



**Kenya Union of Commercial Food and Allied Workers v Kenya Credit Traders Limited  
(Cause E033 of 2022) [2024] KEELRC 2525 (KLR) (18 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2525 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
CAUSE E033 OF 2022  
ON MAKAU, J  
OCTOBER 18, 2024**

**BETWEEN**

**KENYA UNION OF COMMERCIAL FOOD AND ALLIED  
WORKERS ..... CLAIMANT**

**AND**

**KENYA CREDIT TRADERS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant is a registered trade union and brings this suit on behalf of its member, Mr. Josephat Njege Njiri (herein after called the grievant). The grievant was employed by the respondent as a Shop Assistant on 5<sup>th</sup> August 2014 and served in various branches until 28<sup>th</sup> April 2021 when his services were terminated for gross misconduct. As at the time he was based in Kitui Branch and his monthly salary was Kshs.16,910 plus house allowance Kshs.2,550.
2. The grievant was aggrieved by the termination and the claimant lodged a trade dispute at the Labour office. The conciliator recommended for reinstatement of the grievant or payment of compensation of five months' salary plus terminal dues. However, the employer declined the recommendation and hence the present suit by which the respondent stands accused of unfair and unlawful termination of the grievant's employment. By a memorandum of claim dated 15<sup>th</sup> June 2022, the claimant seeks the following prayers:
  - i. That the grievant to be reinstated back to his position without loss of benefits.
  - ii. That the grievant to be paid all the salaries he could have earned since this unlawful termination to date.

In the alternative and where the reinstatement will not be tenable the grievant to be paid the following as his terminal benefits.



- i. One-month Notice =19,460.00
  - ii. Accrued Annual Leave for 2021 =17,373.80
  - iii. Unpaid salary for April 2021 =19,640.00
  - iv. Maximum compensation for unlawful termination=19,460 x 12 months =235,680.00  
Total Claim =292,333.80
  - v. Any other or further relief that the court deems fit and just to grant in the circumstance meet justice.
  - vi. Cost of the suit in favour of the claimant.
3. The respondent has denied the alleged unlawful termination and averred that the grievant and his fellow workers while stationed at Kiambu branch, they created a fake Hire Purchase account which led to loss of a Washing Machine. It further averred that the said offence amounted to gross misconduct and the grievant was accorded a chance to defend himself before the dismissal. Therefore, it prayed for the suit to be dismissed with costs.
  4. The claimant filed a reply to the defence reiterating that the grievant did not commit the alleged offence and that he was never accorded a fair hearing before the termination.

### **Evidence**

5. The grievant testified as CW1. He adopted his written statement dated 15<sup>th</sup> June 2022 and a bundle of 16 documents as his evidence. He stated that he was dismissed on 28<sup>th</sup> April 2021 on allegation that he had created a fake account for a hire purchase of a washing machine. He denied the alleged offence. He was not accorded any hearing before dismissal. He had worked for six years and eight months but he was not paid his terminal dues.
6. He testified that the matter went to the Ministry of Labour for conciliation and the conciliator recommended for his reinstatement or payment of five months' salary as compensation for unfair termination plus his terminal dues. Nothing was paid and hence the instant suit. Finally, he prayed for the reliefs sought in the suit.
7. On cross examination, he admitted that he was stationed at Kiambu branch in December 2020 as Shop Assistant. His duty was to assist customers in the front office. He denied having opened any account for Jackson Muchemi Nginyo but he admitted that he signed a contract for Repossession for him (Doc.1 for the Respondent). He also admitted that he signed the Cash Sale Receipt for the same transaction (document 5 of the Respondent).
8. He testified that there was a manager and three staff members in the shop. He explained the procedure of opening a Hire Purchase Account as including: -
  - a. Fill Hire Purchase Form and agreement.
  - b. Take passport photo of the customer.
  - c. Receive deposit.
  - d. Signing of a Contract of Repossession Form.
  - e. Witnessing by staff.



9. He alleged that he never saw the customer in this case because he was away for official duties and when he returned to the shop the Manager gave him forms to witness. He contended that it was normal to do so because the machine was outside. He also signed the Cash Sale Receipt without seeing the customer paying because there was a temporary cash sale receipt shown by the manager.
10. He contended that he saw the guarantor Mr. Stanley Ndung'u who was a former customer and he knew him before. However, he admitted that he never saw the guarantor signing the guarantee (Doc.2 of the respondent). He denied knowledge that Stanley denied that he signed the guarantee.
11. He admitted that he attended a meeting on 28<sup>th</sup> April 2021 with Mr. Simon Gitau (Operations Manager), Edin Wanjiku (HR Manager) and Gladys Tuwei (Sales) but clarified that he was not informed the reason until when the meeting started and he was shown the documents filed herein by the respondent.
12. He stated that during the meeting he denied knowledge of the customer, Mr. Jackson Muchemi. He reiterated that he knew Stanley because he had bought a TV from the shop earlier. He denied that he was summoned by the police about the said incidence.
13. In re-examination, he clarified that he counter signed the receipts to confirm that the money was paid as required by the company procedures. He contended that his colleague Mr. Mwangi filled the Books and Receipts and reiterated that a temporary receipt had been issued before the official one.
14. Mr. Simon Ngige Gitau, respondent's Operations Manager, testified as RW1. He adopted his written statement dated 19<sup>th</sup> October 2023 as his evidence. He also produced 11 documents as exhibits to support his testimony. He then stated that the grievant was employee of the respondent stationed in Kiambu and together with others created a fake account purporting to have sold a washing machine.
15. He testified that after transfer of the grievant and his colleagues to other branches, the staff who replaced them discovered that the account was not receiving monthly repayments. When they called the hirer to pay, a different person received the calls. They then visited the hirer at his workplace at the Farmers Choice, but found that there was no such a person. As a result, they pursued the guarantor who denied the alleged guarantee and wrote a letter denying liability.
16. When the alleged hirer was traced at his home in Kinangop, he denied the alleged transaction and therefore the said account was confirmed to be fake. The two employees including the grievant were suspended and thereafter called for a hearing. The offence of creating a fake account was confirmed and they were dismissed.
17. He stated that a contract of Repossession is only signed when the hirer is present and the claimant signed it on 15<sup>th</sup> December 2020. He contended that Cash Sale Receipt (Doc 5) is normally given when the customer is finalizing a sale and it is signed by the staff who issued the receipt. In this case, the grievant signed and issued the receipt on 15<sup>th</sup> December 2020. He further issued another receipt on 23<sup>rd</sup> January 2021 for the first instalment.
18. He contended that the grievant admitted that he signed the receipts without seeing the customer. He maintained that the grievant was supposed to sign in the presence of the customer. He contended that he was involved in the investigations and the disciplinary hearing which culminated in the dismissal of the grievant.
19. He contended that the grievant was paid his dues totaling to Kshs.21,546.30 but he declined. The said amount was made up of leave, leave travelling allowance and salary for April 2021. A cheque was written after the hearing on 28<sup>th</sup> April 2021 but he declined and the matter went for conciliation at



the Labor office and computation of his dues was done at Kshs.33,917.30. Again, the grievant refused the cheque but his colleague collected his cheque. He stated that the matter was reported to the police but no arrest was made.

20. On cross examination, he reiterated that the fake account was created on 15<sup>th</sup> December 2020 but it took long to discover because the staff in the branch was involved including the Branch Manager and the grievant. He reiterated that the cash sale receipt (Doc.5) is issued when the customer is finalizing the transaction in order for him to collect the item.
21. He further admitted that the grievant never signed anywhere admitting the offence. He further admitted that he has not produced the minutes of the disciplinary hearing.
22. On being shown the conciliation proceedings, he admitted that the conciliator never computed grievant's dues at Kshs.33,917.30 and confirmed that the recommendation was for five (5) months' salary compensation for unfair termination. He admitted that the respondent declined the conciliator's recommendation and computed what it deemed was due to the grievant. He contended that the dues payable was Kshs.46,022.60 less recoveries leaving a net of Kshs.33,917.30.
23. Finally, he stated that the grievant was invited to the disciplinary hearing accompanied by a fellow employee but he attended alone.

### **Submissions**

24. The claimant submitted that the dismissal of the grievant was unfair and unlawful because the procedure provided under section 41 of the *Employment Act* was not followed. He was not accorded a fair hearing and he was not accompanied by his union or fellow employee. Further that no valid reason has been proved as required under section 43 of the *Employment Act*, 2007. Consequently, the reliefs sought are merited.
25. On the other hand, it was submitted that the grievant was lawfully dismissed for his involvement in the offence of fraud against the employer. He admitted that he signed important documents for opening a fake Hire purchase account. It was submitted that section 44 (4) (g) of the *Employment Act* entitles an employer to dismiss an employee if the employee commits or is suspected to have committed a criminal offence against the employer or his employer's property.
26. It was further submitted that the grievant was accorded hearing before dismissal where he was allowed to be accompanied by another employee or union official but he attended alone. Consequently, it was argued that the procedure under section 41 of the *Employment Act*, 2007 was followed. For emphasis, reliance was placed on *Postal Corporation of Kenya v Andrew K.Tanui (2019) eKLR* and *Thomas Sila Nzivo v Bamburi Cement Limited (2014) eKLR*.

### **Issues for determination**

27. I have considered the pleadings, evidence and submissions. It is a fact that the grievant was employed by the respondent as a Shop Assistant until 28<sup>th</sup> April 2021 when he was dismissed for gross misconduct. The issues for determination therefore are:
  - a. Whether dismissal was unfair and unlawful.
  - b. Whether the reliefs sought are merited.



## Unfair termination

28. Section 45 (1) & (2) of the [Employment Act, 2007](#) provides as follows:

- “(1) No employer shall terminate the employment of an employee unfairly.
- (2) A termination of employment by an employer is unfair if the employer fails to prove:
- (a) that the reason for the termination is valid;
  - (b) that the reason for the termination is a fair reason-
    - i. related to the employee’s conduct, capacity or compatibility; or
    - ii. based on the operational requirements of the employer; and
  - (c) that the employment was terminated in accordance with fair procedure.”

## Reasons for termination

29. The termination letter dated 28<sup>th</sup> April 2021 cited the reason for the termination as “creating a fake Hire Purchase (HP) account for a Washing Machine” which amounts to gross misconduct. The burden of proving the said reason lies with the employer by dint of section 43 of the [Employment Act, 2007](#) provides that: -

- “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.”

30. RW1 was involved in the investigation and he discovered that the account opened on 15<sup>th</sup> December 2020 for a washing machine, where the grievant was involved, was fake. He produced documents showing that the grievant was involved in the opening of the fake account together with other staff members in the Branch. The grievant signed a cash sale receipt and witnessed contract of Repossession for the customer.

31. The grievant admitted that he wrote the cash sale receipt and witnessed the Contract of Repossession without seeing the customer. The company procedure is that he should sign the said contract in the presence of the customer. He breached the said procedure and that led to the employer losing the washing machine. He knew how to do his job but he acted either negligently or deliberately in cahoots with his fellow employees with intention to defraud the employer. Consequently, I find and hold that the employer has proved on a balance of probability that the grievant grossly misconducted himself in his role as a Shop Assistant which amounts to a valid and fair reason for summary dismissal under section 44 (4) (c) and (g) of the [Employment Act, 2007](#).



32. I gather support from *Thomas Sila Nzivo v Bamburi Cement Limited* (2014) eKLR where Rika J held thus: -

“The Respondent had reasonable and sufficient grounds to suspect the claimant of having acted to the substantial detriment of the Respondent and its property, and was justified in summarily dismissing the claimant under section 44 (4) (g) of the *Employment Act*, 2007. The Employer was not required to have conclusive proof of the claimant’s involvement; it was only expected to have reasonable and sufficient grounds. The physical audit, the discovery that no oil was available even as the claimant protest he had received such oil, the claimant’s role in receiving oil and releasing the delivering Truck, all gave the Respondent reasonable and sufficient grounds to act against the claimant. Alternative to section 44 (4) (g) the respondent may still have found justification in making the decision against the claimant under section 44 (4) (c).”

### **Procedure followed**

33. Section 41 of the *Employment Act*, 2007 provides that: -

“(1) Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”

34. The grievant contended that he was not accorded any hearing as required by the above provision. He was just told to go to the Headquarters on 28<sup>th</sup> April 2021, without being given the reason for going there. He was also not told to go with a union official or a fellow employee. At the meeting, he was shown papers and then he was told to wait outside. After three hours he was given a dismissal letter. He challenged the employer to produce the minutes of the disciplinary hearing but none was produced in court.

35. RW1 stated that he attended the disciplinary hearing and that the grievant was heard. He contended that the grievant was allowed to come with a union official or a fellow employee but he attended alone. The hearing was done and the grievant admitted that he signed documents for the fake account.

36. I have considered the evidence adduced. There is a charge which was signed by the grievant on the 28<sup>th</sup> April 2021. There is however, no minutes of the disciplinary hearing produced. There is also no letter produced by which the grievant was invited to the disciplinary hearing which could have confirmed whether or not the grievant was allowed to attend the hearing with his union official or fellow employee.

37. Disciplinary hearing is a serious matter which is likely to end someone’s employment and ruin his life. As such, an employer is obliged to strictly comply with section 41 of the *Employment Act* by notifying the employee of the charges in advance, notify him of the right to be accompanied by a union official



or another employee, supply any documentary evidence against him and allow him to freely defend himself. This is not what happened here and I find that the respondent did not follow the procedure under section 41 of the Employment Act before dismissing the grievant. Consequently, I hold that the dismissal of the grievant was unfair and unlawful within the meaning of section 45 of the Employment Act for failing to pass the test of procedural fairness.

### Reliefs

38. In view of the foregoing finding, the claimant is entitled to remedy under section 49 of the Employment Act, 2007. The primary prayer is reinstatement without loss of benefits from the date of termination on 28<sup>th</sup> April 2021. However, that relief is not appropriate because, three years have lapsed since the termination. Consequently, an award of compensation is the appropriate remedy in the circumstances.
39. He will get one-month salary in lieu of notice being Kshs.19,460 plus compensation for unfair termination. Having considered that he served for over six (6) years, and that he contributed to the termination by misconduct, I award him only three months' gross salary as compensation for unfair termination being Kshs.58,380.
40. The claim for unpaid salary for April 2021 and accrued leave was admitted being Kshs.19,640 and Kshs.17,373.80 respectively.

### Conclusion

41. I have found that despite the fact that the grievant misconducted himself, his dismissal was unfair because it was not done in accordance with a fair procedure. I have found that the claimant is entitled to compensation for the unfair termination. Consequently, I enter judgment for the claimant as follows: -
  - a. Notice.....Kshs.19,460.00
  - b. Compensation.....Kshs.58,380.00
  - c. Salary (April, 2021).....Kshs.19,460.00
  - d. Leave.....Kshs.17,373.80Kshs.114,673.80

The award is subject to statutory deductions but in addition to costs of the suit plus interest at court rates from the date of the Judgment.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 18TH DAY OF OCTOBER, 2024.**

**ONESMUS N MAKAU**

**JUDGE**

**Order**

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

