



**Mutuku v Total Kenya PLC (Cause 7 of 2020)
[2024] KEELRC 2150 (KLR) (31 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2150 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 7 OF 2020**

AK NZEI, J

JULY 31, 2024

BETWEEN

SAMUEL MUNYAO MUTUKU CLAIMANT

AND

TOTAL KENYA PLC RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent herein vide a memorandum of claim dated 23/1/2020 and filed in this Court on 6/2/2020, and pleaded:-
 - a. That at all material times, the Claimant was an employee of the Respondent, working as a Mechanical/Technical Engineer, and earning a basic monthly salary of Kshs 309,664 and a travel allowance of Kshs 30,500, until 20/5/2019 when his services were terminated.
 - b. That the Claimant had been engaged by Gapco Kenya Limited on 12/8/2008. That Gapco Kenya Limited was, vide gazette Notice No 957 of 10/11/2016, acquired by Total Kenya Group, thus becoming a member of Total Group. That on 21/12/2017, the Respondent herein (Total Kenya PLC) issued the Claimant with a letter notifying him of the change of employment from Gapco Kenya Limited to Total Kenya PLC.
 - c. That consequently, the Respondent issued the Claimant with a variation of employment contract between Total Kenya PLC (the Respondent) and the Claimant.
 - d. That on 16/1/2019, the Claimant was called to a meeting attended by the Respondent's Risk, Governance and Compliance Manager (Mr. Charles Wambugu), Operations Manager & Head of Department Operations (Joshua Ouma) and Human Resource Administration Manager (Irene Muinde) whereat he was informed of allegations that he (the Claimant) had been receiving monies from the Respondent's customers, particularly from number 0724



678284 which was said to belong to a Re-seller Customer (a Mr. Peter Kipyegon Cheruiyot) who operated 4 stations in Mombasa.

- e. That the Claimant explained that he was involved with the said person on personal business which did not interfere with the Claimant's work. That it was agreed that the Claimant would be given an opportunity to make a fresh declaration regarding the matter (of his personal business).
 - f. That on 17/1/2019, the Claimant received a Show Cause Letter regarding the issues raised in the aforesaid meeting held on 16/1/2019 and yet he had, in the said meeting, been accorded an opportunity to make a fresh declaration on his business.
 - g. That on 21/1/2019, the Claimant responded to the show cause letter and stated that he was engaged in farming in Makueni County which was mainly done by his wife, and that it was in the course of farming that he had met the said Peter Kipyegon Cheruiyot, whom he came to learn on 16/1/2019 was a reseller customer of the Respondent.
 - h. That on 29/3/2019, the Human Resource & Administration Manager wrote an email to the Claimant asking for particulars in support of his assertion that he was running a farming business. That this was followed by various email correspondences until 20/5/2019 when the Respondent issued the Claimant with a termination letter.
 - i. That the Claimant was not accorded an opportunity to be heard before termination, and that termination of his employment was unfair as it was not done in accordance with fair procedure and on a justifiable cause as envisaged in the Employment Act, 2007.
2. The Claimant sought the following reliefs:-
- a. A declaration that the Claimant's termination by the Respondent was unfair.
 - b. Compensation for unlawful termination (12 months x 340,164)..... Kshs 4,081,968
 - c. Certificate of service.
 - d. Costs of the suit and interest at Court rates.
 - e. Any other relief that the Honourable Court may deem just to grant.
3. Documents filed alongside the Claimant's memorandum of claim included the Claimant's written witness statement dated 23/12/2019 and an evenly dated list of documents, listing 10 documents. The listed documents included the Respondent's letter to the Claimant dated 21/12/2017, the Claimant's copy of the variation of employment, a bundle of the Claimant's payslips, minutes of a meeting held on 16/1/2019, a copy of the show cause letter dated 17/1/2019, Claimant's response to the show cause letter dated 21/1/2019, a bundle of emails, the Claimant's copy of the termination letter dated 20/5/2019, a demand letter dated 15/8/2019 and a copy of the Claimant's identity card.
4. The Respondent filed Response to claim on 27/11/2020, which it subsequently amended with leave of the Court on 10/5/2022, and denied having unfairly terminated the Claimant's employment. The Respondent pleaded:-
- a. That the Claimant received a fair hearing of allegations against him, a show cause letter was issued and the Claimant given several chances to provide proof contrary to the allegations, to no avail.



- b. That the Respondent, through its Risk, Governance and Compliance Manager, the Operations Manager and the Human Resource & Administration Manager, held a meeting with the Claimant on 16th January 2019 whereat the Respondent's concerns over the Claimant's conduct were raised.
 - c. That on 17th January 2019, the Respondent presented a show Cause Letter to the Claimant to show cause why disciplinary action could not be taken against him, and was given an opportunity to respond to the show cause notice (letter) by 22nd January 2019 at 12.00 pm.
 - d. That the Claimant responded to the show cause letter.
 - e. That on 29th March 2019, the Respondent sought for documentary proof of the Claimant's alleged business, whereupon the Claimant send land ownership titles and photographs of farm produce in the farm, and had no documentary proof of a farming business other than the land ownership titles and pictures of farm produce on a farm.
 - f. That the Claimant was issued with a termination letter on 20/5/2019. That the termination was on valid reasons and was fair.
 - g. That the Claimant was paid salary upto and including 24th May 2019, one month salary in lieu of notice and 19.87 prorata leave days.
5. On 13/10/2020, the Claimant filed a further list of witnesses dated 16/4/2020 and a witness statement of Peter Kipyegon Cheruiyot dated 23/1/2020. Copies of the said person's identity card were attached to the said witness statement.
 6. On 25/5/2022, the Claimant filed a further list of documents dated 23/5/2022, listing 2 documents. The 2 listed documents were the Claimant's payslip for May 2019 and the Respondent's letter to the Barclays Bank dated 31/8/2019.
 7. The Respondent filed a written witness statement of Irene Muinde dated 10/5/2022, and was on 29/9/2022 granted leave to substitute that witness statement with one by Victoria Salwa.
 8. Trial opened before me on 11/5/2022. The Claimant testified and adopted his filed witness statement as his testimony. He also produced in evidence the documents listed on his list of documents dated 23/1/2020 and referred to at paragraph 3 of this judgment, save for the document listed as item No 4 on the said list, which was not availed by the Claimant at the time. The Claimant also produced in evidence the two documents listed on his further list of documents, and referred to at paragraph 6 of this judgment.
 9. The Claimant further testified that as a Terminal Engineer doing mechanical and technical work which included maintenance of tanks and pipes, he dealt with contractors performing maintenance works. That he never dealt with Resellers (Persons who buy fuel from the Respondent to go and sell). That such customers were dealt with by commercial and marketing personnel, and that the Claimant did not even know to whom they made payments.
 10. The Claimant further testified that at the meeting held on 16/1/2019, he was told that the meeting was to discuss his conduct and ethics in dealing with resellers; and that the reseller in issue was Peter Kipyegon Cheruiyot. The Claimant testified that he knew Peter Kipyegon Cheruiyot, and that his relationship with the said person was that he (Peter Kipyegon), had bought farm produce from the Claimant, and had paid Kshs 2,500 by M-pesa. The Claimant told the Court that he made that clarification during the meeting held on 16/1/2019, and that at the end of the meeting, it was agreed



that he would be given an opportunity to declare his farming business; but to his surprise, he was on 17/1/2019 given a show cause letter.

11. It was the Claimant's further evidence that he responded to the show cause letter on 21/1/2019, explaining his farming business, and subsequently received emails asking him to explain on his farming business, and that he wrote and explained. That he received a termination letter on 20/5/2019.
12. The Claimant further testified that he was not invited for any disciplinary hearing, and did not attend any, either with a colleague or otherwise. That the meeting of 16/1/2019 was not a disciplinary hearing. That the reason for termination was not valid.
13. Cross-examined, the Claimant denied any conflict of interest. He testified that he received money from his customer, and that he did not know that the customer was also the Respondent's customer. That he explained all this to the Respondent. That he only became aware during the meeting of 16/1/2019 that Peter Kipyegon was the Respondent's client; and that the declaration he was asked to make was on his farming business, but not on conflict of interest.
14. The Claimant further testified that he was paid one month salary in lieu of notice, his salary upto and including 24/5/2019 and 19.87 prorata leave days, a total of Kshs 209, 304 excluding statutory deductions. That he was also paid other benefits, all amounting to Kshs 1,487,934.
15. The Claimant called one witness, Peter Kipyegon Cheruiyot (CW2), who told the Court that he was a business man dealing in petroleum products and other businesses. He adopted his filed witness statement as his testimony. It is stated as follows in CW2's said adopted witness statement:-

- “ 3. I know Samuel Mutuku Munyao, the Claimant herein, as a friend and later discovered that he was working with Total Kenya PLC as an Engineer.
4. Though he worked with Total Kenya PLC, I have never dealt with him (in any of my dealings with Total Kenya PLC save on a personal level as I used to purchase some subsistence food stuffs from his farming business.
5. I have personally never made any complaint to Total Kenya PLC over any conflict of interest.
6. I am a personal friend of Samuel Munyao Mutuku and I am aware that he was dismissed from employment where his employer cited that “their customer”, where they gave my details, had claimed that dealings with him gave rise to conflict of interest and potential corruption.
7. That the information given by the Respondent, Samuel's former employer, is not true. I have never lodged any complaint with the Respondent. Our relationship with the Claimant was pegged on sale of farm produce and do not conflict with my business of re-sale of oil products with Total Kenya PLC. As a matter of fact, I have never dealt with the Claimant in his capacity as an employee of Total Kenya PLC”

16. Cross-examined, CW2 testified that before trading with Total Kenya PLC (the Respondent), he had traded with Gapco Kenya Limited for 8 years, and that after the takeover, he had traded with the Respondent for 3 years as at the time of trial. That basically, he bought petroleum products from them. That he had traded with the Claimant on farm produce for 4 years as at the time of trial. That he paid the Claimant or his wife in cash or by M-pesa, and that at times, the money could be collected from



- CW2's hotel. That he (CW2) never used to interact with the Claimant much as it was a case of supply and payment.
17. The Respondent called one witness, Victoria Salwa (RW1). She adopted her filed witness statement dated 19/10/2022 as her testimony. She also produced in evidence the 7 documents listed on the Respondent's list of documents dated 10/5/2022. The listed documents are the Claimant's contract, Minutes of a meeting held with Claimant on 16/1/2019, Claimant's response to show cause letter dated 21/1/2019, email correspondence between the Claimant and the Respondent dated 19/3/2019 and 25/4/2019 and remittance advice on the Claimant's benefits.
 18. RW1 further testified that the Claimant was a Terminal Engineer at the Respondent's Gapco Terminal 2 in Mombasa, and that his gross salary was Kshs 309,664 per month. That on 16/1/2016, a meeting was held regarding complaints that had been forwarded to the Integrity Committee regarding the Claimant's activities. That the complaint had been forwarded by a whistle blower through the Respondent's anonymous email. That minutes of the meeting are dated 16/1/2019. That the meeting held on 16/1/2019 was to inform the Claimant that complaints had been received against him and to ask him whether it was true.
 19. That following the meeting on 16/1/2019, the Claimant was asked to review his conflict of interest declaration and to share any evidence of any business he had, in respect of which the individuals involved were allegedly paying. That conflict of interest declaration form is filled when there is a known conflict of interest. That the Claimant was given a show cause letter after the meeting, to which he responded on 21/1/2019 and stated that he was involved in farming, and that this was how he came to know Peter Kipyegon. That the Claimant continued working until 16/4/2019 when the Respondent send him an email, followed by a termination letter dated 20/5/2019.
 20. Having considered the pleadings filed and evidence presented thereon, issues that fall for determination, in my view, are as follows:-
 - a. whether termination of the Claimant's employment by the Respondent was unfair.
 - b. whether the reliefs sought by the Claimant are deserved.
 21. On the issue of fairness, the Court of Appeal held as follows in the case of *Overdrive Consultants [K] Ltd v Mazbar Sumra* [2020] eKLR:-

“For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness.

Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”
 22. In *Ndugu Transport Company Limited v Sewe* [2024] KECA 127 [KLR], the Court of Appeal held that the question of whether or not a termination is unfair is dependent on whether or not an employer has adhered to the twin requirements of due procedure and substantive justification. The Court observed that adhering to one and contravening the other renders the dismissal wrongful.
 23. In *Cooperative Bank of Kenya Limited v Yator* [2021] KECA 95 (KLR), the Court of Appeal stated as follows on procedural fairness:-

“33.....even where an employee has committed gross acts of misconduct, which acts warrant summary dismissal, the law requires that before such sanction is undertaken, an employer



must ensure procedural fairness to the employee by allowing the employee to give his defence.”

24. In the present case, the accusation levelled against the Claimant by the Respondent is one of misconduct. That fact is patent on the Claimant’s termination letter dated 20/5/2019 which states in part:-

“... We have reviewed your response to the show cause letter and follow up email communication and revert that your response was found to be unsatisfactory thus leading to the conclusion that you conducted yourself in such a manner that warranted appropriate disciplinary action as per the provisions of the Employment Act (2007), terms and conditions of employment, the company’s Program and Staff Code of Conduct which maintains a “zero tolerance” to fraud and corruption. In this regard, we regret to inform you that your services have been terminated on grounds of misconduct with effect from 24th May 2019.....”

25. The ground for termination having been alleged misconduct on the part of the Claimant (the employee), the Respondent was obligated to adhere to the mandatory procedure set out in Section 41 of the Employment Act, which provides as follows:-

“(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, the 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 ground of misconduct or poor performance, and the person, if any chosen by the employee within subsection (1) make.”

26. The evidence on record shows that on 16/1/2019, the Claimant was called to a meeting attended by three managers of the Respondent, whereby allegations of receiving money from the Respondent’s customers were made against the Claimant, allegedly based on reports sent to the Respondent’s Ethics Committee by the Respondent’s customers. The Claimant was in particular accused of having received money from phone No 0724XXXXXX, to which the Claimant responded that he was involved in farming business and that a number of transactions related to his personal business which did not in any way conflict/interfere with the Respondent’s business. At the end of the meeting, it was agreed that the Claimant would be accorded an opportunity to make a declaration, in view of the Respondent’s principles on conflict of interest. Signed Minutes of the Meeting were produced in evidence by the Claimant. The Minutes are titled “Minutes of meeting held with Samuel Mutuku Munyao, Terminal Engineer, Terminal 2 Depot. Date and venue 16th January 2019...”

27. On the following day (17/1/2019), however, the Claimant received an evenly dated Show Cause Letter reiterating matters discussed in the meeting held the previous day (16/1/2019), including what the



Claimant had told the meeting in response to the accusation levelled against him, and calling upon the Claimant to make a response thereto. The letter stated in part:-

“... You are hereby required to show cause why disciplinary action should not be taken against you based on Management concerns as stated above. Your written explanation should reach the undersigned by Tuesday 22nd January 2019 at 12.00pm failure to which the Management will take disciplinary action that it deems appropriate on you without any further reference to you.”

28. The Claimant responded to the show cause letter vide his handwritten letter to the Respondent dated 21/1/2019, stating that apart from his engagement as a Terminal Engineer, he engaged in farming in Makueni County whereby his wife did the actual farming on the ground and supplied to their different customers in different parts of the Country. That it was in the course of the farming business that he had met Peter Kipyegon Cheruiyot even prior to joining Total. That Peter had been purchasing from the Claimant's farm and directly paying to the Claimant. That he did not know that Peter was a Total customer dealing with fuel purchase and only learnt this from the Respondent.
29. The Claimant further stated in his said response/letter that the nature of business conducted between him and Peter Cheruiyot was at a personal capacity and did not compromise or jeopardise the Claimant's work ethics. He denied any conflict of interest and requested that the said Peter Cheruiyot be called in order to cast down any fears. The Claimant continued working.
30. There was an exchange of email correspondence between the Claimant and the Respondent in April 2019, followed by a termination letter dated 20/5/2024. The Claimant was not invited for any hearing before the termination, and was therefore never accorded an opportunity to defend himself against the accusations levelled against in the show cause letter dated 17/1/2019.
31. It is clear from all the foregoing that the Respondent did not comply with the mandatory procedure set out in Section 41 of the Employment Act, which I have set out at paragraph 25 of this judgment. It is clear even from the wording of the termination letter dated 20/5/2019 that the Respondent terminated the Claimant's employment after review of his response to the show cause letter and follow up email communication.
32. The meeting held on 16/1/2019 cannot be said to have satisfied the mandatory requirements of Section 41 of the Employment Act as it came before disclosure to the Claimant of the charges levelled against him by the Respondent. The Claimant had also not been notified of the requirement and/or right to be accompanied to the said meeting by a fellow employee and/or witness. It was an ambush on the Claimant. There cannot be a fair hearing without prior disclosure of accusations. Anything in the contrary is against the principles of natural justice. The Court was not told how and when the Claimant had been notified of the said meeting.
33. By dint of Section 41 of the *Employment Act*, reasons for contemplated termination of employment must first be made known to the employee, and he or she must be given [reasonable] time to respond to the charge or charges levelled against him or her. The employee and a person chosen by him under Section 41 (1) must then be accorded an opportunity to be heard on the disclosed charges before any disciplinary action can be taken against him.
34. A charge sheet in employment and labour matters is a memorandum of charges (acts and omissions alleged to have been committed by an employee) and consists of allegations which the employer wishes to establish against the employee. More often than not, a formal charge sheet in employment matters comes in the form of a show cause letter. This formal charge sheet (catalogue of charges) states with precision and in a definite manner the alleged misconduct, negligence or omissions allegedly



committed, and gives the accused employee reasonable time to make his formal response. The basic principle of natural justice that a fair and reasonable opportunity of being heard must be given to a person accused of misconduct or breach of regulations cannot be achieved unless the person is specifically told of the accusations against him. An accused employee must first know of his alleged misconduct before he can respond to the same. Subjecting an employee to “a hearing” before disclosure of the allegations against him and then raising a formal charge against him is unfair.

35. Even after an employee formally responds to the show cause letter, he must be accorded an opportunity to be heard, and Section 41 of the Employment Act provides for an oral and physical hearing. A physical interaction whereby the employee and his witness, if he chooses to call one (a fellow employee or a Union official) are heard. Termination of an employee’s employment before he is accorded an opportunity to be heard is unfair. The Court of Appeal stated as follows in the case of *New Kenya Co-operative Creameries Ltd v Olga Auma* [2019] eKLR:-

“

- “(8) The repeated use of the word “shall” in Section 41 makes it clear that the Section is a mandatory provision. The use of the words “present during this explanation” in Section 41 (1) places an obligation on the employer that the explanation for which the employer is considering the termination be given in an oral explanation where the employee and another person chosen by the employee is present. Section 41(2) requires that both the employee and the other person present be given an opportunity to make representations, which representations should be considered by the employer in making his decision.

In our view, Section 41 provides for a physical interaction in the disciplinary process and therefore, the hearing provided under Section 41 of the Employment Act, which is a mandatory provision, must be an oral hearing.”

36. Further the Court of Appeal stated as follows in the case of *CMC Aviation v Mohammed Noor* [2015] eKLR

“In view of the foregoing, we find that the appellant’s act of summarily dismissing the Respondent without giving him an opportunity to be heard amounted to unfair termination as defined under Section 45 of the Employment Act. In *Kenya Union Of Commercial Food And Allied Workers v Meru North Farmers Sacco Limited* [2013] eKLR, the Industrial Court held that whatever reason or reasons that arise to cause an employer to terminate the services of an employee, the employee must be taken through the mandatory process as outlined under Section 41 of the Employment Act. That applies in a case of termination as well as in a case that warrants summary dismissal. See also *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR”

37. In view of all the foregoing, I find and hold that termination of the Claimant’s employment was procedurally unfair.

38. On substantive fairness, and in view of the evidence adduced by the Claimant and by his witness, Peter Kipyegon Cheruiyot (CW2), which the Respondent did not either controvert or rebut, either by counter evidence or in cross-examination, I make a finding that the Respondent did not demonstrate that the reason for terminating the Claimant’s employment was valid pursuant to Section 45(2)(a) of the Employment Act. The person from whom the Claimant was alleged to have unethically received money, Peter Kipyegon Cheruiyot, testified as the Claimant’s witness and corroborated the Claimant’s



evidence that he had, for years, purchased farm produce from the Claimant. The Claimant testified that this personal relationship between the two dated back to years before the Claimant joined the Respondent. In my view, no conflict of interest as alleged by the Respondent, or possible conflict of interest was demonstrated.

39. As stated in the persuasive case of *Abraham Gumba v Kenya Medical Supplies Authority* [2014] eKLR:-
- “ Conflict of interest occurs where an employee is in a position to influence, be influenced, or appear to be influenced due to a personal or pecuniary private interest in the work place.”
40. In the present case, it was a common ground that the Claimant worked in the Respondent company as a Terminal Engineer, doing Mechanical and technical works which included repairing of tanks and pipes, interacting with contractors undertaking such works. The Claimant testified that he was confined to the Terminal where he worked. RW1 testified that the Claimant was based at the Respondent’s Gapco Terminal 2 in Mombasa. The Court was not told that any fuel was being sold at the said Terminal; or at any other Terminal.
41. The Respondent (RW1) testified that Peter Kipyegon Cheruiyot, the person from whom the Claimant was said to have received some money, was the Respondent’s re-sell customer, buying fuel from the Respondent for sale. The Claimant testified that such customers were handled by the Respondent’s Commercial and Marketing Personnel, and that he did not even know to whom they made payments. This evidence was not rebutted or controverted by the Respondent. It was not demonstrated that the Claimant dealt with re-sell customers or any customers of the Respondent in the course of his employment.
42. I find and hold that termination of the Claimant’s employment was substantively and procedurally unfair, and I so declare.
43. On the second issue, and having made a finding that termination of the Claimant’s employment was unfair, and taking into account the manner and the circumstances in which the termination was effected, I award the Claimant the equivalent of ten (10) months’ salary as compensation for unfair termination of employment. It was a common ground that the Claimant’s gross salary (exclusive of mileage/travelling allowance) was Kshs 309,664. The equivalent of ten months’ salary is therefore Kshs $309,664 \times 10 = 3,096,640$, which I award to the Claimant.
44. The Claimant is entitled to be issued with a certificate of service pursuant to Section 51 of the *Employment Act*.
45. In sum, and having considered written submissions filed on behalf of both parties herein, judgment is hereby entered for the Claimant against the Respondent for Kshs 3,096,640 being compensation for unfair termination of employment.
46. The awarded sum shall be subject to statutory deductions pursuant to Section 49(2) of the *Employment Act*.
47. The Respondent shall issue the Claimant with a Certificate of Service pursuant to Section 51(1) of the *Employment Act* within thirty days of this judgment.
48. The Claimant is awarded costs of the suit, plus interest on the awarded sum. Interest shall be calculated at Court rates from the date of this judgment.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 31ST July 2024

AGNES KITIKU NZEI



JUDGE

Order

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....Claimant

.....Respondent

