



Odhiambo v Black Tulip Flowers Limited (Employment and Labour Relations Cause E019 of 2020) [2024] KEELRC 2052 (KLR) (31 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 2052 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
EMPLOYMENT AND LABOUR RELATIONS CAUSE E019 OF 2020**

DN NDERITU, J

JULY 31, 2024

BETWEEN

ALPHONCIA AWUOR ODHIAMBO CLAIMANT

AND

BLACK TULIP FLOWERS LIMITED RESPONDENT

JUDGMENT

I. Introduction

1. The claimant commenced this cause by way of a memorandum of claim dated 16th November, 2022 filed in court on 17th November, 2022 through Ochieng' Walukhwe & Associates Advocates. As it is the procedure, the statement of claim is accompanied with a verifying affidavit sworn by the claimant, a list of witnesses, a written statement by the claimant, a list of documents and a bundle of copies of the listed documents.
2. Subsequently, with the leave of the court, the claimant filed an amended memorandum of claim dated 22nd March, 2023 wherein she seeks for the following reliefs –
 - A. A declaration do issue that the Respondents' decision to summarily dismiss the claimant from employment was unfair, unlawful and un-procedural;
 - B. A declaration do issue that the Respondent's action of summarily dismiss the claimant form employment violated the claimant's rights and fundamental freedoms as enshrined under Articles 27, 47 & 50(1) of the Constitution of Kenya and violated provisions of the Employment Act.
 - C. This Honourable Tribunal be pleased to issue an order of reinstatement of the claimant in service with effect from 13th October, 2022 in the same position previously held without a



break in service with full prevailing benefits and to continue in that service until the due date for retirement.

- D. General (statutory) damages for unfair, unlawful and unprocedural termination being Kshs 2,339,088.00 (12 months x Kshs 194,924.00)
 - E. Unpaid salary for the period of 26th September, 2022 to 13th October, 2022 being Kshs 134,947.39
 - E1. One month's salary *in lieu* of notice.
 - F. Any other relief or order the Honourable Court may deem fit to grant.
 - G. Costs of the claim.
3. The respondent through Wangai Nyuthe & Co. Advocates entered appearance and filed a response to the claim on 7th February, 2023, a list of witnesses, a witness statement by Lydia W. Macharia (RW1), the human resources manager of the respondent, a list of documents and a bundle of copies of the listed documents. In the response to the claim the respondent denies liability and prays that the claimant's suit be dismissed with costs for want of merits.
 4. The claimant filed a reply to the respondent's response to the claim on 28th February, 2023 dismissing the response/defence and reiterating that judgment be entered against the respondent as prayed in the memorandum of claim.
 5. The claimant's case came up for hearing on 22nd March, 2023 when the claimant (CW1) testified and closed her case. It is at that point that counsel for the claimant applied for the amendment of the memorandum of claim which application was not opposed by counsel for the respondent and the same was allowed. An amended memorandum of claim dated 22nd March, 2023 was subsequently filed with the new prayer E1.
 6. The defence was heard on 26th July, 2023 when RW1 testified and the respondent's case was closed.
 7. Counsel for both parties addressed the court by way of written submissions. Mr Walukhwe for the claimant filed written submissions on 19th October, 2023 while Mr Chengecha for the respondent filed on 13th December, 2023.

II. The Claimant's Case

8. The claimant's case is expressed in the amended memorandum of claim, the oral and documentary evidence adduced by the claimant (CW1), and in the written submissions by her counsel.
9. In the amended memorandum of claim, the claimant avers that she was engaged by the claimant as a clerk on 12th September, 1994 and rose through the ranks to become a human resources manager as at the time of her dismissal in October, 2022. It is pleaded that the claimant was initially engaged by James Finlay Kenya Limited (Finlays) but the respondent bought and took over the management of Lemotit farm from Finlays on 26th January, 2022. It is pleaded that it was agreed by and between Finlays and the respondent that the staff in the said farm acquired by the respondent, including the claimant, were to be retained by the respondent on the terms and conditions that they were enjoying as at the time of the purchase.
10. It is pleaded that as at the time of her dismissal the claimant was on a gross monthly salary of Kshs 194,924/=.



11. It is pleaded that in the course of her employment the claimant was appointed as the fair-trade officer for Lemotit Farm to represent management in the Fair-Trade Premium Committee meetings of Lemoflo Community Based Group (the CBG). It is submitted that the CBG is a separate and distinct legal entity from the respondent and from Finlays, the former owners of the tea farm. It is pleaded that the CBG is a community-based organization aimed at fighting and combating poverty and promote sustainable development among the labourers in the farm based on requirements by Fairtrade Hired Labour International Standards.
12. It is pleaded that on or about July, 2022 the administrator of the CBG informed the claimant that three transactions amounting to Kshs 2,345,080/= had been effected on the bank account of the organization without the necessary supporting documentation. It is further pleaded that investigations by the Directorate of Criminal Investigations (DCI) confirmed that the claimant's signature on the three cheques that effected the three transactions was forged and as such the claimant was absolved and exonerated of any wrong doing or criminal activity as per the investigation report that was prepared upon conclusion of the investigation.
13. It is stated that four culprits, including the administrator of the organization, were arrested and arraigned in court facing criminal charges arising from the fraud and theft alluded to above based on an investigation report by the police dated 7th October, 2022.
14. It is pleaded that notwithstanding the above and in full knowledge that the claimant was not involved in the said fraud and theft the respondent purported to dismiss the claimant based on the same vide a letter of dismissal dated 13th October, 2022. It is pleaded that the dismissal was wrongful, unfair, and unlawful as it lacked both substantive foundation and procedural fairness against the provisions of the respondent's human resources management manual and the applicable law.
15. It is pleaded that besides the contents of the foregoing paragraph, the appeal lodged by the claimant after the dismissal was not considered on merits as the respondent had a predetermined mind to dismiss her. It is pleaded that the respondent violated Articles 27, 47, & 50 of the Constitution and Sections 41, 43, 44, 45, & 47 of the Employment Act (the Act).
16. It is pleaded that the dismissal was not only wrongful, unfair, and unlawful but also disproportionate considering the entire circumstances of the matter.
17. In her testimony in court, the claimant stated she is a human resources management practitioner and that she has been unemployed since she was dismissed by the respondent. She stated that as at the time of the dismissal she was on a monthly gross pay of Kshs 194,424/= as per the payslip produced as an exhibit. She also availed and produced a copy of her contract of service with the respondent. She stated that she also used to double as a fair-trade officer with the CBG by virtue of her employment with the respondent but she emphasized that the CBG is an independent legal entity from the respondent.
18. She stated that she is the one who reported the fraud and theft alluded to above to the police and that she was exonerated from the same after it was confirmed that her signature had been forged on the cheques that were used in withdrawing the stolen funds. She stated that the culprits who orchestrated the fraud and theft were arrested and charged in a criminal court and she availed and produced as exhibit a copy of the charge-sheet.
19. The claimant stated that she was wrongfully, unfairly, and unlawfully dismissed vide a letter dated 13th October, 2022. She reiterated the contents of her pleadings and her written statement that the dismissal lacked in substance and procedural fairness.



20. In cross-examination, the claimant stated that as at the time of dismissal she was a human resources manager with the respondent. She stated that by virtue of the fact that she was stationed at Lemotit Farm as an employee of the respondent she was a member of the CBG. She stated that the respondent had no shares or ownership in the CBG. However, she stated that virtue of the fact that the CBG was about the welfare of the employees of the respondents in the farm the general manager of the respondent informally appointed her as a fair-trade officer in the organization.
21. She stated that as a fair-trade officer in the organization she was obliged to ensure and confirm that all payments made out of the bank accounts were regular and procedural. However, she stated that she was not the accounting officer of the organization as there was an administrator who was a fulltime employee of the CBG. She insisted that while she was an alternate signatory on cheques she was only on secondment in the CBG by the management of the respondent.
22. She stated that prior to her dismissal she was issued with a show-cause letter to which she responded. She insisted that she had no role in the alleged fraud and theft of funds belonging to the CBG and that she neither failed nor neglected in her duties. She denied signing any minutes authorizing withdrawal of the stolen funds and stated that she reported the fraud and theft to the police as soon as she gained information on the same in July, 2022, and that she reported the same to the farm manager as well. She stated that the CBG lost about Kshs 2.3 million in the three fraudulent transactions.
23. In re-examination the claimant insisted that the CBG is a different, separate, and distinct legal entity from the respondent. She reiterated that she was not a mandatory signatory to the cheques, including those that were used in the fraudulent transactions. However, she admitted that alongside the administrator of the CBG and the farm manager she used to receive messages of any transactions in the accounts of the CBG on her phone. She stated that the administrator and the treasurer were the custodians of the properties of the CBG including cheque books and other records. She stated that the administrator was in particular an employee of the CBG while her duties as a free-trade officer seconded by the respondent was oversight and guardianship of the organization. The farm manager was the patron of the CBG.
24. Responding to a clarification sought by the court the claimant stated that the respondent did not fund the CBG but it had interest as the CBG was intended to cater for the welfare of its employees in accordance with fair-trade international standards. She stated that she was seconded to the CBG as a trade-officer with the sole purpose of guiding and overseeing the interests of the respondent. She insisted that she had no managerial duties in the CBG. She stated that no one else was disciplined as a result of the fraud and theft but those charged in court left employment.
25. It is on the basis on the foregoing evidence and circumstances that the claimant is seeking that judgment be entered in her favour as prayed in the statement of claim. The submissions by her counsel shall be considered in a succeeding part of this judgment.

III. The Respondent's Case

26. The respondent's case is contained in the statement of response to the claim, the oral and documentary evidence adduced through RW1, and the written submissions by counsel.
27. In the response to the memorandum of claim the respondent vehemently denies the averments in the statement of claim. It is pleaded that the claimant was hired on a one-year renewable contract from 26th January, 2022 to 25th January, 2023 and as such she had not worked for the respondent for 28 years as alleged in the claim. It is pleaded that besides her employment as a human resources manager the claimant was at the same time seconded to the CBG as a fair-trade officer.



28. It is pleaded that before the claimant was engaged by the respondent as pleaded above she was an employee of Finlays which is a separate and distinct entity from the respondent herein and she only joined the respondent when it bought Lemotit Farm where the claimant was based when she worked for Finlays.
29. It is pleaded that in her duties as a fair-trade officer the claimant was supposed and expected to implement and guide the CBG in good management and proper utilization of resources as the respondent had a stake therein as a fair-trade certified organization. It is pleaded that in a meeting of the CBG held on 20th May, 2022 it was resolved that the signatories to the organization's bank accounts be changed and that the claimant was to facilitate and take lead in that process. It is alleged that in a meeting held on 24th June, 2022 the claimant altered the minutes of the meeting of 20th May, 2022 to deflect and hide her failures, negligence, and carelessness in performance of her duties.
30. It is pleaded that the claimant failed, refused, and or neglected to act when she was supposed to resulting in the fraudulent withdrawals of Kshs 2,345,080/= alluded to in earlier part of this judgment. The respondent attributes the loss of the money to the omissions and commissions by the claimant.
31. It is pleaded that following her alleged misconduct the claimant was given a fair hearing, afforded both substantive and procedural fairness, leading to her summary dismissal vide a letter dated 13th October, 2022.
32. In her testimony in court RW1 stated that she a former employee of the respondent wherein she worked as the group human resources manager. She adopted her written statement as her evidence-in-chief and produced copies of the respondent's filed documents as exhibits 1 to 7. She stated that the claimant was the respondent's human resources manager at Lomotit Farm and seconded as a fair-trade officer to the CBG within the farm.
33. She stated that the claimant was engaged by the respondent on 26th January, 2022 as per the availed letter of employment. She denied that the claimant was in employment of the respondent for 27 years as alleged. She stated that the CBG is funded by the respondent for the welfare of its workers in Lomotit Farm. She clarified that it is on that basis that the claimant as a human resources manager in the said farm was allocated duties in the affairs of the CBG as the respondent clearly had a stake in the proper functioning and operations of the same. She stated that the claimant was to oversee and give guidance in the management of the CBG.
34. She stated that the CBG lost in excess of Kshs 2.3 million under the claimant's watch in July, 2022. She stated that the claimant was aware of the loss but failed to report to the management until September, 2022. She stated that the respondent concluded that the claimant was negligent and careless in performance of her duties as a fair-trade officer as seconded by the respondent. She stated that a treasurer of the CBG had been voted out in May, 2022 yet due to inertia, negligence, and carelessness on the part of the claimant who failed to give guidance and leadership as a fair-trade officer, fraudulent and forged cheques were cashed in July, 2022 signed by a treasurer who had been voted out of office, resulting in the loss of funds as alluded to above. She stated that the claimant was aware and part of the fraudulent loss of the funds as she used to receive text message alerts on her phone for any activity in the bank accounts of the CBG.
35. She testified that the claimant was afforded and accorded fair hearing all the way from notification of the charges/allegations against her, show-cause letter, notification and invitation to the disciplinary, taking part in the disciplinary hearing, and notification of the summary dismissal. RW1 stated that the claimant admitted to her negligence and carelessness during the disciplinary hearing. She stated that the disciplinary process was fair, just, and lawful and executed in accordance with the disciplinary



manual of the respondent and the applicable law. Further, she stated that the claimant appealed but the claimant refused and or failed to attend the hearing of the appeal after her request to appear with a lawyer was declined by the respondent. Nonetheless, RW1 testified that the appeal was considered on merits and dismissed.

36. For clarification, RW1 stated that the CBG is funded by the respondent through money paid by the international buyers of their flowers who opt to pay extra money for the welfare of the employees in establishing community projects within the farms such as schools, hospitals, and other social amenities. She stated that it is on that footing that the employees of the respondent, such as the claimant, are seconded to lead, guide, and oversight the CBGs and in any event the claimant was also a member of the said CBG in her capacity as an employee of the respondent in the farm.
37. In cross-examination RW1 admitted that an alleged letter appointing the claimant as a fair-trade officer with the CBG was not filed in court. She admitted that the CBG is a separate and distinct entity from the respondent. She stated that for the respondent to be accredited and certified for fair-trade status the CBG had to exist and hence the nexus and secondment of the claimant to the CBG. She admitted that she had no evidence that the respondent refunded or paid the money lost in the fraud in excess of Kshs 2.3 million.
38. She stated that while the police exonerated the claimant as her signature on the cheques was forged, the respondent took disciplinary action against her for her negligence and carelessness in handling the affairs of the CBG. She confirmed that the claimant was an alternate signatory and as such her signature on the cheques was not mandatory. However, she alleged that the claimant received a text message alert for each and every transaction in the CBG's bank accounts.
39. It is the basis on the foregoing evidence and circumstances that the respondent prays that the claimant's cause be dismissed with costs. The submissions by the respondent shall be considered in the succeeding parts of this judgment alongside those by counsel for the claimant.

IV. Submissions

40. On the one hand, the claimant's counsel identified the following issues for determination –
 - a. Whether the respondent could dismiss the claimant for reasons extraneous to the claimant's contract of service and job description.
 - b. Whether the respondent's decision to terminate the claimant from employment was unfair, unlawful, and unprocedural contrary to the provisions of the Employment Act.
 - c. Whether the claimant's constitutional rights and fundamental freedoms as enshrined under Articles 27, 47 & 50(1) of the Constitution of Kenya.
41. On the first issue it is submitted that the evidence adduced from both sides is clear and categorical that the claimant was not dismissed for either misconduct or non-performance in her employment with the respondent. It is submitted that this renders the summary dismissal untenable, unfair, and unlawful under Sections 41 & 43 of the Act. It is submitted that there was no misconduct, poor performance, or physical incapacity alleged or proved by the respondent as to justify the dismissal.
42. It is further submitted that the alleged fraud and or theft that led to the dismissal of the claimant occurred in an independent juridical entity that was separate from the respondent and in any event the claimant was exonerated from the same and the culprits were arrested and charged in a criminal court.



43. It is further submitted that the letter of employment of the claimant by the respondent dated 29th January, 2022 allocated no duties to the claimant in the CBG, an organization with its own constitution, leadership, and governance structure.
44. It is submitted that the claimant served on the terms and conditions set out in the letter of employment dated 29th January, 2022 and as such she could only be dismissed in accordance with the terms of that letter and in accordance with the law. It is submitted that in acting in the manner that it did the respondent purported to unilaterally change the terms of engagement contrary to Section 10 of *the Act*. The court is urged to follow the reasoning of the Court of Appeal in Eldoret Civil Appeal No. 94 of 2017 – *Wilfred Kipchirchir Rotich v Metkei Multi-Purpose Company Limited*.
45. On the second issue for determination counsel for the claimant submitted that the respondent failed to prove or justify the reasons and grounds for the claimant’s dismissal as required under Sections 43(1) & 45(2) of *the Act*. It is submitted that no single allegation was made against the claimant in regard to her employment with the respondent. The fraud and or theft at the CBG was attributed to individuals who were arrested and charged in court and the claimant was absolved and exonerated of any wrongdoing. It is submitted that no document or evidence was availed by the respondent to prove or in the least demonstrate what role the claimant played in the affairs and operations of the said organization.
46. On the procedure applied by the respondent it is submitted that Section 41 of the Act was completely ignored. It is submitted that no complaint was made by the CBG where the alleged misconduct is said to have occurred. It is submitted that there having been no established reason for taking disciplinary action against the claimant the entire process including the dismissal was a nullity.
47. It is submitted that the constitutional and statutory rights of the claimant as provided for in Articles 27, 47, & 50 of the *Constitution* and Section 5(3) of *the Act* and Section 4(1) & (3) of the *Fair Administrative Actions Act* were violated.
48. The court is urged to allow the claim with costs as per the amended memorandum of claim. The submission on reliefs shall be considered in a succeeding part of this judgment dedicated to that subject.
49. On the other hand, counsel for the respondent identified the following issues for determination –
1. Whether the claimant was the respondent’s employee?
 2. Whether the claimant’s role extended to the firm trade officer at Lemotit farm and what did the said roles entail?
 3. Whether the termination was regular?
 4. Whether the appeal procedure was regular?
50. On the first issue it is submitted that the claimant was an employee of the respondent on the terms and conditions set out in the letter of employment (contract) dated 29th January, 2022.
51. On the second issue it is submitted that the evidence on record from both sides confirms that the claimant was allocated duties by the respondent in the management and affairs of the CBG. It is submitted that in her role the claimant received prompt text messages on all transactions in the bank accounts of the said organization and yet she failed to act on the fraudulent withdrawals alluded to elsewhere in this judgment.
52. On whether the dismissal was fair and lawful it is submitted that the dismissal was justified under Section 44 of *the Act* and the respondent’s disciplinary procedure manual availed in court by the claimant. It is submitted that the disciplinary action and the dismissal was based on reasonable,



genuine, and honest belief held by the respondent that the claimant had engaged in fraudulent and dishonest activities in her secondment to the CBG. The court is urged to follow the reasoning in *Thomas Sila Nzivo v Bamburi Cement Limited* [2014] eKLR and *Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR.

53. On the procedure adopted it is submitted that the respondent applied and subjected the claimant to due process including affording her right of appeal for which she opted not to attend the hearing after insisting on being represented by a legal counsel against the laid down procedures. The court is urged to adopt the position taken in *Jennifer Osodo v Teachers Service Commission* [2013] eKLR.
54. For all the afore-stated the court is urged to dismiss the claim with costs.

V. Issues For Determination

55. The court has carefully and dutifully gone through the pleadings filed, the oral and documentary evidence tendered from both sides, and the written submissions by counsel for both parties. The following issues commend themselves to the court for determination-
 - a. What were the terms of engagement between the claimant and the respondent?
 - b. Whether the claimant's role and duties in the CBG were defined and ascertained in her contract of employment with the respondent.
 - c. Whether the summary dismissal of the claimant by the respondent was wrongful, unfair, and unlawful.
 - d. Whether the claimant is entitled to the reliefs sought.
 - e. Who should bear the costs of the cause?

VI. Employment

56. The evidence on record is to the effect that the claimant was an employee of Finlays until January, 2022 when her then employer sold a tea farm in the name of Lemotit in Londiani area of Kericho County to the respondent. The claimant was based at the said farm and once the farm was sold she was, together with other employees of Finlays, absorbed and "inherited" by the respondent. The sale of the said farm was communicated to all and sundry in an announcement dated 18th January, 2022 which was availed by the claimant as an exhibit.
57. Subsequently, the claimant entered into an employment contract with the respondent executed on 29th January, 2022. The court finds and holds that this is the document that commenced and established the employment relationship between the parties in this cause. Amongst the salient terms in the said contract was that the same was to run for a period of one year from 26th January, 2022 to 25th January, 2023; the claimant was to be on probation for six months before confirmation; and, her starting monthly gross salary was agreed at Kshs 193,424/=.
58. Clearly and evidently, the claimant was engaged as a human resources manager based at Lemotit farm and the contract was renewable based on satisfactory performance. On the change or variation of the terms of engagement, it was expressly provided that "The Company reserves the right to make reasonable changes to the terms and conditions of your employment. Any minor variations will be advertised before implementation. More significant changes will only be made with the approval of the executive directors by giving you at least one month's notice".



59. The court has combed through the contract between the parties and there is no mention of the CBG let alone any duties or role allocated to the claimant in the said organization. Further, there is no evidence availed by either party that the terms and conditions of employment of the claimant were changed or varied at any point in accordance with the above cited provisions in the contract.
60. In the circumstances, the court finds and holds that the employment relationship between the claimant and the respondent was solely and entirely governed by the terms and conditions set out and contained in the contract executed by both parties on 29th January, 2022. If the parties intended to have other terms and conditions to apply, nothing would have been easier than for it to be expressly stated so in the contract.
61. Having found and held as above the court takes the considered view that the claimant had no defined role and or duties in the functioning and operations of the CBG. This is so because the contract by and between the parties is clear and express on the manner and style in which the contract was to be varied or changed. There is no evidence availed by either party that the terms and conditions were varied and or changed as to allocate duties to the claimant in that separate and distinct legal entity known as Lemoflo Community-Based Group. In any event, and the court finds and holds so, such additional duties called for amendments to the contract with clear terms of engagement, roles, duties, obligations, targets, execution of those roles and duties, reporting lines, authority, remuneration and benefits for the added duties and functions, *et al.*
62. It cannot be assumed that if the claimant had performed such duties while working for Finlays that the said duties and roles were automatically transited once she was contracted by the respondent.
63. Unless based on the well known and established grounds, such as coercion, misrepresentation, fraud, etc, a court of law has no business interfering with the freedom of legally capacitated parties in entering into contracts and doing business. The following rhetorical questions may suffice in exposing the absurdity of the position taken by the respondent in regard to this issue – what was the job description of the claimant while allegedly serving in the said organization? What were her duties and roles? What was her salary, benefits, and allowances for those services rendered thereat? What were the reporting lines? Basically, what were the terms and conditions of that engagement or arrangement?
64. Needless to say, the said CBG was not a party in the disciplinary proceedings or this cause and in any event both parties agree that it is a separate, distinct, and independent juridical personality from the respondent.
65. The court takes the view, and I so hold, that if at all the claimant performed any duties in the said CBG the same ought to have been incorporated in the contract of employment between her and the respondent for the same to form some basis for the disciplinary action that was taken against her. Bar such provisions in the contract, and in view of the fact that the said CBG is not party in this cause, the defence shall fail. The court takes this view from an informed position that the claimant is not alleged to have committed any misconduct or failed to perform as per the contract executed on 29th January, 2022. What the claimant is alleged to have done or failed to do was completely out of context and without the disciplinary purview of her employment with the respondent.
66. The above holding is further buttressed by the fact that no evidence was availed by the respondent in establishing its legal nexus with the said organization and the terms and conditions upon which the claimant was allegedly seconded thereto. The court can only opine that if the claimant offered any services to the said organization she did so on voluntary and informal basis as it has also been confirmed that she was a member thereof in her own right as an employee in the farm. Otherwise, the respondent lacks legitimacy in purporting to take any disciplinary or administrative action against the claimant



for commissions or omissions allegedly committed in a separate and distinct legal entity for roles and duties not contained and or covered in the binding contract of employment.

67. Without even going into the merits or demerits of the disciplinary process, substantively and procedurally, the respondent clearly and evidently overstepped its mandate in purporting to discipline the claimant for misconduct purportedly committed in another distinct and separate legal entity.

VII.The Dismissal

68. The fairness and lawfulness or lack thereof in a termination or dismissal is weighed against the substantive and procedural fairness of the same – *Mary Chemweno v Kenya Pipeline Company Limited* [2017] eKLR, *Loice Otiemo v Kenya Commercial Bank Limited* [2013] eKLR, and *Walter Ogal Anuro v Teachers Service Commission* [2012] eKLR.

69. On 30th September, 2022 the respondent addressed the claimant as follows –

Alphoncia Awuor Odhiambo

Lem002 ID No.11205223

HRM/FTO Black Tulips – Lemotit Farm

30th September, 2022

Dear Alphoncia,

As you are aware, investigation is ongoing regarding a loss of approximately Ksh.2.3Million from Lemoflo Community Based Group, i.e the joint initiative between the farm and the workers under Fairtrade International certification. Your signature on the cheques is still being checked for authenticity.

Also as the HR/FTO management representative on behalf of Black Tulip Flowers - Lemotit Farm, with an advisory and administrative role in the Lemoflo Community group, management needs more time to evaluate your actions and or omissions in this matter. This is as a result of your failure to exercise due diligence after receiving the messages from the bank on the transactions leading to the loss.

We are also investigating your Fairtrade Officer role, actions and/or omissions in managing Lemoflo affairs and your supervision and administration of Lemoflo Community Group between February, 2022 and 28th September, 2022.

To enable us complete these investigations you are required to proceed on you leave with immediate effect i.e. 30.09.2022. Should the investigation require more time you shall be advised on the next course of actions on 5th October, 2022.

Yours sincerely

Lydia W. Macharia

Group Human Resources Manager

Received by Name: Alphicia A. Odhiambo Signed

Copy To: General Manager - Black Tulip Flowers

Farm Manager - Lemotit

CEO - Black Tulip Flowers



CFO - Black Tulip Flowers

70. The above letter was followed up by the respondent with a show-cause letter dated 4th October, 2022 in the following terms –

4th October, 2022

Alphoncia Awuor Odhiambo

Lem002 ID No.11205223

HRM/FTO Black Tulips – Lemotit Farm

Sent through email address alph!nea0@gmail.com <alph!eao@gmail.com

Tel: 0721428801

Dear Alphoncia,

Show Cause Letter & Intention To Recover The Lost Funds From Your Salary

Further to your letter dated 30th September, 2022 on the subject of lost of Fairtrade Premiums i.e 2.3 Million from Lemoflo Community Based Group which has direct detriment to Black Tulip Flowers – Lemotit Farm. You are hereby required to show cause why disciplinary action should not be taken against you and to explain why company should not recover the loss in equal proportions from salary payable to you follow-up to:-

You are aware your signature and two others, on the cheques used for the loss i.e. 1173, 1174 & 1175 was accepted by the bank because it matched the specimen signature that you had given to it. However, we do not have a written statement from you regarding this matter as of 4th October, 2022.

As the HRM/FTO – management representative at Lemotit Farm, management inquired into root cause of the loss and found that you carelessly performed your duties as a signatory and management advisor and or aided the fraud through your actions or omissions. This is because a new treasurer was elected to office on 20th May, 2022 and minutes passed which you signed, requiring him to become a signatory with immediate effect. However, the change was delayed and postponed to September, 2022 for no other apparent reason. Management also noted that FPC minutes of 24th June, 2022 which you and two others approved, minute no 10.06.2022 was changed to appear like the new treasurer was yet to be elected and was to occupy the office thereafter. The delay enabled the cheques to be presented to bank and cleared on 3rd June, 2022, using the old treasurer’s signature. This would have been easily avoided if new treasurer was in office as required.

You also failed to report the matter to management in a timely manner to facilitate speedy corrective action//through investigation. It was also noted that you did not seek guidance on course of action neither from the Fairtrade program support officer or from the Company management.

You are therefore requested to submit your written and signed explanation, addressed to the General Manager and copied to the undersigned at your earliest convenience but by close of business on 6th September 2022.

Please note that you should not resume office until the disciplinary process is completed.

Yours Sincerely



Lydia W. Macharia
Group Human Resources Manager
Copy to: General/Farm Manager

71. As far as it can be deciphered from the above documents the claimant was accused of mishandling and or mismanaging her role and duties in the affairs of the CBG. Notably, the show-cause letter dated 4th October, 2022 calls upon the claimant to respond to the same on or before 6th September, 2022, a date that had already passed. Nonetheless, the claimant responded to the show-cause letter on 4th October, 2022 explaining the circumstances under which the funds of the CBG were lost and the steps taken in addressing the issue. The claimant denied liability for the loss.
72. The claimant was subsequently invited for a disciplinary hearing in a letter dated 12th October, 2022.
73. Ultimately, the claimant was summarily dismissed in a letter dated 13th October, 2022 in the following terms –

13th October, 2022

Alphoncia Awuor Odhiambo Lem002Id no 1120523

Job title HRM/FTO BTF -Lemotit Farm

Dear Alphoncia,

Summary Dimissal of Your Employment Contract

We wish to notify you that management has decided to summarily dismiss your employment contract with effect from 13th October, 2022. This is in line with your employment contract Section 6(c) and 16 read together with The [Employment Act](#) 2007 Section 44. (c). Decisions is a follow-up to:

Show cause letter, your response dated 6th October, 2022 and your submissions during notification hearing of 13th October, 2022 held earlier today.

Your omissions contributing to loss of Fairtrade Premiums i.e 2.3 Million from Lemoflo CBG which has direct detriment to Black Tulip Flowers – Lemotit Farm.

During the notification hearing you did not give an acceptable reason for your failure to exercise due diligence after receiving bank notification messages related to cheques 1173, 1174 & 1175, which were significantly higher than the other ones that were being paid out at the time. Management notes that you performed your duty as a management representative at Lemotit Farm CBO improperly and carelessly.

You also did not explain reasons for contradictions in the minutes of 20th May, 2022 and those of 24th June, 2022 specifically in regards to election and change of signatory. You claimed that it was an oversight to sign the minutes which management interprets as improper performance of your duties.

There were also omissions in supervision of the administrator that facilitated the loss i.e. it would have been easily avoided if new treasurer was in office as required in the month of May, 2022 minutes.

Management was also not convicted of your reasons for failure to report the matter in a timely manner to you immediate superior (Farm Manager) at Black Tulips Flowers Ltd. i.e.



you delayed from July, 2022 and September, 2022. The delay compromised administrative actions to mitigate the loss.

Management also noted that you/administrator failed to comply fully with the CBO terms of reference regarding handling of unused cheques including maintenance of a cheque register.

Your above actions and/or omissions amount to gross misconduct and management has decided to summarily dismiss your employment contract. As discussed during the meeting the person/s to be held responsible for the loss will only be known after findings from the bank fraud department and from the DCI. Therefore, management will hold on your dues until it is clear on how much your contribution for the loss will be or confirm you deserve full payment. Please hand over your duties to your immediate assistant – Mr. Paul Singoei.

Yours sincerely

Lydia W. Macharia

Group Human Resources Manager Received Signed

In presence of: General/Farm Manager/Independent witness

Received the letter today 13.10.2022, But however would wish to appeal the verdict.

74. From the foregoing paragraphs, it is clear that the claimant was neither subjected to the disciplinary process for failure to perform or execute her duties as per the contract nor for omissions or commissions based on the said contract. The respondent purported to act against the claimant for alleged misconduct in the affairs of a completely independent and separate legal and juridical entity which, as the court has found and held above, was not within the realm and purview of her duties with the respondent.
75. In any event, the evidence on record is that the culprits of the alleged fraud and or theft were arrested and charged in court for their part. The evidence on record further establishes that the claimant was exonerated from the alleged criminal misconduct. While the standard of proof in internal disciplinary process is lower and different from that of criminal charges, the court notes that the respondent overstepped its mandate in taking disciplinary action against the claimant for misconduct and or alleged failure in conduct of affairs, duties, and or alleged roles that were not part of the terms and conditions of her contract of employment with the respondent.
76. Even if the court was to find that the respondent had jurisdiction over the claimant in her execution of the duties in the CBG, which is however not the case, the court would still find that the dismissal was predetermined and too draconian in the circumstances. This is so because as noted above the process was hurried and predetermined and yet the culprits of the alleged fraud and theft were arrested and charged and the claimant was exonerated from any criminal conduct. Given the long service given by the claimant to the respondent's predecessor at the farm, Finlays, the respondent ought to have been more considerate notwithstanding that it had a new contract with the claimant as alluded to in another part of this judgment.
77. The court finds and holds that while the procedure adopted by the respondent may have been elaborate and in accordance with the law, the respondent lacked substantive grounds upon which to found the disciplinary process. The court finds and holds that the respondent thus failed to prove reason for dismissal and hence the summary dismissal fouled and violated Sections 43, 44, 45, & 47(5) of *the Act*.



VII. Reliefs

78. Flowing from the finding and the holding in the foregoing part of this judgment, the court shall consider the reliefs sought as hereunder.
79. Prayer A is for a declaration that the summary dismissal handed down to the claimant by the respondent was unfair, unlawful, and un-procedural. The court has found and held that the summary dismissal was wrongful, unfair, and unlawful and a declaration to that effect is hereby proclaimed and issued.
80. Prayer B is for a declaratory order that the summary dismissal violated the claimant's rights and fundamental freedoms in Articles 27, 47, & 50(1) of the *Constitution*. Since no damages are sought in this regard, the court shall not make a finding on this issue as the issues between the parties are properly and adequately accommodated and adjudicated within the provisions of the statutory law and more so the Act.
81. Prayer C is for an order of reinstatement of the claimant to her former position with effect from 13th October, 2022. This request is untenable for the following reasons. The employment contract between the claimant and the respondent was to run for a period of one year from 26th January, 2022 to 25th January, 2023 (now past). Therefore, the natural life of the contract between the parties was to come to an end on 25th January, 2023. In the circumstances, it shall be wrong and unlawful for the court to order reinstatement now as the contract either way should have come to an end by 25th January, 2023. The court shall thus deny this request as the parties have not expressed an intention to re-engage.
82. Prayer D is for general damages for unfair, unlawful, and un-procedural termination in the sum of Kshs 2,339,088/= being the maximum compensation that may be awarded under Section 49(1)(c) of *the Act*. For the umpteenth time the court reiterates and holds that unfair and unlawful termination or wrongful dismissal should not present an opportunity to an employee for unjust enrichment. An award in compensation under this law should take care of what the employee truly and justly lost following the termination or dismissal. In other words, the court has to ask itself, bar the dismissal, what did the claimant lose if she had served her entire contract?
83. The answer to the above question is easy to find in the facts, circumstances, and the evidence as disclosed and provided by the parties. The claimant was on a monthly gross pay of Kshs 194,924/- as at the time of dismissal in October, 2022. This means that she had four months to complete the one year of the contract on 25th January, 2023. So, what damage or loss did the claimant suffer for the wrongful dismissal? Clearly, the claimant lost the gross salary that she should have earned had she worked for the remainder of the contract which translates to Kshs 194,924/- * 4= Kshs 779,696/=. This is the amount that the court awards under this head and the same is subject to statutory deductions.
84. Prayer E for unpaid salary for September and October, 2022 is denied as the same is taken care of in the award made above.
85. Prayer E1 is for one month's salary in lieu of notice. This remedy is found in clause 5 in the contract of employment and the court hereby allows the same in the sum of Kshs 194,924/= subject to statutory deductions.

IX. Costs

86. Costs follow the event and the claimant is awarded the costs of the cause.



X.Orders

87. For all the foregoing reasons, the claimant’s cause succeeds and the court issues the following orders –
- a. A declaration be and is hereby issued that the dismissal of the claimant by the respondent was unfair, wrongful, and unlawful.
 - b. Consequently, the claimant is awarded the following –
 - i. Gross salary due and payable
for the remainder of the term
of the contract Kshs 779,696/=
 - ii) One month’s salary *in lieu* of notice ...Kshs 194,924/=
 - TotalKshs 974,620/=
 - The award is subject to statutory deductions.
 - c) The claimant is awarded the costs of the cause.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 31ST DAY OF JULY, 2024.

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DAVID NDERITU

JUDGE

