



**Kimathi v Hunjan & 10 others (Cause E027 of 2023)
[2024] KEELRC 2412 (KLR) (4 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2412 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CAUSE E027 OF 2023
ON MAKAU, J
OCTOBER 4, 2024**

BETWEEN

ASHFORD KIMATHI CLAIMANT

AND

KUDLIP HUNJAN & 10 OTHERS & 10 OTHERS RESPONDENT

JUDGMENT

1. This is a second suit by claimant on the same matter. Initially he filed Cause No.10 of 2020 against four registered trustees of Nanyuki Sports Club and the Nanyuki Sports Club but the suit was declared a non-starter and fatally incompetent on 14th July 2023. Accordingly, the suit was struck out with no costs and the claimant given leave to file a fresh suit.
2. On 25th August 2023, the claimant brought the instant suit through Onyony & Company Advocates seeking the following orders: -
 - a. An order that the claimant was unfairly and illegally terminated from employment.
 - b. An order compelling the Respondent to pay the claimant unpaid salaries for July, August, and September 2020 amounting to Kshs.360,000 (Three hundred and sixty thousand).
 - c. An order compelling the Respondent to pay the claimant salaries for the remainder of the contract as per the Employment Contract amounting to Kshs.3,450,000 (Three million, four hundred and fifty thousand).
 - d. An order compelling the Respondent to pay the claimant leave allowance for two months in lieu of the contract amounting to Kshs.300,000 (Three hundred thousand).
 - e. General Damages and interest from the date of filing this suit.



- f. Maximum 12 months compensation amounting to Kshs.1,800,000 (one million eight hundred thousand).
 - g. Costs of the suit assessed at a higher scale.
3. The instant suit is against Eleven members of the committee of Nanyuki Sports Club who filed defence through Wahome Gikonyo & Company Advocates. They averred that they lacked capacity to be sued and gave notice that they would raise a preliminary objection. In addition, they denied the merits in the claimant's case and averred that they terminated his employment lawfully for valid reasons and after following fair procedure. Consequently, they prayed for the suit to be dismissed with costs.

Evidence

- 4. The parties agreed to adopt the evidence they tendered in the earlier suit (ELRC Cause No.10 of 2020) and just give highlights in their testimony. Typed proceedings were filed herein.
- 5. The claimant testified as CE1 and adopted his written statement. He also produced bundles of documents as his evidence in ELRC Cause No.10 of 2020. He then stated that the minutes filed by the respondent herein dated 21st May 2020 are fake and are not the same as the ones dated 15th June 2020 which were produced in the previous suit. Although the two minutes deal with salary review, the fake ones lack confirmation, they do not reflect the agenda list, and they lack proposer and seconder.
- 6. Upon cross examination, he contended that the meetings dated 21st May 2020 were done during Covid-19 and denied that it was an emergency meeting. He maintained that the minutes of 21st May 2020 were fake. He admitted that the club was not closed during the pandemic but members were coming there subject to restrictions as to how many people could gather.
- 7. He denied that there was a meeting to discuss reduction of salaries for the Club employees. He maintained that the minutes filed in court were the ones dated 15th June 2020 and not 26th August 2020.
- 8. The 2nd respondent testified as RW1 and adopted his evidence in ELRC 10 of 2020, written statement dated 4th October 2023 and two bundles of documents as his evidence herein. He then stated that the minutes dated 21st May 2020 are not fake but authentic and they were recorded by the claimant as the secretary. He contended that the meeting was a special one due to Covid-19 pandemic and not the monthly committee meeting.
- 9. He further stated that the meeting was an emergency one called to consider the liquidity of the Club and resolutions were made including employees pay cut as opposed to redundancies. The claimant was tasked to come up with the best option of pay cut. He then implements the resolution from July 2020. He confirmed that he never produced minutes of pay cut in the earlier case No.ELRC 10 of 2020 but only the minutes for disciplinary hearing dated 26th August 2020.
- 10. Upon cross examination, he admitted that the minutes dated 21st May 2020 do not indicate the agenda and that the claimant did not sign on the same but the chairman. The meeting was emergency and it gave pay cut which was implemented by the claimant in July 2020. The pay cut is reflected in July 2020 pay roll produced by the respondent and bank statement produced to the claimant.
- 11. He admitted that the claimant did not sign any document consenting to the pay cut. He further admitted that the claimant was employed vide the contract dated 28th May 2019 and confirmed by subsequent letter. He contended that he failed to produce minutes dated 21st May 2020 because he did not expect the claimant to dispute the pay cut.



12. He maintained that due to the pandemic, most facilities were drastically closed including rugby, tennis, squash, gym, golf and the kitchen. Consequently, the work reduced and the claimant wrote letter sending employees on leave. Finally, he contended that the claimant is the one who proposed the pay cut as the Club Manager and he never complained about the pay cut.

Submissions

13. It was submitted for the claimant that he was employed under three years' fixed term contract but the respondents varied the terms without consulting him by reducing his salary. It was submitted that the failure to pay the claimant's salary in full amounted to breach of the contract and section 19 of the [Employment Act, 2007](#).
14. It was further submitted that the minutes dated 21st May 2020 titled Minutes of Special Main Meeting were fake because they lacked any Agenda, was not proposed, was not seconded by any of the committee members present as confirmed in the official manner. It was further submitted that the minutes of June 2020 were riddled with illegalities in that the discussion on salary cuts was done while the claimant was on leave and therefore he was not consulted nor did he give his consent.
15. It was submitted that the minutes dated 21st May 2020 is not authentic because it only appeared after the claimant's dismissal with the aim of covering up the illegal salary reduction. It was submitted that the respondent's evidence was contradictory because on the one hand it was alleged that the claimant never recorded minutes for a whole year and on the other hand it was alleged that he is the one who recorded the minutes about the salary cuts.
16. It was further submitted that the minutes on the pay cut are incompetent and inadmissible because they lack proposer, seconder, confirmation, date and the signatories of the author. Reliance was placed on section 35 (4) of the [Evidence Act](#) and the case of *Cargill Kenya Limited v Wilson Onywoki Nyakeruma* (2021) eKLR where the court found that unsigned minutes were not authenticated.
17. It was further submitted that RW1 admitted that the claimant did not sign any agreement for his salary reduction. It was submitted that the salary reduction was contrary to section 10(5) of the [Employment Act](#) which provides that an employee must be consulted if terms of employment are changed. Reliance was placed on *Maxwell Miyawa & 7 Others v JSC* (2017) eKLR where the court upheld section 10(5) of the [Employment Act](#).
18. It was further submitted that the termination of the claimant's employment was unfair and unlawful. It was argued that the removal of the claimant from the payroll in August 2020 meant that his services had been terminated without following fair process. Further that the disciplinary hearing was meant to achieve a premeditated outcome. It was also submitted that the claimant was not accorded fair hearing and was not allowed to call a fellow employee to accompany him to the hearing. Reliance was placed on *Gilbert Mariera Makori v Equity Bank Limited* (2016) eKLR.
19. It was further submitted that there is no evidence to prove the reasons for dismissing the claimant. It was submitted that the claimant committed no mistake, negligence or any wrong in relation to his job content. It was submitted that Clause 2A of the claimant's job content gave him wide authority to do all that it takes under his managerial prowess, skill and expertise to ensure that the Club runs effectively and efficiently.
20. It was submitted that the allegation that the claimant failed to compile minutes for presentation to the committee members was not true since he presented all the minutes during handing over to the respondent which was witnessed by David Maina and Simon Kibe. It submitted that the said two persons were not called as witnesses by the respondents.



21. It was further submitted that the allegation that the claimant signed and authorized signing of gate passes that led to theft of Club's property was not true. It was argued that the respondent did not produce any Audit Report for the audit conducted as per the letter dated 20th July 2020 nor was the annual audit reports and police report to prove theft or loss of Club's property.
22. It was submitted that the letters allegedly written by Sylvester Munywoki, David Muigu Maina and Anthony Nderitu were very unlikely. It was argued that there is no way the claimant could have while on leave authorized Anthony Nderitu to sign gate passes. It was therefore submitted that the respondent has failed to discharge the burden of proving that the claimant abused gate passes. Further, it was argued that, gate passes are not sufficient prove of theft.
23. It was further submitted that the respondent did not provide any inventory to prove missing property or forensic audit or any other conclusive evidence to prove that the items were signed off with intention to steal. Reliance was placed on *Grace Gacheri Muriithi v Kenya Literature Bureau (2012) eKLR* to urge that the allegations of theft against the claimant is baseless and ill-conceived.
24. It was further submitted that the action against the claimant was discriminative because all the other employees have used the gate passes and action was taken against them or theft or was attributed to them. Reference was made to various gate passes signed by other employees while the claimant was on leave.
25. As regards the alleged failure to update records of staff and trainees' contracts and payroll between 1st January 2020 and 30th June 2020, it was submitted that it was not the responsibility of the claimant under his contract to maintain pay roll records. It was submitted that such duty belonged to the Accountant's docket. Further the said allegation was not raised during the disciplinary hearing and hence a baseless reason for the dismissal.
26. It was further submitted that the allegation that the claimant neglected to award Anthony Nderitu accumulated leave of 108 days is baseless because the said employee wrote a witness statement stating that the claimant awarded him all these leave days on 4th May 2020.
27. It was further submitted that the claimant was being coerced by some committee members to purchase cushions and his signature forged. Mr. Peter Demetho was identified as among the committee members who were interfering with the work of the claimant. It was submitted that the claimant did not insult the committee members and further that it was wrong to dismiss him for an allegation that was not raised in the notice for the disciplinary hearing. Reliance was placed on *Anthony Mkala Chitavi v Malindi Water & Sewerage Co. Limited (2013) eKLR*.
28. In view of the foregoing submission, the court was urged to find that the claimant is entitled to the reliefs sought and award the same as prayed in the claim with costs on the higher scale.
29. On the other hand, it was submitted for the respondent that the dismissal of the claimant was lawful and fair because it was grounded on valid reason and a lawful procedure was followed. It was argued that the claimant was served with a show cause letter and he responded extensively. Subsequently, he was accorded a disciplinary hearing as per the minutes produced as exhibit by RW1 whereby he was found guilty of gross misconduct of neglecting to perform his duty of keeping Minutes of the Management Committee and allowing theft of the Club's property.
30. It was submitted that in view of the foregoing it is evident that the claimant has failed to discharge the burden of proof of unfair termination as required by section 47 (5) of the *Employment Act*. Consequently, it was submitted that the claimant is not entitled to compensatory damages sought. For



emphasis, reliance was placed on *Kennedy Maina Mirera v Barclays Bank of Kenya Limited* (2018) eKLR.

31. As regards the claim for Kshs.360,000, it was submitted that the same must fail on the basis of the minutes of the main committee dated 1st June 2020 vide which it was agreed that the claimant's salary be reduced by 40% and 30% for the rest of the staff. It was submitted that the suggestion for reduction of salaries was made by the claimant as the Club was not performing due to Covid-19 pandemic. It was argued that the claimant was present in the said meeting as the Club secretary and General Manager.
32. In view of the foregoing matters, it was argued that the salary reduction was effected in the month of July 2020 for all the employees including the claimant. The court's attention was drawn to the pay slips for May to September 2020 which show the said salary reduction for all the employees. The claimant's salary in July was reduced by 40% to Kshs.74,250 and it was paid.
33. Finally, it was submitted that the claim for Kshs.3,450,000 being salary and damages for the unserved period of contract and Kshs.300,000 being two months leave in lieu of contract are untenable. For emphasis, reliance was placed on *Elizabeth Wakanyi Kibe v Telkom Kenya Ltd* (2014) eKLR where the Court of Appeal found that the trial court had correctly dismissed a claim for expected remuneration that the appellant would have earned upon her retirement.

Issues for determination

34. Having considered the pleadings, evidence and submissions, I am satisfied that the claimant was employed by the respondent under a fixed term contract of three years' and that the contract was terminated by the respondent prematurely on account of the claimant's gross misconduct. The issues for determination are: -
 - a. Whether the termination was unfair and unlawful.
 - b. Whether the claimant is entitled to the reliefs sought.

Unfair and unlawful dismissal

35. Section 45 (1) & (2) of the *Employment Act* 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.”



36. The foregoing provision does not bar employers from terminating the employment of their employees. All that it says is that whenever an employer wishes to terminate his employee's contract of employment, there must be a valid and fair reason, and a fair procedure must be followed.
37. A valid and fair reason is one that relates to the employees conduct, capacity and compatibility or operational requirement of the employer. Fair procedure on the other hand, entails a fair hearing before the termination.

Reasons for dismissal

38. In this case the reasons for dismissing the claimant was communicated vide the dismissal letter dated 2nd September 2020.

“Ashford Kimathi

Nanyuki Sports Club

PO Box 139-10400

Nanyuki.

Dear Sir,

REF: SUMMARY DISMISSAL

We refer to our show cause letter, your response dated 20th August 2020 and the disciplinary hearing later held on 26th August 2020.

The committee observed the following findings:

1. That you consistently delayed and failed to compile minutes for presentation to the committee members for mandatory approval citing Covid-19 pandemic as an excuse.
2. Without following laid down procedures, you signed and authorized the signing of gate passes that led to several incidents of theft of club property. A bundle of gate passes were furnished to you together with show cause letter.
3. That you failed to ensure proper and accurate records management of staff and trainees' contracts and payroll records from the period starting 1st January 2020 to 30th June year 2020 and amongst the specific cases pointed out to you were:
 - a. Elizabeth Simiti
 - b. Emmanuel Wambugu
 - c. Joseph Ngatia
 - d. John Kiarie Mwangi
4. That you negligently and without any justification awarded Anthony Nderitu accumulated leave/off days amounting to One Hundred and Eight (108) days. In your defence you claimed that the leave form had been forged which defence was unfounded. Notably you have not sought clarification or correction to date.



5. That during the disciplinary hearing you alleged that you were coerced by the serving committee members to procure cushions contrary to the documentary evidence indicating authorization by yourself and the respective sub-committee.
6. You have expressly disrespected and insubordinated the serving committee in your show cause response (Reference to clauses No.1, 2,3 & 4) accusing and threatening specifically the chairman in a manner that is unprofessional and unacceptable.

In view of the foregoing, you have by way of your conduct fundamentally breached your obligation under your contract of employment. Your actions amount inter alia to neglect of duty, carelessness and want of integrity. There are no valid reasons that justify them. As per the Employment Act section 44(4) (c), (d) and (g) this amounts to gross misconduct which is liable to summary dismissal.

You are hereby summarily dismissed.

Your last working day will be 11th September 2020 and your final dues will be calculated and paid as follows: -

- Salary up to and including 11th September 2020 subject to the staff agreed deductions.
- Less any monies owed to the club.

You are hereby advised to handover all Company property in your possession to the accountant Mr.David Maina, upon which your terminal dues will be paid.

A certificate of Service will also be provided.

Yours Faithfully,

Kuldip Hunjan

Chairman Nanyuki Sports Club

Acknowledgment

Ashford Kimathi.....Name

Signature

10970272ID No.

11/9/2020.....Date/Time

Cc: 1. Chairman HR Sub-committee

Nanyuki Sports Club”

39. The claimant denied all the above allegations and further averred that some of the reasons cited were not contained in the letter inviting him to the hearing. In addition, he averred that no report of audit for the Club’s assets has been produced to prove the alleged loss or theft of assets.



40. The respondents have produced documents to prove that the claimant allowed assets of the club to be taken away including machines and food stuffs. He has not disputed the Gate Passes he signed to allow the said items to exit the Club's premises. Whereas I agree with the claimant that audited reports and inventory of assets was relevant evidence to enable the court to verify the alleged theft or loss of Club assets, I must hasten to find that Gate passes produced were sufficient proof that the claimant gave out food stuffs from the Club without authority.
41. He tried to seek protection from the Club Rules/Constitution alleging that it gives the General Manager wide powers. I agree with that defence only to the extent that the said powers are to be exercised lawfully and within the scope of his job description. In this case, the claimant abused his mandate by giving out food stuffs to employees including pumpkins, vegetables, juices, mandazi, plus tiles among others.
42. It is appreciated that the above food stuffs were perishable but the burden is upon the claimant to prove that he lawfully gave out the said items, either with the authority of the respondents or the beneficiaries had paid for the same. The claimant has not discharged that burden.
43. The said Gate passes and minutes dated 20th August 2020 further show that the claimant condoned the behavior of giving out food stuffs and other items by his junior staff and even trainees. He was therefore negligent by failing to stop his juniors from giving out Club's assets without authority from the respondents. Consequently, I find and hold that the respondents have discharged the burden of proof of valid reason for dismissing the claimant for gross misconduct.

Procedure followed

44. The claimant admitted that he was served with a show cause letter setting out allegations and he responded to the same. He also admitted that he was invited to a disciplinary hearing and he attended. However, he alleged that no hearing was held and instead he was told to resign and when he declined he was dismissed.
45. The respondents produced minutes of the disciplinary hearing held on 26th August 2020. They do not show anywhere that the claimant was requested to resign. The minutes show that the disciplinary hearing took place and the claimant aired his defence to the charges by relying on his written response to the show cause letter and proceeded to respond to questions raised by the respondents during the hearing. He even admitted that he should have sought permission before giving food stuffs from the club kitchen to employees.
46. Minute 4 shows that after the hearing, the committee deliberated on the representations made by the claimant and reached the decision to dismiss him. Section 41 of the *Employment Act* 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.”

47. Having considered the evidence adduced by both sides, I find and hold that the respondents’ followed a fair procedure before terminating the claimant’s employment. He was informed about the allegations against him vide a show cause letter and he responded in writing. Thereafter, he was invited to a hearing and he attended the hearing and aired his defence. Thereafter, the committee considered his defence before resolving to dismiss him. Finally, the decision was communicated through the said dismissal letter.
48. In view of the finding that there were valid reasons for dismissing the claimant and further that fair procedure was followed, I must conclude that the claimant has not proved on a balance of probability his claim for unfair termination as required by section 47(5) of the *Employment Act*, 2007.

Reliefs sought

49. Having found that the dismissal of the claimant was not unlawful, the claimant is not entitled to any relief under section 49 of the *Employment Act*, 2007 including compensatory damages.
50. As regards claim for Kshs.360,000 being the unpaid salary for July, August and September 2020, the respondent contended that the claimant agreed to a salary cut of 40% which reduced his gross salary to Kshs.90,000. It was alleged that the proposal to reduce salary during Covid-19 pandemic was made by the claimant himself and he implemented it from July 2020.
51. The matter of salary cut was discussed by the committee of the club in minutes dated 21st May 2020. The claimant dismissed the said minutes as fake. The respondents maintained that they are authentic minutes of an emergency meeting due to Covid-19 pandemic.
52. I have considered the said minutes and confirmed that they are not signed by the claimant as the secretary of the committee but by the chairman Mr.Kuldip Hunjan. There is no evidence that the claimant attended and that minutes were ever confirmed in a subsequent meeting. However, I find the minutes useful to the claimant’s case in that it clarifies that the proposal of salary cuts was not made by him but by Mr.Sohan Aggarwal (see Min/NSC04/May 2020). Such proposal required consent from the claimant as required by section 10(5) of the *Employment Act*.
53. The claimant has denied that he was present when the salary cut was decided and he denied that he implemented the same in July 2020. He contended that he was away on leave. The burden of proving that the claimant consented to the salary cut was upon the respondents but they failed to discharge it. Consequently, I find that the claimant is entitled to the unpaid salary for July, August and days worked in September 2020.
54. The unpaid salary in July 2020 was Kshs.60,000 in August Kshs.150,000 and in September Kshs.55,000 equaling to Kshs.265,000. The respondents did not prove that the claimant was paid salary for August and September 2020. The claimant admitted that he received part of his salary for July 2020 and not for August and September, 2020.
55. The claim for Kshs.450,000 and Kshs.300,000 being salaries and leave for remainder of the contract term is declined because it is not grounded on the law or the contract of employment. I gather support from the decision of the Court of Appeal in Elizabeth Wakanyi Kibe v Telkom Kenya Ltd (2014) eKLR thus: -

“We are of the considered view that the decision in Rt. Rev.*Silas Njiru & Catholic Diocese of Meru v Andrew Kiruja-Civil Appeal No.312 of 2004* is distinguishable in this case. This



is because the decision was made under repealed Employment Act. We find that the learned Judge correctly dismissed the prayer for expected remuneration that the appellant would have earned upon her retirement.”

Conclusion

56. I have found that the claimant has not proved the alleged unfair and unlawful termination of his employment. I have also found that the claimant is neither entitled to compensatory damages for unfair termination nor the remuneration for the unserved period of his contract. However, I am satisfied that the claimant did not consent to salary cut of 40% or at all, and therefore he is entitled to the unpaid salary for July, August and 11 days in September 2020. Consequently, I enter judgment for him against the respondents as follows: -

- a. Unpaid salary.....Kshs.265,000.00
- b. Costs and interest at court rates from the date of filing this suit.
- c. The award is subject to statutory deductions.

DATED, SIGNED AND DELIVERED AT NYERI THIS 4TH 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.

ONESMUS N MAKAU

JUDGE

