



**Mwangangi v Kenya Wildlife Service (Cause 138 of 2018)
[2024] KEELRC 2342 (KLR) (30 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2342 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 138 OF 2018
JK GAKERI, J
SEPTEMBER 30, 2024**

BETWEEN

VINCENT MUIA MWANGANGI CLAIMANT

AND

KENYA WILDLIFE SERVICE RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent on 8th February, 2018 alleging that his employment was unlawfully terminated by the Respondent.
2. The Claimant was employed by the Respondent effective 1st February, 2010 as an Accounts Assistant, Grade 9A and was based at the Tsavo East National Park.
3. The Claimant further avers that he was interdicted and was on half salary from 23rd June, 2015 on the basis of a Preliminary Audit Report dated 25th May, 2015 which implicated him in malpractices and recorded a statement with the police at Voi Police Station in July 2015.
4. That on 29th April, 2016, he received a notice to show cause dated 22nd April, 2016 which accused him of defrauding the Respondent Kshs.1,255,080.00 and responded vide letter dated 4th May, 2016.
5. That the Audit Report given to the Claimant had a figure of Kshs.1,118,090.00 and no finding of forgery was made.
6. The Claimant avers that any document with cancellations or alterations was cancelled or altered by the author.
7. The Claimant admits that by letter dated 11th November, 2016 received on 14th November, 2016, he was invited for a disciplinary hearing scheduled for 17th November, 2016 by a 2 days' notice and attended and informed of the decision on 9th February, 2017, a termination of the employment for



defrauding the Respondent Kshs.1,255,080.00 which he denies. That the dismissal was reduced to termination.

8. The Claimant avers that request for minutes vide letter dated 21st June, 2017 and 21st September, 2017 yielded no response nor were reports of further investigations supplied.
9. The Claimant prays for;
 - i. Reinstatement.
 - ii. Half salary from July 2015 to January 2017.
 - iii. 12 months' salary for unlawful termination.
 - iv. Salary from 1st to 9th February, 2017.
 - v. 2 months' salary in lieu of notice.
 - vi. Certificate of service.
 - vii. Costs of the suit.
 - viii. Interest on (i) – (v) above at Court rates from date of filing till payment in full.

Respondent's case

10. The Respondent admits that the Claimant was its employee as alleged and was interdicted to pave way for investigations as the interdiction was based on a preliminary report, which implicated the Claimant in malpractice relating to handling of petty cash at Tsavo East National Park, January 2014 and May 2015.
11. The sum of more than 1 million shillings from petty cash control could not be accounted for hence the interdiction.
12. That the findings of the internal inquiry were communicated vide letter dated 22nd April, 2016.
13. That the Claimant was provided with sufficient information to prepare for the disciplinary hearing.
14. It is the Respondent's case that the Claimant performed his duties negligently and recklessly by posting fictitious amounts in the general ledger, under and over-casting through running balances, deliberately failing to post correct entries in the petty cash control sheets and failing to exercise reasonable skill and occasioning the loss of Kshs.1,255,080.00 by the Respondent.
15. The Respondent prays for dismissal of the Claimant's suit with costs.

Claimant's evidence

16. On cross-examination, the Claimant confirmed that he was the Accounts Assistant at the Tsavo East National Park during the period 2014 to 2015 and his duties included revenue collection at the gate, cash payments and capturing data in the Petty Cash Control Sheets and enter the same in the system and the amounts had to tally.
17. The Claimant admitted that an audit was conducted for the period January 2014 and May 2015 and a report was prepared and a copy was availed to him. That he met one Mr. Allan Kamau.
18. That the report raised issues of fictitious amounts and cash shortage was noted.
19. That his documents were found to be in good order and accurate and there was no shortage of cash.



20. Guided by the Respondent's counsel, the Claimant admitted that he processed Imprest Number 324123 of Kshs.43,340.00 and paid the sum, posted the same on the petty cash control sheet as Kshs.63,340.00 (inflating it by Kshs.20,000/=).
21. According to the Claimant, it was an error, but the auditor did not find the cash in the cash box.
22. As regards Imprest No. 317096 worth Kshs.3,000.00 due to Mohammed Noor, the Claimant confirmed that he paid Mr. Noor Kshs.3,000.00 but the same was posted as Kshs.30,000.00 (over-stated by Kshs.27,000/=) and no adjustment was made on the Petty Cash Control Sheet to correct the error. The auditors noted the anomaly.
23. In the case of Imprest No. 224347 of Kshs.54,900.00 to Hussein Mohammed, the Claimant confirmed that he paid the amount but entered the sum of Kshs.84,900.00 in the Petty Cash Control Sheet (over-stated by Kshs.30,000/=) and no adjustment was made to the PCCS and the auditors noted the anomaly.
24. The witness confirmed that in one instance, the running balance in the Petty Cash Control Sheet had an under-casting of Kshs.100,000.00 and was flagged by the auditors and the practice was repeated and the total under-casting was Kshs.1,118,090.00 as the amount was not in the cash box.
25. The Claimant admitted that although he was requested to comment on the Preliminary Audit Report and requested for time to confirm the figures, and was the custodian of the cash and thus accountable, he did not respond to the report before interdiction on 23rd June, 2015 for almost one (1) month.
26. The witness admitted having received the notice to show cause dated 22nd April, 2015 and responded vide letter dated 4th May, 2015.
27. The Claimant testified that he was responsible for the cash, did not repay the amount that could not be traced, Kshs.1,118,090/= and was unaware of whether it was recovered.
28. The Claimant confirmed that it was not a deliberate move to defraud the Respondent and did not know where the cash went and the incidences are regretted as they were human errors.
29. The Claimant confirmed that he was responsible for the Petty Cash Control Sheets and all funds came to him as were imprests.
30. The Claimant admitted that he was invited to a disciplinary hearing and attended and participated and was informed of his rights and had no question to ask when asked if he had any question.
31. The Claimant confirmed that he made final submissions.
32. The Claimant also confirmed that he did not indicate that he was not given time to prepare for the defence or that he was not supplied with any document.
33. The Claimant testified that he did not appeal the Respondent's decision to terminate his employment although the letter informed him of the right to appeal and did not clear with the Respondent.
34. That although he was found guilty of gross misconduct, dishonesty and fictitious postings, the employer was lenient and reduced the dismissal to termination.
35. On re-examination the Claimant testified that the notice to show cause had neither a case summary, investigation report or other information to respond to the charges.
36. That neither a copy of the covering report nor the Petty Cash Control Sheets or receipts were availed.



Respondent's evidence

37. RWI, Mr. Watson Karagathu confirmed that an exhibit on record had neither a date, author nor signature.
38. The witness confirmed that after the preliminary investigation, further investigation was conducted by the investigations department and it was a criminal inquiry of stealing by servant by Chief Inspector, Charles Inoti and Celina Mwangangi a member of staff.
39. The witness explained the difference between over-casting and under-casting or over-reporting and under-reporting to the Court, that while the former involves capturing more than ought to have been, the latter involves capturing less than what ought to have been recorded.
40. The witness admitted that the amount allegedly lost by the Respondent differs as the figures of Kshs.1,255,080.00 and Kshs.1,118,090.00 are used and the audit covered 7 months and it was conducted using sampling.
41. The witness was categorical that there were not errors but variances.
42. That the investigation noted that there was no proper interval controls in particular segregation of duties to ensure review of records, and record keeping was also manual and the Claimant was the custodian of the cash.
43. On re-examination, the witness testified that the audit showed that the entries made by Mr. Mwangangi, the Claimant were incorrect.
44. According to the witness, if an error occurs, there ought to be correction which means there ought to be supporting documents to correct the error and the change is effected and none had been done and the errors were not reported and an explanation was needed from the Claimant.
45. That variances can be verified from the petty cash and none was recovered.
46. RWII, Mr. Vincent Makau Samoo confirmed on cross-examination that the Respondent's Human Resource Policy and Procedures Manual (herein after HR Policy) provided for recovery of loss from staff by instalments of up to 25% of the monthly salary, an option the Claimant was not given as he admitted having taken the cash and the same was not demanded from him or a counter-claim filed.
47. That the Claimant was accorded all rights in the disciplinary process and termination of his employment was in accordance with the HR Manual but was not paid gratuity because he did not clear.
48. RWII confirmed that the Covering Report identified as Exhibit "C" sub-file marked "confidential" pages 18-56 of the Respondent's trial bundle was generated when the Claimant was on interdiction and was not availed to him contrary to the HR Manual.
49. According to RWII, the committee referred to the internal investigation report and the Claimant had a copy.
50. That if a document had errors, they are traceable to the one who authored it.
51. RWII confirmed that the lack of proper supervision of the Claimant could not be blamed on him as it was a collective duty, but the Claimant admitted that there were human errors.
52. That the invitation to the hearing was delivered to the Claimant two (2) days to the hearing.
53. That the Claimant had no previous disciplinary case for the 7 years served since 2010.



54. That Mr. Allan Kamau and John Tomno did not interview the Claimant.
55. That the Claimant requested for reports through his advocate vide letter dated 21st September, 2017.
56. On re-examination, the witness testified that interdiction was one of the options available to the Respondent under the HR Manual and the Claimant was taken through a disciplinary process and appealed the decision.
57. The witness testified that if there were errors on the Petty Cash Control Sheets, the cash would have been in the cash box.
58. That according to the inquiry, the Respondent lost Kshs.1,255,080/=.

Submissions

59. By 23rd August, 2024 when the Court retired to prepare this judgment, none of the parties had filed submissions contrary to the directions given on 23rd July, 2024.

Analysis

60. It is common ground that the Claimant joined the Respondent as an Accounts Assistant at the Tsavo East National Park on 1st February, 2010 and was confirmed vide letter dated 14th September, 2010 and served diligently until he was interdicted vide letter dated 23rd June, 2015 on ½ salary and remained on interdiction until termination of employment on 9th February, 2017.
61. It is equally not in contest that the Respondent conducted an internal audit for the period January 2014 to May 2015 and a report was prepared which implicated the Claimant in wrong doing and a copy was sent to him for comments and response but he did not even after requesting for time to do so.
62. The Internal Audit Investigation found that some imprests given to staff had cancellations or alterations, and some payment vouchers could not be traced. Cash shortage was also noted.
63. The auditors recommended further investigation to determine the extent of losses under petty cash management system among other recommendations.
64. The report generated by the auditors was not responded to by the Claimant and his supervisors at the Tsavo East National Park.
65. Records reveal that a detailed investigation was conducted by Chief Inspector Charles Inoti of the Criminal Investigation Department (C.I.D) and Celina Mwangangi who was an employee of the Respondent.
66. The team found that there was fraud and stealing of the Respondents money by;
 - i. Posting of fictitious amounts or figures such as:



Date	Ref doc	Correct Amount	Fictitious Amount	Amount of money stolen
07/2/14	PCV 2870	43,340	63,340	20,000
31/2/14	PCV 2792	10,200	20,200	10,000
4/2/2014	PCV 2823	3,000	30,000	27,000
26/2/2014	PCV 3105	23,140	33,140	10,000

- ii. In addition surrendered cash on imprest was not added to the PCI
 - iii. Under-casting and over-casting
 - iv. Unbanked revenue
 - v. Poor asset management
 - vi. Weak controls in fuel management and
 - vii. Misuse of the Respondent's vehicles.
67. The investigators recommended inter alia that the Claimant be charged with 3 counts of stealing by servant, uttering false documents and obtaining money by false pretence as he was dishonest and his colleagues be reprimanded for various failures, and one Mr. Obrein be surcharged for a plastic tank that went missing from the AD's compound.
68. Internal Audit Report is however undated but is categorical that it was based on the Audit Report dated 14th May, 2015 and led to Claimant's interdiction vide letter dated 23rd June, 2015, which was unambiguous that the interdiction was necessitated by the need to conduct a full investigation in the matter.
69. It is common ground that the Claimant was issued with a notice to show cause on 29th April, 2016 dated 22nd April, 2016 and accorded 7 days to respond from the date of receipt of the letter which the Court deems sufficient and responded vide letter dated 4th May, 2016, was invited for a disciplinary hearing on 14th November, 2016 vide letter dated 11th November, 2016, attended and his employment was terminated vide letter dated 9th February, 2017, and did not appeal the decision or clear with the Respondent.
70. The Claimant faults the termination of his employment variously.
71. The issues that commend themselves for determination are;
- i. Whether termination of the Claimant's employment by the Respondent was unfair.
 - ii. Whether the Claimant is entitled to the reliefs sought.
72. On the first issue, it requires no gainsaying that for a termination of employment to pass muster, it must be characterized by a valid and fair reason and a fair procedure.



73. Put in the alternative, there must be a substantive justification and procedural fairness. See *Naima Khamis V Oxford University Press (FA) Ltd* (2017) eKLR, *Walter Ogal Anuro V Teachers Service Commission*.
74. These two elements are provided for by the provisions of Section 41, 43, 44, 45 and 47(5) of the [Employment Act](#) as aptly captured by the Court of Appeal in *Pius Machafu Isindu V Lavington Security Guards Ltd* (2017) eKLR.

Reason for termination

75. By the notice to show cause dated 22nd April, 2016, the Respondent accused the Claimant of dishonesty in the performance of his duties, defrauding the Respondent the sum of Kshs.1,255,080.00 and breach of the Respondent's Revenue Collection Procedures by irregularly holding cash and failing to maintain revenue records as standard operating procedures required.
76. The Claimant denied the allegations and was terminated from employment on account of gross misconduct and dishonesty for defrauding the Respondent Kshs.1,255,080.00 through posting of fictitious amounts/figures, Kshs.125,100.00 under-casting through running balances, Kshs.1,121,980.00 and receipt of cash imprest of Kshs.8,000/= vide receipt number AR9463282 not reflected in the Petty Cash Control Sheet.
77. During cross-examination, the Claimant admitted that he was the custodian of cash, all imprests were surrendered to him and prepared the Petty Cash Control Sheets at the Tsavo East National Park.
78. Contrary to the Claimant's testimony that his documents were found to be in order and was thus cleared, the Preliminary Audit Report implicated him and his colleagues and a response was required which neither the Claimant nor his colleagues responded yet copies of the report were availed.
79. The Claimant admitted on cross-examination that he dealt with Imprest Warrant No. 324,123 of Kshs.43,340.00 which he captured as Kshs.63,340/= on the Petty Cash Control voucher and admitted it was an error which regrettably he did not correct and the cash could not be found in the cash box.
80. The same applied to Imprest Warrant No. 317096 Reference Number 2823 of Kshs.3,000/= which he captured as Kshs.30,000/= on the Petty Cash Control Voucher (over-casting) and admitted that the alleged error was not corrected.
81. The Claimant gave a similar explanation in respect of Imprest Warrant No. 224347 (Ref No. 2837) of Kshs.54,900/= captured as Kshs.84,900/= and no adjustment was done.
82. Similarly, on the running balance, in one instance, the Claimant admitted that there was an under-casting of Kshs.100,000/=, issues the auditors raised as admitted by the Claimant and he did not deem a response or explanation necessary.
83. Relatedly, the Claimant admitted that the cash shortage was real as the sum could not be found in the cash box, Kshs.1,118,090.00.
84. In response to a question from the Respondent's counsel, the Claimant retorted that he was not sure whether a satisfactory explanation of the issues raised would have obviated the interdiction. Which would appear to suggest he had no explanation or the one he had was unsatisfactory.
85. Thus far, it is discernible that the Claimant admitted that there were instances of over and under-casting at his station and certain amounts of cash could not be traced. He admitted that the documents and the cash could not tally and did not bother to offer an explanation or excuse why.



86. During the hearing, the Claimant admitted that he met the auditors who sought explanations on cancellation of documents and the different figures in the payment vouchers and the Petty Cash Control Sheets and Receipt No. 9463282 and had not noticed the anomalies before the auditors raised them.
87. In relation to PCV 2870, when asked about where the sum of Kshs.20,000/= went, his response was “I can’t tell” and admitted that all the anomalies were errors and ought to be treated as such and were never reversed.
88. The Claimant confirmed that even if the documents were reversed, the cash would not be recovered as according to him, shortages of Kshs.1000 – 2000 are possible.
89. That capturing PCV NO. 2319 of Kshs.650/= to one Julius Kabete as 270,650 on the General Ledger was an error and if reversed there would be no cash.
90. The Claimant admitted that all the documents cited had errors but money was lost and was thus negligent.
91. The Claimant regretted what happened at Tsavo East National Park.
92. The disciplinary panel recommended that the Claimant be dismissed from service but the employer reduced it to a termination.
93. The totality of the evidence adduced by the Claimant in Court during cross-examination and before the disciplinary hearing lead to the irresistible finding that the Respondent had evidentiary demonstrated that it had a valid and fair reason to terminate the Claimant’s employment as it did.
94. The Claimant’s evidence lay it bare that he could not account for monies under his control and engaged in malpractices.

Procedure

95. As held in *Pius Machafu Isindu V Lavington Security Guards Ltd (Supra)*, the termination process provided by Section 41 of the *Employment Act* is mandatory and non-compliance renders a termination of employment procedurally unfair within the meaning of Section 45 of the *Employment Act*.
96. In his claim, the Claimant faults the 2 day notice of the disciplinary hearing, non-availment of the results of the investigation to enable him adequately prepare for the defence and the delayed communication of the outcome of the hearing.
97. As adverted to elsewhere in this judgment, the Respondent availed the Preliminary Audit Report to the Claimant and shortly thereafter interdicted him effective 23rd June, 2015 “in order to pay way for full investigation into the matter” and almost one year later, the Claimant was issued with a notice to show cause stating that he had defrauded the Respondent the sum of Kshs.1,255,080.00 yet the Audit Report had a figure of Kshs.1,118,090.00 and the difference, though not material, in the Court’s view was not explained.
98. The Respondent ought to have explained its basis and availed a copy of the Comprehensive Investigation Report prepared by Chief Inspector, Inoti and Celina Mwangangi to enable the Claimant contextualize the notice to show cause and respond effectively. He could not respond to the specifics unearthed by the investigators as he did not have the report.



99. Both RWI and RWII admitted that the report was not availed to the Claimant. Indeed, RWII confirmed on cross-examination that the Respondent was under no obligation to avail the report to the Claimant and in any case he was given a copy of the Preliminary Audit Report.
100. The Court begs to differ.
101. Having interdicted the Claimant for purposes of an investigation and having additionally issued a notice to show cause based on the investigation report, it was incumbent upon the Respondent to avail a copy to the Claimant to enable him appreciate the basis of the charges and respond appropriately.
102. It requires no belabouring that the right to be heard is a constitutional imperative.
103. Section 4(3)(g) of the *fair Administrative Action Act* requires the “accuser” to give the “accused” information, materials and evidence to be relied upon in making of the decision.
104. The sentiments of the Court in *Mereru V Tata Chemicals Magadi Ltd (2023)* eKLR are apt as the sentiments of the Court of Appeal in *Postal Corporation of Kenya V Andrew K. Tanui (2019)* eKLR thus:-
- “The board had in its possession the very document that formed the basis of the charges framed against the Respondent but kept it away from him. Even in criminal trials which are more serious in nature, the accused is entitled to the statements that support the charges laid against him. This is the essence of fairness, even outside a judicial setting. The Respondent faced serious indictments which could torpedo his entire career and destroy his future . . .”
105. These sentiments apply on all fours to the circumstances of the instant case.
106. See also *Regent Management Ltd V Wilberforce Ojiambo Oundo (2018)* eKLR where the appellant had not provided documents to the Respondent but purported to do so (for a few minute) at the hearing. The Court found the same insufficient.
107. In the instance case, the Respondent did not avail the basis of the charges against the Claimant for an effective response and defence during the hearing. It thus impeded the Claimant’s constitutional right of fair hearing.
108. Closely related to the foregoing is the 2 days’ notice the Claimant was accorded to prepare for the hearing. Was it sufficient? The Court is not persuaded it was.
109. Having availed the Claimant about 7 days to respond to the notice to show cause, the Respondent ought to have availed him a similar number of days or more as preparation for a hearing is undoubtedly more involving than a response to the notice to show cause bearing in mind that the Claimant had the attendant right to decide whether or not he would call witnesses and who they would be and whether to be accompanied and by who.
110. The two days’ notice, in the Court’s view was insufficient. The fact that the Claimant did not raise the issue notwithstanding.
111. Having been denied the final investigation report, the Claimant could only rely on the responses to the notice to show cause.
112. No doubt the Claimant attended the hearing, defended himself and responded to the questions asked though when accorded a chance, he had no question for members of the panel.



113. For the above stated reasons, it is the finding of the Court that the procedure employed by the Respondent in the termination of the Claimant's employment fell below the threshold prescribed by law rendering the termination procedurally unfair.

Appropriate relief

Reinstatement

114. This relief is unavailable under the provision of Section 12(3)(vii) of the *Employment and Labour Relations Court Act* read with Section 49(3)(a) of the *Employment Act*, as it can only be decreed within 3 years from the date of termination of employment.
115. The Claimant's employment was terminated in 2017, more than 7 years ago.

Half salary for July 2015 to January 2017

116. Having found that the Respondent had a substantive justification to terminate the Claimant's employment as it did, the claim for the ½ unpaid salary for the duration of the interdiction is unsustainable.

The prayer is declined.

Salary from 1st – 9th February, 2017

117. The Claimant is entitled to ½ salary for the duration 1st – 9th February, 2017 unless already paid.

2 months' salary in lieu of notice

118. Having found that the Respondent had a valid and fair reason to terminate the Claimant's employment, the claim for salary in lieu of notice is unsustainable and is rejected.

12 months' salary for unlawful termination

119. Having found that the termination of the Claimant's employment by the Respondent was procedurally flawed, the Claimant is entitled to the relief under Section 49(1)(c) of the *Employment Act*.
120. In determining the quantum of compensation, the Court has taken into consideration the fact that;
- i. The Claimant was an employee of the Respondent from 2010 to 2017, a duration of 7 years which is not long.
 - ii. The Claimant did not express his wish to remain in the Respondent's employment and did not appeal the decision to terminate his employment.
 - iii. The Claimant had no previously recorded cases or incidences of misconduct as RWII confirmed on cross-examination.
 - iv. The Claimant substantially contributed to the termination of his employment. From the evidence on record, it is clear that he cannot lay the blame elsewhere.
121. In the circumstances, the court is satisfied that the equivalent of three months' gross salary is fair, Kshs.76,695/= less statutory deductions.



Certificate of service

122. The Claimant is entitled to a certificate of service by dint of Section 51 of the [Employment Act](#).
123. In the upshot, judgment is entered in favour of the Claimant against the Respondent in the following terms;
- a. Equivalent of three (3) months' gross salary Kshs.76,695/=.
 - b. Half salary for the duration 1st – 9th February, 2017 unless already paid.
 - c. Certificate of service.
124. In the circumstances of this case, parties shall bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 30TH DAY OF SEPTEMBER 2024

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of [the Constitution](#) which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of [the Constitution](#) and the provisions of Section 1B of the [Civil Procedure Act](#) (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

