



**Arora v Board of Directors African Cotton & Textile Industries Federation
(Cause 970 of 2015) [2024] KEELRC 2497 (KLR) (3 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2497 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 970 OF 2015
M MBARÚ, J
OCTOBER 3, 2024**

BETWEEN

RAJEEV ARORA CLAIMANT

AND

**BOARD OF DIRECTORS AFRICAN COTTON & TEXTILE INDUSTRIES
FEDERATION RESPONDENT**

JUDGMENT

1. Judgment herein was due on 16 March 2022 but was placed in abeyance to allow the respondent time to file the complete statement of response missing pages 2 and 4. Several mentions followed and there was no compliance. On 22 November 2023, the court directed that judgment be issued without this document.
2. The missing pages are important as they contain the bulk of the respondent’s case a counter-claim.
3. Without compliance, such a record is deemed not filed.

Claim

4. On 1st July 2009, the respondent employed the claimant as the executive director and he worked until 1st April 2015.
5. The claim is that the respondent unfairly and unlawfully terminated the claimant in his employment without due process or justification. The claimant was earning \$8,760 an equivalent of Ksh.788, 400 per month.
6. The claim is for the following dues;
 - a. 3 months’ notice pay Ksh.2,365,200;



- b. Salary outstanding for February and March Ksh.1,576,800;
 - c. Gratuity for 5 years and 8 months Ksh.2,365,200;
 - d. Unremitted December 2014 and January 2015 contributions from Kimisitu Sacco at Ksh.50,000 total Ksh.100,000;
 - e. Pay to Kenindia Assurance the staff/company contribution for provident fund of December 2014 and January 2015 Ksh.315,360;
 - f. 5 days leave pay ksh.210,240;
 - g. General damages for unfair termination ksh.9,460,800; and
 - h. Costs.
7. The claimant testified in support of his claim that upon employment by the respondent, he worked diligently was on good terms with the chairperson and was recognised for his good performance. He was then issued with a letter of compulsory leave because the respondent was required to undertake an enquiry. He went into shock and no one wanted to give reasons leading to such a decision and he proceeded on leave.
 8. The claimant testified that before his compulsory leave ended, on 1st April 2014 he was issued with notice to show cause which listed charges and upon which the respondent dismissed him from his employment on 13th March 2015. He replied to the notice to show cause but was not given a hearing. It was unfair because his performance was good and his salary increased over time.
 9. The claimant testified that he was called by the Board the accountant and one member and where he was told that he had failed to do his duties well and had falsified records all meant to avoid paying him his terminal dues. At the meeting, he was not allowed to respond to any issue or have a representative of his choice. There was no evidence of any financial misappropriation after the allegations of falsification of accounts nor was the financial officer called to state the allegations.
 10. The claimant had a contract running from 1st July, 2009 and had outlined disciplinary procedures. In his case, these procedures were not followed. The respondent alleged that he had misappropriated funds and when he was sent on leave he was not allowed access to any records to defend himself and his response was based on memory.
 11. The claimant testified that the counter-claim by the respondent is without proof. The salary was signed for by the chairperson and the counter-claim is only meant to intimidate him not to claim as herein done. His salary was paid in United States Dollars and converted into Kenya Shillings since his contract said he should not be paid in the local currency. For the respondent to claim the difference in exchange rates is unfair labour practice. The respondent was always aware of currency exchange conversion. The fluctuations led to an increase in his salary in local currency. It was not a misappropriation of funds.
 12. Upon cross-examination, the claimant testified that he was supervised by the board which used to meet 3 to 4 times in a year and he would organise for the meetings. The board would approve the agenda once presented to them. The chair would approve all monthly and statutory expenses and was not allowed to spend before approval. As the chief executive officer, he was the accounting officer. When an expense was not approved, he would spend within the allowed limits and then get it approved by the chair or the board.
 13. The claimant also testified that he was required to conduct himself appropriately and be an example to other employees. He was offered two (2) free tickets by one client and he decided to keep one and



offer the other to his wife who was not an employee of the respondent. It was within his discretion to choose whom to give the tickets. The tickets were given by a ticketing agent as an end-of-year gift. It was not meant to carry out any of the respondent's activities.

14. In the notice to show cause, the claimant was asked to answer to matters of refund of the credit card and other expenses on 4th September 2014 when his card was charged interests which he in return charged the respondent. He had travelled to Washington DC where he met clients and used his credit card for the loss he claimed from the respondent. He held discussions with the chairperson who verbally approved. There was a paper trail to assist with the audit.
15. On the claims made, the claimant testified that no gratuity was paid and his contributions to the Sacco and provident fund were not remitted. They claimed his case was of summary dismissal but there was no fair hearing.

Response

16. In response, the respondent's case is that the claimant was summarily dismissed on 1st April 2015 for gross misconduct and breach of contract. The claimant was sent on leave on 13 March 2015 pending investigations and called for a disciplinary hearing to answer allegations of negligence and gross misconduct. He responded on 15 and 18 March 2015 through emails and the respondent noted these responses in an email dated 19 March 2015. The respondent also indicated that the board would contact the claimant with further details.
17. The response was also that on 28 March 2015, the claimant contacted the board chairman stating that he wished for a mutual separation. The respondent indicated that such matter would be discussed during the disciplinary hearing on 31st March 2015 where he was invited to argue his case.
18. In counter-claim, the respondent's case is that the claimant was the CEO and was dismissed for misappropriation of funds amounting to \$37,884.93. He unilaterally increased his salary without any approval to \$11,311.4 and despite demand for missing funds, he has refused to make a refund.
19. No witness was called by the respondent.
20. At the close of the hearing, both parties agreed to file written submissions. Only the claimant complied.

Determination

21. As outlined above, the court has delayed the delivery of the judgment due to missing pages in the response filed by the respondent. The matter has been placed for mention severally, there is no compliance. On 22 November 2023, the court directed the judgment placed in abeyance to be delivered and the file moved from the Nairobi registry to the Mombasa registry following the movement of the presiding judges.
22. It was evident through the hearing that the respondent did not give this matter due attention.
23. In a letter dated 1st April 2015, the respondent dismissed the claimant from his employment as the CEO because under his employment contract, his salary was to be paid in Kenya Shillings and would fluctuate in the variance of the exchange rate to be determined bi-annually and any change would be made in writing but he had failed to use the correct rates. He was also alleged to have taken arbitrary expenses to the loss of the respondent and contrary to the procedures manual. Further, he was accused of failing to deliver a fully functional, self-sustaining association contrary to the employment contract leading to financial constraints. He was found to have breached his contract and hence subject to summary dismissal.



24. Through notice dated 13 March 2015, the respondent directed the claimant to proceed on leave pending investigations over negligence and misconduct over financial affairs. He was also directed to respond within 48 hours.
25. On 18 March 2015, the claimant replied and noted that the matters put to his attention required him to be in the office to retrieve records and that he required particulars of the alleged financial misconduct to enable him to reply.
26. An employer has the right under Section 44(3) and (4) of the *Employment Act* to terminate the employee in his employment through summary dismissal for breach of his employment contract or for gross misconduct. However, there is a concomitant right to the employee under Section 41(2) to be issued with notice and allowed to attend a disciplinary hearing in the presence of another employee of his choice;
- (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.
27. Whatever the allegations the claimant was required to respond to before the summary dismissal, the provisions of Section 41 of the *Employment Act* are mandatory. The employee must be accorded fair hearing and procedure. Whatever matters the employer finds to warrant disciplinary action against the employee, due process and justification are mandatory.
28. In the case of *Postal Corporation of Kenya vs Andrew K. Tanui* [2019] eKLR the court held that;
- Admittedly, there has been considerable debate as to what amounts to a fair hearing or procedure in disciplinary proceedings. Indeed the appellant has cited the Kenya Revenue Authority case where this Court held that the fairness of a hearing is not determined solely by its oral nature and that a hearing may be conducted through an exchange of letters as happened in that case. It also held that whether an oral hearing is necessary will depend on the subject matter and circumstances of the particular case and upon the nature of the decision to be made. We believe that is still good law, but not in respect of a hearing before termination as envisaged under Section 41 of the Act. It is our further view that Section 41 provides the minimum standards of a fair procedure that an employer ought to comply with. The section provides for "Notification and hearing before termination on grounds of misconduct" in the following manner: - ...
29. In the case of *Oyombe v Eco Bank Limited (Civil Appeal 185 of 2017)* [2022] KECA the Court of Appeal in considering the motions of Section 41 of the *Employment Act* held that;
- Under this Section, four elements must thus be satisfied for the summary dismissal procedure to be said to be fair, being: -
- a) An explanation of the grounds of termination in a language understood by the employee;
 - b) The reason for which the employer is considering termination;
 - c) Entitlement of an employee to have a representative of his choice when the explanation of grounds of terminations is being made;



- d) Hearing and considering any representation made by the employee and the representative chosen by the employee.
30. Through notices issued allowing the claimant to respond to various allegations made against him, for the alleged disciplinary hearing on 31st March 2015, there is no notice commensurate with the provisions of Section 41 of the *Employment Act* or any record to support any disciplinary hearing conducted against him and where he was allowed to defend himself. Without any witnesses called to support the procedures undertaken in this regard, the claims made are unchallenged. The mandatory nature of Section 41 of the Employment once not adhered to results in unlawful and unfair termination of employment.
31. The case that the claimant applied money exchange rates without written approval and that he reviewed his salary unilaterally is left bare.
32. The respondent also made a case that the claimant failed in his duties and did not perform as per his employment contract leading to loss and the respondent being dysfunctional and not self-sustaining by 1st March 2013. The claimant's employment was terminated on 1st April 2015. Since 1st March 2013, the respondent had two (2) full years to assess his capabilities, capacity and skills and address as appropriate. Termination of employment over alleged poor performance is without evidence, any material to support such allegations and to use such matter to sanction the claimant with summary dismissal is procedural and unfair. See *Mwilo v Absa Bank (K) PLC (Cause 31 of 2020)* [2022] KEELRC where the court held that;
- ...before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity, explain to the employee in a language that the employee understands, the reasons for which the employer is considering to terminate the employee's employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of his own choice and to hear and consider any representation that the employee may advance in response to the allegations levelled against him by the employer...
33. This position is reiterated by the Court of Appeal in the case of Janet Nyandiko v Kenya Commercial Bank Limited [2017] eKLR and of National Bank of Kenya v Samuel Nguru Mutonya [2019] eKLR.
34. In this case, the court finds there was unlawful and unfair termination of employment.
35. The counter-claim made is without evidence.
36. The claimant is seeking 3 months' notice pay based on the exchange rates applicable at the time his employment was terminated on 1st April 2015. Under the employment contract dated 1st July 2009 under clause VII, 3 months' notice was required before termination of employment. On the finding that there was unfair termination of employment, the claim for notice pay at Ksh.2, 365,200 is justified.
37. The claim for unpaid salary for February and March at Ksh.1, 576,800 was an issue addressed in the court ruling on 1st September 2016 and due to the counter-claim, parties were directed to proceed for a hearing. On the findings that the counter-claim is without evidence, such unpaid salary is due all at Ksh.1, 576,800.
38. On the claim for gratuity for 5 years and 8 months Ksh.2, 365,200; under the employment contract, this is not a benefit accruing in the employment. The claimant has not submitted any other record or policy that gave him gratuity at the end of his employment.



39. With the non-payment of salaries in December 2014 and January 2015 the due contributions to Kimisitu Sacco and the Kenindia Assurance staff/company contributions are also due at Ksh.100,000 and Ksh.315,360 respectively.
40. On the claim for 5 leave days owed at the end of employment, this being a right under Section 28 of the *Employment Act*, the respondent had a duty to submit the work record in this regard. There is none and hence the claim for Ksh.210, 240 is justified.
41. On the claim for general damages for unfair termination of employment at 12 months' salary, the findings that there was no due process addressed, the respondent having failed to call any evidence to challenge the claim, and the terminal dues well addressed above, the court finds that the claimant worked for the respondent for over 5 years without any bad record. In the circumstances, compensation at 5 months gross salary at the monthly salary at the time at Ksh.788, 400 x 5 =3,942,000 in compensation.
42. On costs, the conclusion of the suit herein has been prolonged due to the unresponsive respondent. In the circumstances, the court awards the claimant 50% of his costs.
43. Accordingly, judgment is hereby entered for the claimant against the respondent in the following terms;
 - a. 3 months' notice pay Ksh.2,365,200;
 - b. Salary outstanding for February and March Ksh.1,576,800;
 - c. Unremitted December 2014 and January 2015 contributions to Kimisitu Sacco at Ksh.50,000 total Ksh.100,000;
 - d. Pay to Kenindia Assurance the staff/company contribution for provident fund of December 2014 and January 2015 Ksh.315,360;
 - e. 5 days leave pay ksh.210,240;
 - f. General damages for unfair termination ksh.3,942,000 and
 - g. 50% of Costs.

DELIVERED IN VIRTUAL OPEN COURT AT MOMBASA ON THIS 3 DAY OF OCTOBER 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

