



**Mutuku v AAR Insurance (Kenya) Limited (Cause 114 of 2019)
[2024] KEELRC 2387 (KLR) (27 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2387 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 114 OF 2019
NJ ABUODHA, J
SEPTEMBER 27, 2024**

BETWEEN

PATRICK MULEI MUTUKU CLAIMANT

AND

AAR INSURANCE (KENYA) LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed his statement of claim dated 21st February, 2019 and pleaded inter alia as follows: -
 - a. At all material times the Claimant was an employee of the Respondent engaged as a Management Accountant until his employment was terminated vide a letter dated 21st June, 2018.
 - b. The Claimant averred that his dismissal by the Respondent was unfair, unlawful and in breach of the express provisions of the *Employment Act*.
 - c. The Claimant claimed damages for unfair termination of his employment to the tune of consolidated monthly pay of Kshs 292,245.41 for 12 months amounting to Kshs 3,506,945/=
2. The Claimant in the upshot prayed for the following against the Respondent;
 - a. A declaration that the Respondent's termination of the Claimants' employment was unfair and unlawful.
 - b. Damages for wrongful termination equivalent to 12 months' salary -Kshs 3,506,945/=
 - c. Costs and interests of the suit.
3. The Respondent filed its statement of Response dated 26th March, 2019 and they averred inter alia that;



- i. The Respondent denied the contents of the claim and averred that the Claimant's termination was not unlawful as claimed. That it never acted illegally and unfairly in terminating the Claimant from employment and further that due process was followed.
- ii. The Respondent averred that the Claimant's employment was terminated on account of gross misconduct. That the Claimant's conduct at the 2nd Disciplinary hearing which was negative, uncalled for and insubordination towards the disciplinary committee. That the Claimant blatantly disobeyed and disrespected members of the committee who were conducting their authorized duties.
- iii. The Respondent averred that the Claimant's conduct demonstrated that he behaved in a manner disrespectful to a committee placed in authority over him and further refused and failed to obey a lawful and proper command to allow the said committee conduct its work.
- iv. The Respondent averred that the Claimant's dismissal was premised on the grounds that he had shown disrespectful conduct towards the Disciplinary committee which amounts to gross misconduct and was justifiable and/or lawful ground of summary dismissal under section 44(d) of the Employment Act.
- v. The Respondent further averred that other grounds that gave rise to the termination included missing approvals/authorization and supporting documents on journals posted in the books of accounts for the period ending December 2017 and unreliable reconciliations conducted on General Ledger Accounts after being subjected to due process in line with the Respondent's code of Regulations, the Labour Relations Law and the Employment Act.
- vi. The Respondent averred that the Claimant was accorded fair labour relations within the meaning of Employment Act by being given a show cause letter and was given adequate opportunity to be heard as he appeared before two disciplinary committees one on the 10th April, 2018 and other on the 21st June 2018 whereupon it was decided that his services be terminated hence the allegations made in the claim were afterthought, farfetched, vague and devoid of proper particulars.
- vii. The Respondent further averred that the Claim was bad in law and fatally defective and that the Claimant was not entitled to any of the reliefs sought in the claim.

Evidence

4. The Claimant's case was heard on 19th October, 2023 where the Claimant CW 1 herein testified and he adopted his witness statement and documents filed herein as his evidence in chief. CW 1 further testified that he was not in charge of preparing trial balance and that the financial Accountant was responsible for that and needed input from other members of the team.
5. In cross examination CW1 confirmed that he was the management accountant and he signed a job description which set out his duties. That his key roles were among others branch reporting and management reports. He was supposed to report to his supervisor, the GM Finance.
6. CW1 confirmed that he used to prepare quarterly reports which used to be submitted on 10th of every month. CW1 further stated that in 2017 the Respondent recorded a loss of 394 Million and that he needed to have a trial balance to prepare his reports. According to him, he was the one to build up the project and logs based on trial balance which was key. He stated that the Financial Accountant would look at the trial balance first because he had the general ledger and he would oversee it and forward it to him. That the accountants were to ensure that what was in the trial balance was authenticated.



7. CW1 further stated that he was issued with a show cause letter which set out the accusations against him. That his job description was not to deal with general ledger and trial balance but financial reporting. He did not just key in, he did his own verification and where there was an error he would raise a flag and escalate the same.
8. CW 1 confirmed that he was invited for disciplinary hearing and refused to sign the minutes as it did not reflect what was discussed. He was thereafter issued with 1st Warning letter on professional misconduct and he responded to the same.
9. CW1 confirmed having been informed of the external Forensic Audit and further that he was suspended for 14 days during the forensic audit. He was given a draft forensic report and thereafter called for another hearing. It was his evidence that he requested for more time to go through the report which was accepted by the respondent and the meeting rescheduled to 21st May, 2018. It was in the third meeting where he indicated at the hearing that he would reserve his comments until he saw the final report. He was required to answer to professional negligence and he was given more than 2 days he asked for. CW1 confirmed that he was supposed to safeguard the Respondent's assets and to carry out the needed financial reporting. That the letter dated 19th June, 2018 was to question him on his job description. That the letter was about missing approvals, missing authorization and unreliable reconciliation.
10. CW1 stated that he never called any witness during the disciplinary hearing and that the accusations in the letter of invitation were not within his job description. He was next in charge after the GM Finance yet not the same level as the Financial Accountant.
11. CW1 confirmed that he refused to sign the minutes because the audit report had gaps that needed to be finalized before he signed. That he never said he was recording the disciplinary hearing to take to his advocate for legal action. CW1 confirmed that he was paid his terminal dues upon exit from employment.
12. In re-examination CW1 clarified that the 2nd meeting took place on 21st May, 2018 and the meeting discussed about final forensic audit report. He stated that he cooperated with the auditors and signed off the report. CW1 clarified that he did not see the executive summary of the forensic audit and the was entitled to the forensic report before the 3rd meeting. It was agreed at the 2nd meeting.
13. The Respondents case was heard on 6th December, 2023 where three witnesses testified.
14. The first witness was the Group head of HR of the Respondent RW1 herein. RW1 adopted his statement and the Respondent documents filed as his evidence in chief and in cross examination RW1 confirmed that the Job description was comprehensive enough and the Claimant had necessary educational professional skills. That the Claimant as per the Job Description reported to Chief Accountant.
15. RW1 confirmed that prior to the show cause letter the Claimant had a clean record. That the Claimant reported to GM Finance because there was no chief accountant then as he was seconded to Tanzania. RW1 confirmed that prior to the secondment the Claimant used to report to the Chief Accountant. That the Claimant received show cause letter on 23rd March, 2018 which referred to 2017 financial year.
16. RW1 confirmed that the Claimant responded to the show cause letter and thereafter he was invited for disciplinary hearing where minutes were taken recommending his immediate suspension. RW1 further stated that 2017 supervisors did not attend and testify and that the Claimant was thereafter issued with a warning letter and he responded to the same. RW1 could not confirm if the Claimant breached code of conduct but the management took exception to use of extreme language.



17. RW1 confirmed that the Claimant was within his right to respond the way he did and that the Claimant was never redeployed to another department. RW1 stated that the Claimant was suspended to allow conduct of external forensic audit to ascertain the extent of the misinformation in the management accounts. The Claimant was given a report and invited for another disciplinary hearing. RW1 confirmed that the Claimant had been supplied with the forensic report which had recommendations. He further stated that the letter of invitation did not refer to any charge and the forensic auditors had concluded their investigations.
18. RW1 confirmed that the draft report was a final document. That the second meeting scheduled for 21st May ,2018 did not take place because the Claimant said he had a meeting with Auditors and that another invitation was sent on 19th June,2018 where the meeting was scheduled for 21st June,2018.
19. RW1 confirmed that the Factual report was a summary of audit conducted by Auditors dated 2nd May,2018 and that there were earlier reasons which were given to the Claimant. The contents were the same as the earlier reasons save for the date he further stated that the Claimant had two unsupported transactions. He stated that the claimant was not the only one taken through the disciplinary process and that the recommendations did not solely blame the Claimant.
20. In re-examination RW1 clarified that the Respondent had issue with Claimant's extreme tone in response. That the other issues were communicated in the disciplinary notice and that the Claimants' supervisor like the GM Finance resigned over the same issue.
21. The second Respondent's witness was the Respondent's Finance Manager who relied on his statement as his evidence in chief and in cross examination confirmed that in the factual report the Financial Accountant was in charge of accounts payable, general ledger and accountants reported to him. RW informed the court that the Claimant's job description included preparation of trial balance which was given at point of employment. That on the factual report management accounts were part of trial balance as the management accounts were internal and did not require to be published. RW 2 stated that the trial balance was evidence of charges against the Claimant which was a case of misreporting and that management account consisted of income statements and a balance sheet and the starting point was the trial balance.
22. The third witness RW3 was the Respondent's GM Finance herein who testified and adopted his statement filed in court as his evidence in chief. In cross examination RW3 stated that he attended the 1st disciplinary hearing on 10th April,2018 and that he did not sign the minutes and did not directly supervise the Claimant. That in 2017 his role was to consolidate group accounts. RW3 confirmed that financial accounts were approved by management of AAR Kenya.

Claimant's Submissions

23. The Claimant filed his written submissions dated 18th March,2024 and submitted on the issue of whether he received a fair hearing during the entire disciplinary process. He relied on sections 41, 43 and 45 of the [Employment Act](#) to submit that fair hearing was not adhered to. It was the Claimant's submissions that him alone could not have occasioned the Respondent loss since he was reporting either to the GM Finance or Chief Accountant where if there were any changes they would be made at management level. The Claimant further submitted that the GM Finance who was in charge in 2017 was no longer in the employ of the Respondent and no reason was advanced why she was not called to testify since the Claimant had escalated his concerns to her. The chief Accountant or the GM Finance who he was reporting to were not called to give evidence.



24. The Claimant submitted that the letter the Respondent alleged had extremist tone was his reply to the first warning letter which set out what the Claimant believed to be the truth. The Respondent's witness confirmed that he did not breach any conduct as he was entitled to respond to the allegations as he did.
25. The Claimant submitted that the Respondent while inviting him for another disciplinary hearing just stated that he was adversely mentioned in the forensic report without laying down the charges against him as per the Forensic report so that he would prepare for his defence. That the Claimant raised the issue of lack of charges as well as the Forensic Report being a draft one not final. That the Claimant was left wondering between the draft report dated 11th May,2018 and the Factual report dated 2nd August ,2018 which one was final report prepared by the forensic auditors.
26. The Claimant submitted that the 11th May, 2018 draft report could not be a final document since consultations were still ongoing as at 17/18,May 2018 and further that the final document could only be the one dated 8th August,2018 after his input together with that of other staff.
27. The Claimant submitted that when invited for another meeting of 21st June,2018 he raised the issue of never receiving the final report. That the Respondent could not wait for the final report as it had decided to terminate him. That the invitation letter raised fresh charges against him and he did not know how to defend himself against the charges without the final report.
28. The Claimant submitted that as much as the 2nd August,2018 report made recommendations where he was among those with unsupported transactions, it was confirmed during hearing that it was only the Claimant who was dismissed from service. That the Respondent's witnesses confirmed that the Report did not point a finger to Claimant as the responsible person.
29. It was the Claimant's submissions that the Respondent had weak policies and procedures in the entire finance department and chose to sacrifice the Claimant for standing his ground when charged with professional misconduct.
30. While concluding the Claimant submitted that the entire process leading to his dismissal was unprocedural and amounted to unfair termination. The Claimant placed reliance on the cases of Renson Makheta Wanyonyi v Industrial Estates Limited (2018) eKLR and Peter Kamau Mwaura & Another v National Bank of Kenya Limited (2017) eKLR.

RESPONDENT'S SUBMISSIONS

31. The Respondent through its written submissions, submitted that it had valid and fair grounds to terminate the Claimant as per Section 43 of the *Employment Act*. It was the Respondent's contention that the Claimant was terminated on account of gross misconduct and on account of missing approvals/authorization and supporting documents on journals posted in the books of accounts for the period ending December,2017 and unreliable reconciliation found in the general ledger accounts.
32. The Respondent further submitted that in the letter of 14th April,2018 by the Claimant, he used extremist tone which would be classified as behaving in a manner that insulted the employer as per Section 44(4)(d) of the *Employment Act* hence a ground for dismissal. The Respondent further submitted that the Claimant was rude/defiant unresponsive to issues touching his professional conduct and refused to sign minutes of the 21st June,2018 meeting. Being rude was also a misconduct under the above provision leading to dismissal. The Claimant was careless and performed improperly his duties hence a ground for dismissal.
33. The Respondent submitted that the Claimant was supplied with his Job Description updated on 6th January,2014 which gave his roles. That RW2 confirmed that the Claimant had a role of preparing trial



balance and auditors identified. nine Trial Balances which were irregular and had been passed by the Claimant, indicating malpractice.

34. The Respondent further submitted that the Claimant noticed unsubstantiated assets meant to be written off but he failed to write off contributing to loss of 461 Million by the Respondent. That the Claimant ought to have picked up the unsubstantiated assets in the balance sheets during his monthly review which he failed to do hence careless and improper performance of duty which amounted to dismissal as per section 44(40(c) of the Employment Act.
35. The Respondent submitted that the Claimant was afforded fair labour treatment when it came to procedure adopted by the Respondent. That this was done when he was given show cause letters, opportunity to be heard when and he appeared before two disciplinary committee hearings and it was decided that his services would be terminated. The Respondent further submitted that the Claimant admitted to the charges in the show cause letter in his response.
36. On the issue of whether the Claimant was entitled to the reliefs sought the Respondent submitted that the Claimant was paid Kshs 555,800/94 less deduction which amounted to Kshs. 384,830.52/= which he admitted receiving including one month salary in lieu of notice, days worked, leave days and certificate of service.

Determination

37. The court has reviewed and considered the pleadings by both parties and testimony by witnesses and I have has come up with two main issues;
 - a. Aa. aa. Whether the Claimant's termination of employment was unfair and unlawful
 - b. Whether the Claimant is entitled to the reliefs sought.

Whether the Claimant's termination of employment was unfair and unlawful

38. In this instant case, the Respondent alleged that they terminated the Claimant on account of gross misconduct and on account of missing approvals/authorization and supporting documents on journals posted in the books of account for the period ending December,2017 and unreliable reconciliation conducted in the general ledger accounts.
39. It is not in dispute that the Claimant was qualified for the work he was employed for. The Claimant alleged that it was not his role to prepare trial balances and that he was reporting either to the GM Finance or Chief Accountant. He raised his concerns to the GM Finance over the issues of 2017 which started long in 2016 but no action was taken
40. This court notes that the Claimant's Job description dated 8th January,2014 gave among other roles the role of management of fund accounts/Administration fees and preparation of Trial Balance though not mentioned the Respondent's witnesses confirmed that it was part of management of accounts which was an internal process.
41. The Court also notes that the Claimant reported to the Chief Accountant and in this case it was evident that the Claimant was reporting to GM Finance after the Chief Accountant was seconded to Tanzania. The GM Finance during hearing denied supervising the Claimant directly and did not link the Claimant with the loss and neither did the Respondent's second witness link the Claimant.
42. The court notes that the Factual report of 2nd August,2018 did not put the whole blame on the Claimant rather to the weak policies in the Finance department. It appeared from the Claimant's



- responses that he knew what was troubling the Respondent company when they reported profits yet the Respondent Company was making losses.
43. The court to this end notes that the Respondent in the end incurred huge losses although not solely attributed to the Claimant he was however part of senior management of the Respondent. The Claimant during hearing admitted that he used to do verification and where there was a gap he would raise an alarm. He stated that he raised the alarm to the former GM Finance but they all succumbed to pressure to report profits instead of losses.
44. This therefore meant that the Claimant offended the provisions of Section 44 (4) (c) of the Employment Act, by not performing his duties professionally and carefully resulting in to losses. The Claimant was supposed to update the Respondent on monthly basis of its financial position and ought to have raised the issues herein and escalated them properly to the management. It was also clear that it was not only the Claimant against whom disciplinary actions was taken. That the former GM Finance had to resign due to the same issues. It was therefore clear that the reason for the termination was a valid and fair one as provided for under section 43 of the Employment Act.
45. The courts has always maintained that there must be a valid and fair reason before termination. In *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR the court held as follows: -
- Invariably therefore, before an employer can exercise their right to terminate the contract of an employee, there must be valid reason or reasons that touch on grounds of misconduct, poor performance or physical incapacity.
46. In conclusion, the Court finds that the termination of Claimant's employment was substantially justified with a valid and fair reason for dismissal/termination.
47. Regarding procedural fairness courts have repeatedly emphasized on both substantial and procedural fairness in a number of cases including in the case of *Janet Nyandiko versus Kenya Commercial Bank Limited* (2017) eKLR that for termination to pass the fairness test, it must be shown that there was not only substantive test for termination but also procedural test.
48. Further Section 41 is the governing law on notification and hearing before termination on grounds of misconduct which provides that the employe be explained the reason for termination in language he/she understands and consider the representations by such an employee who should have an employee of his/her choice.
49. This was stated by the Court in *Kenya Union Of Commercial Food And Allied Workers v Meru North Farmers Sacco Limited* [2014] eKLR that: -
- Section 41 of the Employment Act is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative.
50. The Respondent gave the Claimant show cause letters, first warning letter and he attended two disciplinary hearings. The conduct of the Claimant was said to be wanting and he insisted that he be supplied with the final Forensic report. The Respondent's witnesses confirmed that the draft report and the Factual report had the same content apart from the date. That the factual report was a summary of the Auditor's report. The Draft report had sufficient grounds upon which the Claimant could have defended himself but he chose not to respond to the questions asked. The Court further notes that



the Claimant was given enough time he asked for to go through the Forensic report before the second hearing.

51. The invitations to the disciplinary hearing were elaborate and the Claimant was informed of his right to attend with a fellow employee but he chose not to. The Claimant went ahead and displayed arrogance by recording the disciplinary proceedings without the approval of the Respondent. This conduct to the court was gross to warrant summary dismissal of the Claimant. The Claimant refused to sign for the disciplinary minutes when it was clearly stated that parties had to sign the minutes.
52. The Claimant cannot claim he was not given fair hearing when the Respondent accommodated him whenever he requested for more time to go through the Forensic report and time to prepare.
53. In conclusion the Court finds and holds that there were valid reasons for terminating the claimant's service and that the termination was carried out through a fair procedure. The Claim is therefore found without merit and is hereby dismissed with costs.
54. It is so ordered

DATED AT NAIROBI THIS 27TH DAY OF SEPTEMBER, 2024

DELIVERED VIRTUALLY THIS 27TH DAY OF SEPTEMBER, 2024

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION

