



**Ateka v Agricultural Society of Kenya (Cause 202 of 2015)
[2024] KEELRC 13611 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13611 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 202 OF 2015
DN NDERITU, J
SEPTEMBER 26, 2024**

BETWEEN

OBED OKELLO ATEKA CLAIMANT

AND

AGRICULTURAL SOCIETY OF KENYA RESPONDENT

JUDGMENT

I. Introduction

1. In a memorandum of claim dated 8th July, 2015 filed through Mongeri & Company Advocates the claimant prays for –
 - a. Payment in lieu of Notice (3 months)
 - b. Salary for last month worked
 - c. Benefits
 - d. Service payment for 3 years (3 x ½ salary x 12)
 - e. Damages for unlawful termination
 - f. Declaration that the termination was unlawful
 - g. Payment for leave allowance which he was not paid
 - h. Letter of service
 - i. Costs of this suit
 - j. Interests on(b) and (c) at court rates
 - k. Any other relief that the Honourable Court may deem fit to grant.



2. Alongside the statement of claim were filed an affidavit of verification, a statement by the claimant, a list of documents, and a bundle of copies of the listed documents, all in support of the claim.
3. The respondent entered appearance through the Federation of Kenya Employers (FKE) on 2nd September, 2015 and filed a statement of defence on 26th January, 2016. In the defence to the claim the respondent prays that the claimant's cause be dismissed with costs for want of merits.
4. Alongside the defence, the respondent filed a bundle of copies of documents in support of its position taken.
5. With the leave of court the claimant filed a further list of documents on 30th November, 2021 and copies of the listed documents alongside his second written statement. A further list and a copy of one listed document was filed on 18th March, 2022.
6. With the leave of the court the respondent filed a witness statement by Benard Ateng'a on 5th October, 2022.
7. With the leave of the court the claimant filed a supplementary list of documents on 28th October, 2022 with a copy of one listed document.
8. This cause came up for hearing on 7th March, 2022 when the claimant (CW1) testified partly. The claimant testified further on 24th October, 2022 and closed his case.
9. The defence was heard on 29th March, 2023 with Bernard Ateng'a (RW1) testifying and the respondent's case was closed.
10. Counsel for both parties were directed to address the court by way of written submissions. Miss Moenga for the claimant filed her submissions on 17th May, 2023 while Miss Obonyo for the respondent did not file any written submissions.

II. The Claimant's Case

11. The claimant's case is expressed in the memorandum of claim, the oral and documentary evidence adduced through the claimant (CW1), and the written submissions by his counsel.
12. In the memorandum of claim the claimant avers that he was engaged by the respondent as an accountant in or about August, 2009. It is pleaded that the claimant worked diligently and discharged his duties without any complaints against him and in accordance with the terms and conditions agreed by and between the parties. However, it is pleaded that on 23rd August, 2012 the claimant was dismissed allegedly without any prior notice or warning and without due process. It is further pleaded that the claimant appealed the dismissal but he was denied a hearing and his appeal dismissed.
13. It is pleaded that the dismissal was wrongful, unfair, and unlawful and the claimant prays for the reliefs stated in the introductory part of this judgment.
14. In his testimony in court, the claimant stated that he was engaged by the respondent on 1st September, 2009 as an accountant-II and issued with a contract of employment dated 3rd August, 2009. He stated that on 28th June, 2012 a burglary took place at his place of work and he was informed of the same in the early morning of 29th June, 2012. The claimant and one security officer were subsequently arrested in connection with the burglary and charged with the offence of breaking into a house and committing a felony and neglect of duty in Nakuru Chief Magistrate's Court Criminal Case No. 2199 of 2012. The claimant and his co-accused were subsequently acquitted of all the charges.



15. The claimant stated that on 29th June, 2009 he was suspended from duty vide a letter of that date and henceforth denied entry into his place of work, salary, and allowances.
16. The claimant further stated that he was issued and served with a show-cause letter on 20th July, 2012 and that he responded to the same in a letter dated 3rd August, 2012. He denied the allegations of misappropriation of funds, under-banking, and burglary. On 14th August, 2012 the claimant attended a disciplinary hearing and on 23rd August, 2012 he was issued and served with a letter of summary dismissal.
17. The claimant testified that the dismissal was wrongful, unfair, and unlawful in that he was not issued with a notice, he was denied salary and allowances for days worked up to and including 28th June, 2009, and he was not served with an audit report that allegedly established the misappropriation of funds. He stated that the charges in the show-cause letter did not gain or find support during the disciplinary hearing as he was during the disciplinary hearing accused of additional charges of absenteeism and being disrespectful. According to the claimant the entire disciplinary process was thus unfair and unlawful.
18. The claimant produced his filed documents as exhibits 1 to 5. A copy of the criminal trial proceedings was produced as exhibit 6.
19. In cross-examination, the claimant clarified that he used to carry out accounting work. He stated that an audit is carried out to detect any errors in the accounting. He stated that he attended the disciplinary hearing on 14th August, 2012 which was, as per the show-cause letter, in regard to alleged misappropriation of funds and neglect of duty.
20. It is on the basis on the foregoing evidence and circumstances that the claimant is seeking that judgment be entered in his favour as prayed in the statement of claim. The submissions by his counsel shall be considered in a succeeding part of this judgment.

III. The Respondent's Case

21. The respondent's case is contained in the statement of defence to the claim and the oral and documentary evidence adduced through RW1.
22. In the defence to the claim, the respondent admits that the claimant was their employee as pleaded in the memorandum of claim and that he was transferred to Nakuru from Nairobi in 2011.
23. It is pleaded that sometimes in July, 2012 the respondent's Nakuru office was broken into and cash stolen and the evidence pointed towards neglect of duty on the part of the claimant in the manner that he handled cash and other properties of the respondent in the account's office. It is pleaded that as a consequence the claimant was arrested and charged after an internal audit allegedly revealed massive loss of respondent's funds through under-banking of cash and loss or theft of receipt books.
24. It is pleaded that the claimant was issued with a show-cause letter in regard to the above specific charges. It is pleaded that instead of responding to the specific charges against him the claimant opted to attack the professional qualifications of the auditor. Later the claimant was invited to a disciplinary hearing on 14th August, 2012 vide a letter dated 9th August, 2012. It is alleged that during the disciplinary hearing the claimant admitted to his misconduct and apologized.
25. It is pleaded that the claimant failed to account for over Kshs2,239,843/= and that had the audit not been prompted by the burglary the claimant could have misappropriated more funds. It is submitted



that the claimant failed to follow the laid-down procedures of banking all monies received on the same date and or keeping what is not banked in the safe that was located in the branch manager's office.

26. It is pleaded that the entire disciplinary process was fair and lawful both in substance and procedure and that the respondent was justified in dismissing the claimant.
27. In his testimony in court, RW1 relied on his filed statement dated 25th August, 2022 as his evidence-in-chief. He produced the respondent's filed documents as exhibits 1 to 8.
28. He stated that on 28th July, 2012 a burglary took place in the account's office of the respondent's Nakuru office which prompted an audit. He stated that the audit report revealed and established that money which was in custody of the claimant had been lost. He stated that the audit report revealed that the money had been lost between January and June, 2012.
29. He stated that before the dismissal the claimant was given a fair hearing all the way from the suspension, show-cause letter, to the physical hearing.
30. In cross-examination, RW1 stated that the auditor who authored the audit report was subsequently terminated. He stated that he was not the branch manager at the respondent's Nakuru office during the material time and that the then branch manager had since retired.
31. He stated that the claimant had been paid his dues after he was acquitted of the criminal charges from a retirement scheme although he failed to give any details or documentation thereof.
32. He conceded that the minutes of the disciplinary hearing filed in court were not signed and did not indicate who chaired the meeting or who recorded the minutes. He further conceded that there were no charges or allegations of absenteeism, disrespectful behaviour, or use of unauthorized receipt books in the initial communication to the claimant, as per the letter of suspension, show-cause letter, and the letter inviting him for the disciplinary hearing. He admitted that those new charges only came up during the disciplinary hearing.
33. He stated that the claimant was summarily dismissed and hence no notice was issued to him. He further stated that no appeal was filed against the acquittal in the criminal case.
34. In re-examination, RW1 stated that money in custody of the claimant was lost and that the claimant failed in defending himself against the charges in the show-cause letter.
35. It is the basis on the foregoing evidence and circumstances that the respondent prays that the claimant's cause be dismissed with costs. As stated earlier on in this judgment, no written submissions were filed by the respondent's counsel.

IV. Submissions By Counsel

36. The claimant's counsel submitted on two issues – Whether the dismissal of the claimant by the respondent was wrongful, unfair, and unlawful; And, Whether the claimant is entitled to the reliefs sought.
37. On the first issue, it is submitted that the respondent had no substantive justification in taking the disciplinary action leading to the summary dismissal of the claimant. It is submitted that the suspension of the claimant from work was without contractual or legal backing and or justification. It is submitted that the genesis of the claimant's troubles with the claimant is the burglary that took place in the respondent's Nakuru office in night of 28th /29th June, 2012. It is submitted that the respondent caused the claimant to be charged with various criminal counts arising from the said burglary but the claimant was ultimately acquitted.



38. It is submitted that the allegations against the claimant in the show-cause letter were substantially different from those that he was confronted with during the disciplinary hearing. It is submitted that in the show-cause letter the claimant faced allegations of misappropriation of funds and neglect of duty but during the disciplinary hearing he faced additional charges such as absenteeism from duty, disrespectful behaviour, using unauthorized receipt books, and splitting cheques. It is submitted that the claimant was denied an opportunity to defend himself against those additional charges.
39. Counsel cited *National Cereals & Produce Board V John Kirui Tongorei (2017) eKLR* and *CMC Aviation Limited V Mohammed Nour (2015) eKLR* in support of the submission that where new charges or allegations are introduced midway or during the disciplinary hearing an employee is deemed to have been denied an opportunity to defend himself against such charges. Counsel further cited *County Assembly of Kisumu & 2 Others V Kisumu County Assembly Service Board & 6 Others (2015) eKLR* on the same issue wherein the Court of Appeal opined that cosmetic and half-hearted adherence to due process shall not suffice in a disciplinary process.
40. It is submitted that the audit carried out by the respondent did not disclose misappropriation, loss, or theft of funds by the claimant and in any event annual statements of accounts for other years were not availed to confirm or establish the alleged loss of funds. It is submitted that the audit report produced in court by the respondent was not supplied to the claimant during the disciplinary process and that denied the claimant the opportunity to defend himself.
41. It is submitted that in those circumstances the respondent failed the test provided in Section 43 of the [Employment Act](#) (The Act). The court is urged to allow the claim and award all the reliefs sought.

V. Issues for Determination

42. Upon careful examination and consideration of the pleadings filed, the oral and documentary evidence tendered from both sides, and the submissions by counsel for the claimant, the court identifies the following issues for determination -
 - a. Whether the claimant was wrongfully, unfairly, and unlawfully dismissed.
 - b. Whether the claimant is entitled to the reliefs sought.
 - c. Costs.

VI. Employment

43. The facts on employment and the terms and conditions of the employment of the claimant by the respondent are not in dispute. The claimant was engaged by the respondent as an accountant-II based in Nairobi vide a letter of appointment dated 3rd August, 2009 with effect from 1st September, 2009. As at the time of his dismissal vide a letter dated 23rd August, 2012 the claimant held the same position but was based at the Nakuru branch of the respondent. As per the payslip availed by the claimant for the month of March, 2012, the claimant's monthly gross salary was Kshs72,003/= and presumably remained the same until the time of his dismissal.

VII. Dismissal

44. The circumstances preceding and culminating in the summary dismissal of the claimant are also not in dispute. On or about the night of 28th/29th June, 2012 a burglary occurred in the offices of the respondent's Nakuru branch in the accounts office where the claimant was in-charge. Upon investigation, the police arrested and charged the claimant jointly with one Samuel Kipsang with the



offence of breaking into a building and committing a felony contrary to Section 306 of the Penal Code. In a judgment delivered on 8th September, 2017 both the accused persons were acquitted under Section 215 of the Criminal Procedure Code.

45. However, based on the suspicion by the respondent that the claimant was involved in the alleged felony, the claimant was suspended from duty vide a letter dated 29th June, 2012 without pay and ordered to keep off the workplace. The reason for the suspension was stated thus “You are hereby suspended from duty with effect from the date of this letter following the break (sic) in of our Nakuru Branch Accounts Offices, loss of Society funds in the same office allegedly not kept in the Branch safe as required by our rules and procedures and your subsequent arrest by the police on 29th June, 2019”.
46. Subsequently, the respondent carried out an internal audit and a report dated 18th July, 2012 was prepared allegedly authored by one Anthony Irungu although the copy filed in court is not signed. During the hearing of the cause in court the claimant stated that he only saw this audit report in court when the same was filed by the respondent.
47. The audit report concluded that the claimant had under-banked in the sum of Kshs2,239,843/=. It concluded that the claimant as the accountant in-charge had banked Kshs8,701,870/= out of the collected sum of Kshs10,941,713/= for the period from January to June, 2012. The report also concluded that a sum of Kshs90,000/= had been lost or stolen during the burglary. The report also indicated that receipt books had been lost and that there was mismanagement and misappropriation of funds belonging to the respondent.
48. Subsequent to the investigation and the compilation of the above audit report, the respondent issued the claimant with a show-cause letter dated 30th July, 2012 in the following terms–

Obed O. Ateka

C/O A.S.K- Nakuru Branch

478

Nakuru

Dear Obed,

Re: Show Cause Letter

Your letter/report on the break in at the Nakuru branch offices and your subsequent arrest by the police on 29th June 2012 refer.

It is noted with concern that you negligently failed to perform your duties on the material day by failing to follow the laid down society rules on custody/safekeeping of society cash receipts and withdrawals thus occasioning loss of society funds during the break-in of the Branch account office.

Secondly, an audit report conducted immediately after the incident revealed massive loss of Society funds in form of under-banking between January to 28th June 2012.

This is negligence of duty and misappropriation of society funds, gross offences punishable by summary dismissal as per Society Code of Regulations.

In view of the circumstances, you are required to show cause within 48 hours why disciplinary action should not be taken against you.

Yours Sincerely,

Batram Muthoka



Chief Executive Officer

CC: Branch Manager.

Personal file

49. In a response dated 3rd August, 2012 the claimant denied all the allegations against him. Subsequently, in a letter dated 9th August, 2012 the claimant was invited for a disciplinary hearing that was to take place on 14th August, 2012. The minutes of the disciplinary hearing signed by one Batram Muthoki were availed and produced as an exhibit by the respondent. In a letter dated 23rd August, 2012 the claimant was summarily dismissed in the following address –

23rd August, 2012

Obed Okello Ateka

C/O ASK Nakuru Branch

p.o. box 478

Nakuru

Dear Obed,

Re- Summary Dismissal

Reference is made to disciplinary hearing meeting you attended on 14th August, 2012.

This is to inform you that the disciplinary hearing committee upheld the allegations of gross negligence of duty, misappropriation of Society funds, disrespect towards superiors amongst others.

The Society has therefore decided to summarily dismiss you from service with effect from 24th August, 2012 in accordance with your terms of contract of serve, Society Code of Regulations and [Employment Act](#).

You are required to hand over any Society asset in your possession to the Branch Manager – Nakuru Branch immediately.

Yours Sincerely,

Batram Muthoka

Chief Executive Officer

CC: Chief Accountant

Branch Manager

Ag. Human Resources Manager

Personal file

50. It is against the foregoing background that the court has to weigh the evidence and the circumstances of this cause and determine whether the dismissal was wrongful, unfair, and unlawful as pleaded and advanced by the claimant or whether the same was fair and lawful as propounded by the respondent.
51. The jurisprudence on substantive and procedural fairness that an employer shall comply with before terminating or dismissing an employee is now somehow settled through a multitude of decisions from this court (ELRC) – For example See *Mary Chemweno V Kenya Pipeline Company Limited* (2017)



eKLR, *Loice Otieno V Kenya Commercial Bank Limited* (2013) eKLR, and *Walter Ogal Anuro V Teachers Service Commission* (2012) eKLR.

52. The above decisions find backing in Sections 41, 43, 44, 45, & 47 of the Act, Section 4 of the Fair Administrative Actions Act, Articles 22, 23, 27, 41, & 50 of *the Constitution*, and the general rules and principles of natural justice as enshrined in the above cited law and various international instruments.
53. In terms of substantive justification, the court finds and holds that in view of the alleged burglary, the loss, theft, and or misappropriation of its funds which were in custody of the claimant, coupled with the arrest and arraignment of the claimant with criminal charges of breaking into the premises and committing a felony, the respondent had reasonable and justified grounds upon which to found and commence the disciplinary process as it did. Section 43 of the Act provides as follows –
- Proof of reason for termination
- 43.(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
- (2) 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.
54. Based on the evidence availed in court, I find and hold that the respondent genuinely and reasonably believed that the claimant was guilty of gross misconduct and hence initiated the disciplinary process.
55. However, the court finds the procedure adopted by the respondent lacking in germane material aspects. In the show-cause letter, the claimant was accused of neglect of duty and misappropriation of funds belonging to the respondent. While those allegations were in consonance with those raised in the letter of suspension, the letter inviting the claimant to disciplinary hearing alleged “poor performance of duty” which, in legal and human resources management terms, is very different from neglect of duty and or misappropriation of funds.
56. The court has also looked into the minutes of the disciplinary hearing and established that during the hearing the claimant was accused of other additional charges beyond what was stated in the letter of suspension and the show-cause letter and the letter of invitation to the disciplinary hearing. The said minutes confirm that during the disciplinary hearing the claimant was accused of absenteeism from duty, disrespectful behaviour, use of unauthorized receipt book(s), and splitting cheques. Those were charges beyond the neglect of duty and misappropriation of funds that informed the original charges as per the letter of suspension and the show-cause letter.
57. It is the finding and holding of the court that the claimant was denied an opportunity to defend himself against the additional charges which is against the law and principles of fair hearing and due process as enumerated in the foregoing paragraphs of this part of the judgment.
58. Further, the claimant stated and insisted that he was not served with a copy of the audit report that formed the basis of the disciplinary action against him. No explanation or rebuttal was forthcoming from the respondent as to why the claimant was not served with the audit report to enable him to effectively defend himself.
59. It is the evidence on record that the claimant was acquitted of the criminal charges against him in regard to the burglary which acquittal extinguished any allegations of his involvement in the felony of breaking into the premises. While as at the time of his acquittal on 8th September, 2017 this cause was



pending in court, this cause was not heard until 7th March, 2022. Yet, the respondent took no action to remedy and resolve the issue by either reinstating the claimant or agreeing on a settlement of some sort.

60. The court has said enough in demonstrating that the summary dismissal of the claimant by the respondent was wrongful, unfair, and unjust mainly for lack of procedural fairness. The acquittal of the claimant in the criminal charges offered the respondent an opportunity to re-evaluate the matter yet no action was taken from that end. The court also notes that the audit report filed in court, which the respondent failed to serve upon the claimant before or during the disciplinary hearing, is not signed and the maker thereof was not called as a witness and as such the same has no probative value.

VIII. Reliefs

61. Having found and held that the dismissal of the claimant was wrongful, unfair, and unlawful, the court shall proceed to assess each of the reliefs sought as follows.
62. Prayer (a) is for three months salary in lieu of notice. The letter of appointment dated 3rd August, 2009 provided for three months' notice prior to termination or dismissal. As noted elsewhere in this judgment, the last monthly gross salary of the claimant was Kshs72,003/=. Three months' gross salary in lieu of notice comes to Kshs216,009/= and this is the amount awarded under this head.
63. Prayer (b) is for the salary for the month of June, 2012 for which the claimant worked until 29th when he was suspended as alluded to elsewhere in this judgment. No evidence was availed by the respondent in rebuttal to prove that the claimant was paid for that month and the same is awarded as prayed in the sum of Kshs72,003/=.
64. Prayer (c) is for unspecified and unquantified "benefits". The submissions by counsel did not help as no quantification was done. In any event, the claimant also claims service pay as hereunder which counsel appear to equate to the so claimed benefits. This item is denied for ambiguity and lack of specification and quantification.
65. Prayer (d) is for service pay for the three years worked. While the letter of appointment stated that the claimant was entitled to a superannuation as a member of the respondent's retirement scheme, the payslip availed in court does not indicate that any deductions were made for such a scheme. There is no evidence availed by the respondent that it operated such a retirement scheme and that the claimant was paid any retirement benefits from such a scheme upon dismissal. This entitles the claimant to service pay in lieu of thereof. In *James Chege & 6 Others V Aqua Plumbing Company Limited* (2013) eKLR the court proposed a formula for calculating service pay and the court hereby applies the same as $Kshs72,003/26 \times 15 \times 3 = Kshs124,605/=$. This is the amount awarded under this head.
66. Prayer (e) is for damages for unlawful termination. The claimed damages have neither been pleaded nor quantified nor proved. The submissions by counsel did not shed light on what this prayer was about. It is not enough for a party to lay a claim before the court and expect that the court shall automatically grant the same. The fundamental rule of evidence, that he who alleges must prove, applies unless the law shifts the burden to the other party. Whatever damage the claimant intended to claim, the court holds that the same was neither properly and specifically pleaded nor proved.
67. Prayer (f) is for a declaration that the dismissal was unfair and unlawful. The court has already found and held that the dismissal was wrongful, unfair, and unlawful and a declaration shall issue to that effect.
68. Prayer (g) is for alleged leave allowance not paid. Again, no specifics were given and no evidence was given in support of that claim. To which period does the leave relate? What is the amount claimed?



Those questions find no answer in the case as presented by the claimant and as such the same is hereby denied.

69. Prayer (h) is for a letter (sic) of service. The law does not recognize such a letter and the only assumption that the court can take is that this meant a certificate of service under Section 51 of the Act which is a right to an employee. The court shall order that the respondent issues and delivers a certificate of service to the claimant forthwith.
70. In prayer (k) the claimant is seeking for “any other relief that the Honourable Court may deem fit to grant”. Section 49 of the Act provides for compensation as opposed to damages. Having found and held that the dismissal was wrongful, unfair, and unlawful the court invokes its inherent powers under Section 12(3)(viii) of the *Employment and Labour Relations Court Act* and awards the claimant compensation equivalent to six month’s gross salary in the sum of Kshs432,018/=. The evidence on record does not disclose whether the claimant located another job after the dismissal and how long it took to do so. The respondent is a public body and there is no proved malice or caprice or ill-will on its part. Nonetheless, the dismissal was wrongful, unfair, and unlawful for lack of procedural propriety.

IX. Costs

71. The claimant is awarded costs of the cause and interest on the amounts awarded as asked for in prayers (i) and (j).

X. Disposal

In the disposal of the cause the court issues the following orders:

- a. A declaration be and is hereby issued that the summary dismissal of the claimant was wrongful, unfair, and unlawful.
- b. The claimant is awarded a total of Kshs844,635/= as follows:
- i. Three months’ salary
in lieu of notice.....Kshs216,009/=
 - ii. Salary for June, 2012.....Kshs72,003/=
 - iii. Service pay.....Kshs124,605/=
 - iv. Compensation.....Kshs432,018/=
- Total.....Kshs844,635/=
- The award is subject to statutory deductions.
- c. The respondent shall issue and deliver a certificate of service to the claimant within 30 days of this judgment
- d. Costs of the cause to the claimant.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 26TH DAY OF SEPTEMBER, 2024.

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DAVID NDERITU

JUDGE

