



**Nasiombe v Shippers Council of Eastern Africa (Cause 534 of 2019)  
[2024] KEELRC 2343 (KLR) (30 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2343 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 534 OF 2019  
JK GAKERI, J  
SEPTEMBER 30, 2024**

**BETWEEN**

**PATRICK NASIOMBE ..... CLAIMANT**

**AND**

**SHIPPERS COUNCIL OF EASTERN AFRICA ..... RESPONDENT**

**JUDGMENT**

1. The Claimant commenced the instant suit by a Memorandum of Claim filed on 16<sup>th</sup> August, 2019 alleging wrongful and unlawful termination of employment by the Respondent.
2. It is the Claimant's case that he was employed by the Respondent on 15<sup>th</sup> May, 2012 under a renewable 2 year contract at Kshs.76,000.00 and a mobile allowance of Kshs.2,000.00 per month and the contract was renewed for 3 years effective 1<sup>st</sup> November, 2014 as the Project Accountant and Monitoring and Evaluation Officer at Kshs.95,000.00, mobile phone allowance of Kshs.3,000.00 and car running allowance of Kshs.10,000.00 and gratuity at 10% at the end of the contract.
3. The Claimant avers that he was appointed a member of the Procurement and Tender Committee effective 7<sup>th</sup> January, 2014.
4. That by letter dated 19<sup>th</sup> August, 2016, the Respondent's Chief Executive Officer alleged that there were unauthorized payments and demanded a response by 12 pm on the same day and the letter was backdated to 16<sup>th</sup> August, 2016.
5. That the termination of the Claimant's employment was back dated to 17<sup>th</sup> August, 2016 and termination was effective 16<sup>th</sup> August, 2016.
6. The Claimant avers that he was given neither a proper notice nor an opportunity to respond to the allegations and was not issued with a certificate of service.
7. The Claimant prays for;



- i. A finding that termination of his employment was unfair and unlawful.
- ii. 12 months compensation for unfair termination of employment (108,000x12) = Kshs.1,296,000.00
- iii. Gratuity at 8% Kshs.349,600.00
- iv. One month's notice Kshs.108,000.00  
Total Kshs.1,753,600.00
- v. Certificate of service.
- vi. Costs of the suit and interest.
- vii. Interest on (iv) above at Court rates.

### **Respondent's case**

8. The Respondent's Reply to Memorandum, witness statement Verifying Affidavit and List of documents filed on 2<sup>nd</sup> September, 2020 are unavailable in the Case Tracking System (CTS).
9. Significantly, an email message by the Court dated 27<sup>th</sup> August, 2024 at 9.06 requesting the Respondent's counsel to avail copies of the Response to Claim and witness statement was unresponded to.

### **Response to the Reply to Claim and Counter-Claim**

10. As regards the Claim, the Claimant reiterated the contents of the Memorandum of Claim and concerning the Counter-claim, the Claimant denies the same and avers that the Chief Executive Officer of the Respondent embarked on a malicious campaign to have him terminated from employment after the two fell out.
11. The Counter-claim was withdrawn vide letter dated 13<sup>th</sup> December, 2022 filed on 14<sup>th</sup> December, 2022.

### **Claimant's evidence**

12. On cross-examination, the Claimant confirmed that he was the Respondent's Accountant and served from 2012 to 2016 and was responsible for financial reports and books of accounts.
13. That he wrote cheques and was in charge of the procurement committee as well as monitoring and evaluation and was familiar with the Respondent's finance policies.
14. The witness admitted that the letter of termination of employment dated 17<sup>th</sup> August, 2016 had the reason for dismissal and the contract of employment dated 30<sup>th</sup> October, 2014 had a termination clause by one (1) month's notice or salary in lieu of notice.
15. The Claimant confirmed that he was charged for a Criminal Offence and convicted by the Magistrates Court for stealing and had appealed to the High Court.
16. He denied having used the Respondent's property for personal errands.
17. The Claimant further admitted that in his letter to the Respondent's CEO dated 19<sup>th</sup> July, 2013, he admitted having used taxis services for personal errands for Kshs.6,000/= and the company was invoiced but was reversed when he repaid the cash.
18. He admitted that a Local Purchase Order (LPO) was signed by a stranger which is a criminal offence.



19. The witness could not recall his petty cash limit but guessed that sometimes it was Kshs.200,000/=.
20. The Claimant testified that he prepared cheques in his name and received the cash in his personal account if the cheque was closed and on one occasion the CEO stopped one cheque from being cashed and the issue arose in the criminal case.
21. The Claimant testified that the signatures on the cheques were not forged.
22. He denied having engaged in competing business or being a director of any company.
23. The Claimant testified that the letter dated 6<sup>th</sup> January, 2015 did not come from him as he was not the Finance Manager of the Respondent and did not know the author and the signature was not his.
24. The Claimant denied having used the Respondent's recommendation.
25. On re-examination, the Claimant testified that his signature was the one on the appointment letter dated 30<sup>th</sup> October, 2014.
26. That notwithstanding the allegation of misuse of the Respondent's property, his contract was still renewed, and in any case he paid for the taxi services and there was no evidence to show that the company paid.
27. That he had not been proved guilty as at the date of dismissal and the matter had not been investigated.
28. That the cheque requisition book was not provided as evidence and the bank would call before payment and the company had external auditors.
29. That he was convicted for stealing and was unsatisfied with the termination process and dues were not paid.

### **Respondent's evidence**

30. RWI, Mr. Agayo Ogambi testified that he was the Acting CEO of the Respondent since January 2024 and knew the Claimant as a former colleague when he served as Head of Policy Advocacy and the Claimant was the Accountant.
31. The witness testified that the termination of the Claimant's employment was in accordance with the Respondent's manual as he was found guilty of fraud and theft.
32. RWI admitted that at the time, the Claimant had not been found guilty of theft or fraud and could not recall when the matter was reported to the police.
33. That the basis of the termination were the cheques which the Claimant cashed without authority.
34. That the letter dated 18<sup>th</sup> July, 2013 was not the reason for termination as the Claimant's contract of employment had since been reviewed and appointed Project Accountant and the Monitoring and Evaluation Officer as the response given was satisfactory.
35. That he was unaware of transaction before January 2024 but was still an employee and was aware of the matter.
36. That the Finance Policy had a petty cash limit and the Claimant was an agent of the Respondent to all bank accounts of the Respondent.



37. The witness explained that in order to replenish cash, the Accountant would issue a Local Purchase Order asking for replenishment of petty cash, draw a cheque which would be signed by the signatories, and the Respondent had 3 signatories.
38. That the Claimant would do the requisition, draw cheques and seek approval of the CEO before the cheques were taken to other signatories and there was a cheques register which was not produced as evidence.
39. That although the Claimant's letter to the CEO is dated 19<sup>th</sup> August, 2016, the termination letter is dated 17<sup>th</sup> August, 2016.
40. That there was an error of dates as on 19<sup>th</sup> August, 2016 the Claimant he was not in the employment of the Respondent.
41. That although banks often called the signatories, it was not for all cheques hence the cheque stopped by the CEO who was supposed to confirm payment.
42. That he was unaware of any problem between the Claimant and the then CEO.
43. That no other signatory complained.
44. That none of the audit reports prepared showed that cash was lost.
45. That the CEO wrote to the banks but the witness was unaware of the response.
46. That the letter dated 14<sup>th</sup> July, 2021 from ABSA Bank states that there was on unauthorized withdrawal.
47. That the letter came after the dismissal of the Claimant.
48. That the cheque register is prepared by the Accountant and the CEO's signature confirms the contents of the register.
49. That the CEO terminated the Claimant's employment and informed the Board of Directors.
50. On re-examination, the witness testified that ABSA bank confirmed the withdrawal of cash by the Claimant and although the CEO is required to peruse all documents presented in support of the cheque including the procurement plan, reliance is made on the integrity of the accountant.
51. That auditors depend on the documents presented by the Accountant hence their disclaimer.
52. That the schedule of documents and copies of cheques were obtained from the Criminal Case No. 1895 of 2016.
53. That before dismissal, the Claimant had been accused of other forms of misconduct.
54. That due to the loss of cash, the institution has been suffering and some donors pulled out.
55. That the Claimant was given a chance to respond to the claims but disappeared.

### **Submissions**

56. By 10<sup>th</sup> September, 2024 when the Court retired to prepare this judgment, none of the parties had filed submissions notwithstanding the directions given by the Court on 29<sup>th</sup> July, 2024.



## Analysis and determination

57. It is not in dispute that the Claimant joined the Respondent as its Accountant on 15<sup>th</sup> May, 2012 under a 2 year contract, which was renewed vide letter dated 30<sup>th</sup> October, 2014 effective 1<sup>st</sup> November, 2014 for a term of 3 years.
58. It is equally not in the contest that the Claimant was also the Head of the Tender Committee, prepared all cheques including supporting documentation and those on operational expenses would be in his name to enable him collect the petty cash and if the cheque was closed, the cash would be in his account.
59. Documents on record reveal that by letter dated 16<sup>th</sup> August, 2015, the Respondent's CEO, Mr. Gilbert Langat asked the Claimant to explain unauthorized cheque transactions of various amounts ranging from Kshs.64,360/= to Kshs.96,530/=.
60. The CEO required details on the payee, purpose, payment voucher and cheque register numbers by 12 pm on the same day, 19<sup>th</sup> August, 2015 and the Claimant received the letter on 19<sup>th</sup> August, 2016 and by response dated 19<sup>th</sup> August, 2016, the Claimant was emphatic that;

“The above cheque numbers:

No. Amount in Kshs. Date

424 78,925 31/8/2015

425 64,360 14/9/2015

427 94,760 21/9/2015

430 96,530 16/8/2016

Were duly addressed to Payee Patrick M. Nasiombe. There was however no official authorization and as such no payment vouchers were raised and they did not appear in the cheque register, the purpose for drawing the cheques was there're not indicated.

I am ready to comply with any disciplinary action you will accord me. Thank you in advance.

Yours sincerely

Patrick M. Nasiombe

61. The letter was received by the CEO on the same day, 19<sup>th</sup> August, 2016.
62. At this juncture, it is elemental to dispose of the peripheral but critical issue of dates of the letters dated 16<sup>th</sup> August, 2015, 19<sup>th</sup> August, 2016 and the letter of termination of employment dated 17<sup>th</sup> August, 2016.
63. Although the Claimant alleges that letters were backdated, and his counsel raised the issue in the course of cross-examination of RWI, it is discernible that the typed date of the Respondent's letter dated 16<sup>th</sup> August, 2015 is incorrect and ought to be 16<sup>th</sup> August, 2016.
64. This is decipherable from the hand written acknowledgment at the bottom by the Claimant, 19<sup>th</sup> August, 2016, a fact he did not contest.
65. It is evident that the letters were drawn and received on the same day 19<sup>th</sup> August, 2016.
66. The Claimant's response has the correct date as is the CEO's acknowledgment at the bottom.



67. Finally, the last paragraph of the Respondent's letter dated 16<sup>th</sup> August, 2015 is clear that a response was needed by 19<sup>th</sup> August, 2015, which ought to have been 2016 and the Claimant responded on the same day as demanded by the CEO's letter. The Claimant admitted as much in his witness statement.
68. It is common ground that the Claimant's employment was terminated vide letter dated 17<sup>th</sup> August, 2016 which the Claimant alleged was backdated but did not explain how and why.
69. Regrettably, neither the Claimant's nor the Respondent's copy has an acknowledgment.
70. From the contents of the letter and the milieu in which it was written, it is deducible that the date of 17<sup>th</sup> August, 2016 is incorrectly or erroneously stated.
71. In the Court's view, it is infeasible that the Respondent could by letter make reference to a response dated 19<sup>th</sup> August, 2016, it was unaware of.
72. In addition, paragraph 5 of the letter is unambiguous of the date of the summary dismissal was 19<sup>th</sup> August, 2016 and the dismissal took effect immediately.
73. In the Court's view, the letters dated 16<sup>th</sup> August, 2015 and 17<sup>th</sup> August, 2016 had erroneous dates which are patently explainable having regard to the context in which they were written.
74. The Claimant faults the termination of his employment on the premise that the Respondent had no reasonable cause, warning or notice and was not accorded an opportunity to respond to the allegations.
75. The issues that commend themselves for determination are;
  - i. Whether termination of the Claimant's employment was unfair and unlawful.
  - ii. Whether the Claimant is entitled to the reliefs sought.
76. On the 1<sup>st</sup> issue, parties have adopted contrasting positions with the Claimant maintaining that it was unfair and unlawful for want of a reason and fair process. The Respondent argued otherwise.
77. It is trite that for a termination of employment to pass the fairness test, the employer is required to demonstrate that it had a valid and fair reason to terminate the employee's employment and conducted the termination in accordance with fair procedure and the reason related to the employee's conduct, capacity or compatibility or operational requirements of the employer.
78. These requirements have been underscored in countless decisions.
79. In *Walter Ogal Anuro V Teachers Service Commission (2013) eKLR*, Ndolo J. explained that for a termination of employment to pass the fairness test, there must have been a substantive justification and procedural fairness. The termination must be substantively justifiable and procedurally fair.
80. The Court of Appeal expressed similar sentiments in *Naima Khamis V Oxford University Press (EA) Ltd (2017) eKLR*.

### **Reason for termination**

81. The letter of termination of the Claimant's employment dated 17<sup>th</sup> August, 2016 makes reference to the letter dated 16<sup>th</sup> August, 2015 on unauthorized transactions on SCEA Account 0771xxxx and the Claimant's response dated 19<sup>th</sup> August, 2016. The letter states that;

“Your acceptance vide engaging in unauthorized transaction on the account is considered fraudulent, theft, unethical and gross misconduct on your part”.



82. The letter summarily dismissed the Claimant effective 19<sup>th</sup> August, 2016 and handover to Valerie Adhiambo had to be effected by 4.00 pm.
83. The letter promised further action by relevant investigative arms of government.
84. The Claimant did not deny having written the letter dated 19<sup>th</sup> August, 2016 by which he admitted having engaged in unethical and fraudulent conduct which on all count meets the threshold of gross misconduct consistent with Clause 3.2 of the Respondent's Human Resource Manual which identifies gross misconduct as a justification for summary dismissal.
85. On cross-examination, the Claimant confirmed that the letter of termination of his employment had a reason for the summary dismissal.
86. Although RWI testified that the reason for termination of the Claimant's employment was that he had been found guilty of fraud or theft, the letter makes no reference to such matters and as he testified shortly, the reason was the cheques he cashed. He also admitted that the letter of termination had an erroneous date.
87. In the Court's view, having admitted that he drew and cashed cheques without any requisition or authority and without preparing the requisite supportive documentation and did not even register them in the cheque register, the Respondent was under no obligation to search for any other ground or reason to terminate the Claimant's employment.
88. The written admission demonstrate clearly that the Claimant was honest and made it clear that he was ready to comply, with any disciplinary action to be imposed to him by the Respondent.
89. Section 43(2) of the *Employment Act* provides that;

The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.
90. For the foregoing reasons, it is the finding of the Court that the Respondent has demonstrated that it had a substantial justification to terminate the Claimant's employment.
91. The fact that the Claimant did not contest the contents of the CEO's letter, did not ignore it and unilaterally decided to respond in the manner he did leaves no doubt that the letter manifested his state of mind and the message was explicit.
92. It is important to indicate in parenthesis that the Respondent reported the matter to the police and the Claimant was arrested on 21<sup>st</sup> November, 2016 and charged with stealing by servant contrary to Section 281 of the Penal Code in Criminal Case No. 1895 of 2016 and was found guilty of Count I of stealing by servant on 22<sup>nd</sup> March, 2023 but was acquitted for forgery.

## **Procedure**

93. It requires no belabouring that the provisions of Section 41 of the *Employment Act* are mandatory.
94. For a termination of employment to pass muster, it must be proved that the procedure adopted or employed by the employer was fair. See Pius Machafu Isindu V Lavington Security Guards Ltd (2017) eKLR.
95. The essentials of procedural fairness have been isolated in legions of decisions including by the Court of Appeal in Postal Corporation of Kenya V Andrew K. Tanui 2019 eKLR where the Court itemised



- them as; explanation of the grounds of termination in a language understood by the employee, reasons for which the employer is considering termination, entitlement of the employee to the presence of a representative when the explanation is made and hearing and considering any representations by the employee and the representative chosen by the employee.
96. From the evidence on record, it is clear that the provisions of Section 41 of the *Employment Act* were not complied with.
97. Evidence on record reveals that the CEO's letter dated 16<sup>th</sup> August, 2015, the Claimant's letter dated 19<sup>th</sup> August, 2016 and the termination letter dated 17<sup>th</sup> August, 2016 were written and served on the same day 19<sup>th</sup> August, 2016.
98. Although the Claimant admitted having engaged in unethical and fraudulent conduct which amounted to gross misconduct, the Respondent ought to have summoned him for a meeting or written to him to show cause why his employment should not be terminated having admitted wrong doing.
99. The meeting or notice to show cause would have accorded the Respondent an opportunity to explain to the Claimant the reason why it had opted to terminate his employment and in the presence of another employee or shop floor representative.
100. Flowing from the foregoing, it is clear that termination of the Claimant's employment was procedurally flawed and thus unfair for non-compliance with the provisions of the *Employment Act*.
- Appropriate Relief
- i. Finding that termination of the Claimant's employment was unfair and unlawful
101. Having found that termination of the Claimant's employment by the Respondent was unfair for want of procedural propriety, the finding prayed for is merited.
- ii. Salary in lieu of notice
102. Having found that the Respondent had a valid and fair reason to summarily dismiss the Claimant from employment for misconduct, the provisions of Section 44(1) of the *Employment Act* were applicable.
103. Similarly, the Claimant laid it bare that he had fundamentally breached his obligations under the contract of employment and the Respondent was entitled to terminate his employment.
104. The claim for pay in lieu of notice is declined.
- iii. Gratuity
105. Clause 7 of the Claimant's contract of employment accorded him gratuity at the end of the contract equivalent to 8% of the salary earned.
106. Having served for a period of about 1 year and 9½ months, the Claimant is entitled to gratuity equivalent of 8% of the total salary earned for this period as follows  $Kshs.108,000 \times 21\frac{1}{2} \text{ months} = 2,322,000 \times \frac{8}{100} = Kshs.185,760.00$ .
- iv. 12 months compensation.
107. Having found that termination of the Claimant's employment by the Respondent was procedurally unfair, the Claimant is entitled to the compensation under Section 49(1)(c) of the *Employment Act*.
108. The Court has considered that; the Claimant was an employee of the Respondent for a period of about 3 years and 9½ months which is fairly short, the Claimant substantially contributed to the termination



of employment by engaging in unethical conduct and admitted the same in writing. The Claimant authored his destiny.

Similarly, the Claimant neither appealed the decision nor express his wish to remain in the Respondent's employment.

The Claimant had a recorded warning which highlighted several shortcomings on his part but his response was considered satisfactory and his employment contract renewed on improved terms of service.

109. In the circumstances, the equivalent of one (1) month's salary is fair, Ksh108,000.00

v. Certificate of service

110. The Claimant is entitled to a certificate of service by dint of Section 51 of the *Employment Act*.

111. In the upshot, judgment is entered in favour of the Claimant against the Respondent in the following terms;

a. Finding that termination of employment was unfair and unlawful.

b. Gratuity for the period served Kshs.185,760.00.

c. Equivalent of one (1) month's salary Kshs.108,000.00.

Total Kshs.293,760.00

d. Certificate of service.

112. In the circumstances of this case, parties shall bear their own costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 30<sup>TH</sup> 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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.

**DR. JACOB GAKERI**

**JUDGE**

