at another site/ location outside the office. It was the practice that he should report to the office before leaving to attend at any location but on this day, he opted to proceed directly to the site before reporting to the office. He was noted as absent from duty and the matter was brought to his attention.
14. In response, the respondent admitted that the claimant was employed as head of IT under the respondent Group of companies. His duties were to ensure the software was recorded and the register was maintained ensure regular servicing, and networking and guide staff members in this regard.
15. In June 2020 the respondent received several complaints against the claimant concerning management of IT specifically his conduct as Head of IT. Despite warnings on his conduct, the claimant failed to address it. On 4 July 2020, the claimant was informed about his conduct and warned that a repeat would lead to disciplinary action. This included that the claimant would report to the office at 11 am without prior communication to the respondent while he was required to be in the office at 8 am. Due to the nature of his duties as Head of IT, this created problems for staff who needed assistance from his office. Such was neglect of duty. As a result of his conduct, the claimant was sent on unpaid suspension from 6 July to 6 August 2020.
16. Following investigations, the respondent issued the claimant with a notice to show cause on 27 July 2020 indicating various acts of negligence and requiring the claimant to respond. The claimant was also invited to a disciplinary hearing on 28 July 2020 at 3 pm at the human resources office in Kokotoni Yard and advised that he had a right to bring another employee of his choice. The meeting was rescheduled to 7 August 2020 where the claimant attended and was allowed to make his representations. The explanations given were found unsatisfactory leading to summary dismissal for the reasons that the claimant was found to;
  - a. Sharing the password with the IT team and proceeding to change them without informing them hence inconveniencing the respondent's operations.
  - b. Repeatedly leaving the office without informing anyone and not filing the external meeting form even after several reminders.
  - c. Negligence as he had proceeded on suspension with the company's laptop and proved difficult to return it yet it was needed.
17. The conduct of the claimant in this regard constituted gross misconduct subject to summary dismissal. Following a disciplinary hearing on 7 August 2020 the respondent found the claimant culpable and dismissed him through a letter of equal date and reasons outlined. The claimant was paid his terminal dues including the salary for August 2020.
18. In the course of his employment, the claimant was warned about his conduct verbally and in writing. The claims made are not justified. Each employee took his annual leave one due and the policy stipulated that leave days not taken in a given year were forfeited. The respondent followed the due process in terminating employment hence no notice of pay is due and for the summary dismissal no compensation is due.
19. In evidence, the respondent called Gloria Mlanya the human resources office and testified that she joined the respondent in January 2023 and hence relied on the filed records.
20. Upon cross-examination, the witness testified that the alleged acts of misconduct were not documented or filed. The claimant would report to work late after 8 am but the record is not filed.

21. The claimant was suspended from duty and informed of his acts of gross misconduct but failed to respond. He was issued with a notice to show cause on 27 July 2020 which required him to respond and attend a disciplinary hearing on 28 July 2020 but the same was re-scheduled. The date change was not communicated to the claimant. There is no notice indicating the hearing would be on 7 August 2020. The claimant was heard and found culpable for all the allegations put to him leading to summary dismissal that was justified.
22. Ms. Mlanya testified that the claimant was allowed to take his annual leave days. She gave the example of 20 to 24 December 2017;  
On 4 September 2017, the claimant applied for annual leave from 6 to 9 September 2017;  
From 21<sup>st</sup> to 22<sup>nd</sup> March 2016 the claimant took a day of leave;  
From 5<sup>th</sup> to 6<sup>th</sup> February 2016 the claimant had a day of leave;  
29 to 30 July 2016 a day off;  
18 to 19 November 2015 a day off;  
7 to 8 September 2015 a day off;  
A total of 25 days are recorded.
23. That the applications indicated these were off days but they were effectively annual leave days.
24. At the close of the hearing, both parties filed written submissions which were analyzed and the issues which emerged for determination were whether there was an unfair termination of employment; whether the remedies sought should be issued; and who should pay costs.
25. Through notice dated 4 July 2020, the respondent suspended the claimant following an incident where he was found negligent of duty on several occasions. The respondent noted that the claimant had been issued with several reminders and warnings and the most recent case was where the claimant had reported to work past 11 am with no prior communication and yet he was supposed to be at work at 8 am. This conduct was noted to be unprofessional behavior and cannot be tolerated in this company for it goes against the mode of operation set by the company.  
The suspension was from 6 July to 6 August 2020.
26. On 27 August 2020, the respondent issued the claimant with a notice to show cause on the grounds of gross misconduct. The respondent noted 4 grounds and directed the claimant to give a response by 2 pm on the same day and to attend a disciplinary hearing on 28 July 2020 at the human resources office in Kokotoni Yard.
27. The claimant was also advised to bring another employee of his choice.
28. The claimant testified that he declined to accept the show cause notice as to him, this was punishment and in any event, he was on suspension and so opted to wait until he resumed duty to respond.
29. It is important to note that, an employer is allowed to suspend an employee from duty for stated reasons. In this case, the claimant was suspended following a noted matter on his conduct which required investigations. In the case of *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR, the court held that;

A suspension therefore is ultimately a right due to an employer who on reasonable grounds suspects an employee to have been involved in misconduct, of poor performance or physical

incapacity and wishes to remove such an employee from the work place to enable further investigation without subjecting the employee to further commission of more acts of misconduct, underperformance or the conditions leading to incapacity. The suspension period is a time available to an employer to control as the employee can be summoned back to work any time to undertake disciplinary proceedings or upon terms and given by an employer.

30. This position is reiterated in the case of *Mutwol v Moi University (Civil Appeal 118 of 2019)* 120221 KECA that the employer is allowed to suspend the employee and during such period the employee can be called to address any matter as required by the employer.

31. In this case, the claimant admits he was served the notice to show cause dated 27 July 2020 but declined to accept it. Indeed, this can be confirmed by the fact that he attended a disciplinary hearing as directed on 28 July 2020 but the hearing was rescheduled.

32. To this extent, the respondent had complied with its legal duty and requirements as required under Sections 41 and 43 of the *Employment Act*, 2007 (the Act). However, upon the rescheduling of the disciplinary hearing, the claimant continued with his suspension and was to resume work on 6 August 2020.

A disciplinary hearing was conducted on 7 August 2020.

33. The claimant protested that he had no notice that the call he got to attend the disciplinary hearing on 7 August 2020 was meant to be so. There was no prior notice, he did not know that the call conference included other persons and hence he had no chance to call his witness.

34. Indeed, the motions of Section 41 are mandatory. Before the employer can conduct a disciplinary hearing, the employee's rights must be secured. Notice to attend must be issued. The employee must be allowed to call another employee of his choice. See *Oyombe v Eco Bank Limited (Civil Appeal 185 of 2017)* [20221 KECA 540 (KLR) (13 May 2022) (Judgment) that whatever reasons for an employer to terminate an employee, that employee must be taken through the mandatory process as outlined under Section 41 of the *Employment Act*.

35. Even in the case where the issues related to alleged gross misconduct, Section 41 (2) of the Act provides for the procedure to be adhered to before an employee can be summarily dismissed.

It states that;

(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" [underline added].

36. The lapse here is the rescheduling of the disciplinary hearing and the next appointed date was not brought to the notice of the claimant within the protections envisaged under Section 41 of the Act. This resulted in unfair termination of employment contrary to the provisions of Section 41 of the Act and the resulting summary dismissal cannot find justification where the due process was unlawful.

37. For lapse in due process, the claimant is entitled to notice pay. His last salary was Ksh.86, 532 due in notice pay.

38. The termination of employment is unlawful and unfair for want of due process, compensation is due. However, in assessing the compensation due, the court is required to take into account the conduct and culpability of the employee under the provisions of Section 45(5) of the Act.
39. It is not in dispute that the claimant had a poor work record. Indeed, the matter leading to his suspension related to his absence from work without prior permission to take a record of any work outside the office. Called to respond to his conduct, the claimant refused to oblige. Issued with a notice to show cause, the claimant refused to respond. This conduct operates to the detriment of the claimant. Called to explain his conduct, the claimant should and ought to have seized the moment and responded. The employee who fails to utilize the opportunity to explain himself on the shop floor only works against his rights as held in the case of Paul Wanyangah v Market Development Trust t/a Kenya Markets Trust [2017] eKLR. In the court in the case of Jennifer Osodo versus Teachers Service Commission 120131 eKLR held as follows;  
  
... an employee facing disciplinary action cannot be allowed to hold their employer to ransom by taking the position that they will only attend disciplinary proceedings at their convenience.
40. In this case, the respondent filed work records of warnings relating to the claimant's conduct. Save for want of due process, the claimant failed to explain his conduct at the disciplinary hearing. Putting these matters into account, to assign an award would be to reward gross misconduct and hence the court finds an award of zero (0) compensation sufficient. See Lillian W. Mbogo-Omollo v Cabinet Secretary Ministry of Public Service and Gender & another [2020] eKLR.
41. On the claim for service pay for 9 years, the claimant was registered with the NSSF and NHIF and the respondent had these records filed as part of the documents in response to the claim. The claimant filed his payment statement indicating remittances of statutory dues to NSSF and NI-IIF. Under sections 35(5) and (6) the claimant is removed from claiming service pay.
42. On the claim for leave pay, the claimant is seeking 9 years of accrued leave days. The records filed by the respondent relate to off days.
43. Off days are regulated under Section 27 of the Act while leave days are regulated under Section 28 of the Act. These are different and distinct days and cannot be inferred to mean the same.
44. However, Section 28(4) of the Act requires that leave days be taken within 18 months unless the employer allows the employee to carry over the same to the next year. Without such a record, the claimant is only entitled to leave days up to 18 months only. This translates to 33 days within the provisions of Section 28(4) of the Act.
45. The claimant had a basic salary of Ksh.73, 552 which is applied in tabulating accrued leave days. For 33 days, he is entitled to Ksh.80, 907.20 in accrued leave days.
46. On the claim for holidays for 9 years, these are gazette days and the Minister issues a public notice in this regard. These are not general days and should be particularized for the court to assess where due. The general claim is not justified. This is declined.
47. A certificate of service is due under section 51 of the Act. The claimant should attend and clear upon which his Certificate of Service should be issued.
48. On costs, the claim is partially successful, each party ought to bear its costs.
49. Accordingly, judgment is hereby entered for the claimant against the respondent in the following terms;

- a. Compensation assessed at zero (0);
- b. Notice pay Ksh. 86,532;
- c. Leave days Ksh. 80,907.20;
- d. Each party bears its costs.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 13 DAY OF JUNE 2024.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Japhet