



**Gatundu v First Assurance Company Limited (Cause E6573 of 2020)  
[2024] KEELRC 2518 (KLR) (3 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2518 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E6573 OF 2020  
M MBARŪ, J  
OCTOBER 3, 2024**

**BETWEEN**

**MOSES GATUNDU ..... CLAIMANT**

**AND**

**FIRST ASSURANCE COMPANY LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The respondent employed the claimant as an accountant on 4 September 1995. He rose the ranks and on 3 April 2017 was promoted to the position of Chief Finance Officer at a salary of ksh.920, 304 plus allowances of Ksh.120, 000 per month.
2. The claim is that on 18 December 2018, the respondent terminated the claimant’s employment without due process or adhering to the law. He was not accorded natural justice and is claiming the following terminal dues;
  - a. 12 months compensation for unfair compensation Ksh.11,043,648;
  - b. Compensation for the balance of the term of employment up to 60 years;
  - c. Ksh.4,601,520 unpaid balance of salary in lieu of notice;
  - d. Ksh.260,271 being the balance of share value;
  - e. Certificate of service;
  - f. Costs of the suit.
3. In evidence, the claimant testified that he worked for the respondent from the year 1995 as an accountant until the year 2018 when he was the chief finance officer (CFO). He was accused of issuing a letter with intent to commit fraud against the respondent. As the CFO his duties included premium



collections, and updating accounts and payments. There were no complaints made against him for the 23 years of service.

4. As the CFO, the claimant was allowed to issue demand letters to the agents. The amount stated in the demand letter would be arrived at after the agent had submitted records but in this case, he noted that credits had been issued without the authority of the client. The agent had no authority and hence could not collect the premium. For any payment to be made, a cheque could be issued which required two signatories from the respondent or an electronic payment. For any amount above one million, three signatories were required.
5. In the event of an overpayment, a request for a refund and approval would be issued. In this case, the claimant had not seen the letter from the agent and was only aware of two credits. The claimant did not notice that this particular agent should not be issued with credits. The letter from the Minister was not discussed with the claimant; when he issued the demand letter, the agent had no suspicious transaction.
6. The claimant testified that he was invited to attend a disciplinary hearing which comprised persons who did not know the insurance business, none were from his department of human resources. The questions asked were not relevant to the matters at hand. The entire panel had no experience concerning the respondent's business.
7. The respondent is regulated by the Insurance Regulatory Authority (IRA), and any manager or director cannot work without the IRA's written approval, including the position he held as CFO.
8. After the disciplinary hearing on 13 December 2018, the claimant was issued with a letter terminating his employment on 18 December 2018. There were reasons that he had issued a letter demanding more money than was to be paid suggesting that he was colluding with the agent and therefore intended to defraud the respondent. He was allowed until 24 December 2018 to file an appeal. The respondent also issued notice to all employees that he was no longer an employee.
9. The claimant testified that his disciplinary hearing was conducted by ABSA bank staff and IRA, which has an insurance fraud unit that conducts investigations. The IRA did not find anything to justify the termination of employment, and the subject agent was licensed by the IRA.
10. The claimant testified that he had hoped to work for the respondent until he was 60. The termination of his employment traumatized him, denied him a source of income, and made it impossible for him to secure new employment in the sector. The fact that his notice indicated that he had committed fraud is taken very seriously in the insurance sector.
11. ABSA Bank acquired the respondent and would benefit from his removal. He was in charge of the payroll which covered 130 employees and ABSA would charge the respondent for processing their payroll at Ksh.2 million and as the CFO the claimant would have protested. ABSA hence pushed for his removal from office, which was evidenced by the fact that there was no respondent employee at his disciplinary hearing. None agreed to testify or attend on his behalf and the orders sought should be issued with costs.
12. Upon cross-examination, the claimant admitted that he was issued a notice to show cause by the respondent. The notice indicated the reasons upon which it was considering termination of employment which related to the fact that he had issued a demand letter and a policy in May 2018. The first issue was correct but the second was not factual. The respondent noted that the actions by the claimant had exposed it to risk and warranted summary dismissal.



13. The claimant responded to the notice to show cause and was issued a disciplinary hearing for 13 December 2018. He was advised to have another employee of his choice but the disciplinary panel came from Barclays Bank and was unrelated to his work. He opted to be alone at the disciplinary hearing.
14. The claimant testified that during the disciplinary hearing, he was only asked technical questions and nothing about his response to the notice to show cause or the insurance sector. He was allowed the right of appeal but this was rejected.
15. In evidence, the claimant called Winnie Ng'ang'a who previously worked with the respondent until June 2019 when she left. She testified that she worked as the operations manager in charge of the underwriting of the general business excluding medical. She had a mandate to oversee the issuance of premium debit and credit notes. She interacted with the claimant as the CFO and some underwriting managers including premium collections, and signing insurance confirmation forms or documents.
16. Ms. Ng'ang'a testified that she was a member of the credit committee wherein the claimant was a member. The committee was tasked with the premium collection process. They held meetings and each member was allocated several clients who they would follow up payments from. The claimant was allocated to follow up on premiums from Misort Africa. When the Ministry of Infrastructure and Public Works wrote to enquire on the validity of the insurance policy/debit issued to Misort and the applicable premium, the witness responded to the matter and also referred the same to the risk department. Later, Misort Africa wrote and asked for reversal of some credit notes but the risk department asked her not to act on the instructions on the reversal since the matter was under investigation.
17. The claimant was not aware of the letter from the Ministry at the time he wrote the demand letters to Misort Africa as the same was never shared with him or discussed at the meeting where he was present. No single person could sign into the respondent's account and the claimant did not act fraudulently as alleged.
18. The claimant also called Esther Wangui Kabanya currently running an insurance agency, Scuciegrace and previously worked for the respondent until November 2019. She served as a secretary and later as the personal assistant to the managing director and later moved to the human resources and administration department.
19. Ms. Kubanya testified that she worked closely with the claimant assisting in payroll. The claimant did his duties diligently and managed a huge payroll including the one for Barclays. He worked closely with auditors with utmost integrity.

## **Response**

20. In response, the respondent admitted that the claimant was an employee until 18 December 2018 when he was dismissed following due process and fair reasons and upon payment of one month's notice.
21. Under the contract of employment, the claimant had clear terms that required him to adhere to the internal finance controls and not to act to damage the mutual trust and confidence with the employer. He was required to apply his due care, skill and competence on the job.
22. On 6 August 2018, the claimant dishonestly, negligently and recklessly issued or caused to be issued a payment demand to one client through an agent, and third parties and request for payment of a premium of Ksh.18, 508,212 when he knew or ought to have known that the outstanding amount was ksh.13, 837,287. On the payment demand, the claimant dishonestly, negligently and recklessly stated



- that the policy under which the payment demand was issued was incepted in May 2018 when in fact the policy was incepted in February 2018.
23. In issuing the payment demand, the claimant acted outside his authority and mandate and in doing so, he failed to confirm the actual balances from the respondent's underwriting department. The claimant issued the demand letter without following due procedures. The claimant acted negligently and exposed the respondent to reputational and litigation risk.
  24. The respondent initiated a disciplinary process following the law and policy. Having conducted investigations, the claimant was issued with a notice to show cause dated 30 November 2018 and the allegations made against him. The claimant was allowed to respond in his letter dated 4 December 2018. He was invited to a disciplinary hearing on 6 December 2018 and advised to bring another employee of his choice but he opted to attend alone.
  25. On 13 December 2018, the respondent conducted a disciplinary hearing against the claimant. He did not object to the panel members present. The respondent decided to terminate employment through a notice dated 18 December 2018 and allowed him to file an appeal he attended the appeal hearing on 18 February 2019 but the panel upheld the termination of employment.
  26. The respondent has admitted that there were similar allegations arising from the same incident relating to other employees, especially the credit controller and the accountant. These employees faced disciplinary hearings and the respondent acted under the panel's recommendations. The claimant is not justified in citing discrimination against him. He was paid instead of notice and the claims made should be dismissed with costs.
  27. In evidence, the respondent called Michael Ngobo an investigator, certified fraud investigator and former inspector of police. He testified that in October 2018 he was instructed by the respondent to investigate the facts that around 24 July 2018 the respondent received a letter from the Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works requesting confirmation as to the authenticity of insurance policies issued by the company to Misort Africa Limited. The letter contract details the insurance policies in respect of which they sought confirmation.
  28. The Minister sought to confirm whether the documents concerning the insurance cover were authentic, what type of insurance cover was taken and for what facility, the effective dates for the insurance, and the details of premiums paid, if any, within the periods February 2016 to July 2018 for each policy.
  29. Ngobo testified that he commenced his investigations and discovered that Misort had been contracted by the government in various projects. Through an agency called Masterstroke Insurance Agency, Misort had taken out an insurance cover from the respondent. At this time, Masterstroke was managed by a former employee of the respondent, Ruth Awinja who had worked with the claimant for many years.
  30. The investigations revealed that on 6 August 2018, the claimant issued a payment demand to Masterstroke claiming that its client Misort had a debt of Ksh.18, 376,883 whereas the actual outstanding amount was Ksh.13, 705,925. The claimant indicated that the policies under which the payment demand was issued were incepted in May 2018 when in fact some policies dated back to February 2018.
  31. In issuing the payment demand, the claimant acted outside his authority and failed to confirm the actual balances from the respondent's underwriting department. Based on the claimant's erroneous and dishonest payment demand, Masterstroke wrote to its client, Misort asking them to urgently regularize their account. The defence between the amount dishonestly stated by the claimant to be



- owed from Misort and what was owed is Ksh.4, 670,925 amounted to insurance fraud by a company undertaking a government project is required to take certain types of insurance policies and having done so, may be entitled to claim from the government in respect of such policy, an officer in such a company may then claim the basis of the error/dishonest and pocket the difference.
32. Mr. Ngobo testified that the claimant as the CFO was well aware of the respondent's underwriting guide and its provisions. The Underwriting Guide had been circulated to all employees and the claimant acted dishonestly, negligently or recklessly when he issued a payment demand outside his mandate and without consulting the relevant department.
  33. During the investigations, the claimant was given a chance to make his representations which he did orally and by emails dated 1<sup>st</sup> and 9 November 2018. The claimant admitted that he issued the letter dated 6 August 2018. He admitted that he did not confirm the correct financial position with the underwriting department and did not keep a copy of the computation leading to the sums in the letter. The witness submitted his investigation report to the respondent.
  34. The respondent also called Emily Gachaiya the human resources manager who testified that on 10 March 2017, the claimant was appointed the CFO with duties of risk control and to ensure that all activities were carried out in full compliance with the regulatory requirements. The claimant was aware of the Enterprise Wide Risk Management Framework and internal policies and standards relevant to his role as CFO. As a senior employee of an insurance company, it was expected of the claimant to enforce and apply strict internal finance controls to avoid falling afoul of regulations and damaging client relationships built over many years.
  35. Gachaiya testified that the claimant had a consolidated salary of Ksh.836, 640 per month together with benefits all at ksh.920, 304. He also earned a transport allowance of Ksh.120, 000 per month.
  36. The respondent is an associated company of Absa Bank Plc, previously Barclays Bank of Kenya Ltd and thus the two companies used to share policies and personnel.
  37. Gachaiya testified that in October 2018, the respondent learned that there were fraudulent activities of insurance claims. There were investigations and through a report dated 20 October 2018, it emerged that Misort Africa Ltd had been issued a demand letter by the claimant overstating the outstanding premium and misstating the inception date of the policies concerned. The investigations revealed that on 6 August 2018, the claimant dishonestly issued a payment demand to Mirot for the sum of Ksh.18, 508,212 for policies issued in February 2018 but he stated they were issued in May 2018. By doing so, the claimant acted outside his mandate and failed dot consult with the underwriting department to get the correct figures and inception dates.
  38. The claimant was issued with a notice to show cause, he replied and admitted that he had issued the demand letter with wrong figures that he had given the wrong dates for the policies and that he did not keep copies of the policies and the amounts tabulated. The claimant was invited to attend a disciplinary hearing in compliance with the law and the policies of the respondent but he failed to give satisfactory responses for his lapses leading to termination of employment. The allegations that the disciplinary panel had persons unrelated to the respondent were not addressed before or during the hearing and the same proceeded and the claimant was allowed to bring another employee of his choice but opted to attend alone. He was allowed to appeal and invited to a hearing but did not raise any new matters.
  39. Gachaiya testified that the claimant has alleged that he was discriminated against which is not correct since there were several employees taken through the disciplinary process over the same incident. Each matte was addressed on merit and each employee was allowed to attend and defend himself/herself.



40. On the claim for the share value plan, this was a plan across Absa business and was to vest in three equal tranches over 3 years. The first tranche was vested in 2017, the next was due in 2018 and the final was due in the year 2019. The share value was not payable to employees who had left the business on account of resignation, gross misconduct or summary dismissal. The claimant was dismissed on 18 December 2018 and the final tranche could not vest based on the Plan conditions.
- 41 The claimant has since been paid his terminal dues including;
- a. Leave days ksh.4,067,391;
  - b. Notice pay Ksh.920,304;
  - c. 13 days overpayment of Ksh.375,686;
  - d. December travel allowance Ksh.48,987  
Less tax ksh.1, 361,562.90;  
FAK loan recovery Ksh.2, 104,500.  
Net Ksh.1, 096,959.10.

### **Determination**

42. The claimant last served the respondent as the CFO upon appointment through a letter dated 10 March 2017. He was issued with a detailed letter of contract, job description and policy documents effective 3 April 2017.
43. Under clause 4 of the letter dated 10 March 2017, the claimant was bound under the regulatory compliance rules and regulations of the respondent, Barclays Africa PLC, the respondent's policies and the applicable laws.
44. Through a letter dated 18 December 2018, the respondent terminated the claimant's employment because he had been issued with a notice to show cause on 4 December 2018 filed a response and then invited to a disciplinary hearing on 13 December 2018. The claimant was found culpable for acting dishonestly to defraud the respondent when he issued a demand letter to Masterstroke Agency for payment of ksh.18, 508,212 instead of Ksh.13, and 837,287 thereby overstating the amount premium by ksh.4, 670,925. The claimant was also found culpable of issuing the demand letter outside his mandate and authority and for failing to confirm the balances from the underwriting department. The claimant was further found culpable of indicating that Misort policies were inceptioned in May 2018 instead of February 2018.
45. These actions were found to be gross misconduct based on the claimant's letter of employment, the policy and the laws regulating his employment.
46. Through notice to show cause dated 30 November 2018, the claimant was invited to address the allegations made against him and in his response, he admitted that;

I confirm that I issued a letter dated 6<sup>th</sup> August 2018 to Master Stroke Insurance Agency requesting payment of Kes 18.5m for the Misort Africa Account at the request of the agent to assist in premium collections. The account at the time was reading Ksh.13.7m as there were credits which had been issued which the agent said would be reversed. Debits and credits are issued by our underwriting department and not finance. I did not confirm with underwriting whether the credits were due for reversal.



We issue demand letters occasionally to our debtors in our premium collection process. ...

47. The admission by the claimant to the allegations made against him went to the core of his duties.
48. The claimant testified in court and went into great detail about his duties and responsibilities. These included payment verifications and financial accountability as the CFO for the respondent.
49. Despite his admissions to matters set out for him to answer, the claimant was invited to a disciplinary hearing. He attended on 13 December 2018. He was taken through the various aspects of his job and role, the technical details that he was required to be conversant with including the regulatory framework in the insurance sector and how demand notices to agents and payment of premiums were to be processed. He was taken through the process of how premiums and due payments would be processed from the underwriting department up to his department, finance.
50. The claimant failed to adhere to the procedures and regulations of processing demand notices concerning Master Stroke Insurance Agency exposing the respondent to possible fraud. As the CFO he was entrusted with the duty to prevent such an occurrence.
51. Certain positions attract a high calling of integrity and financial probity. Once held, great responsibility and accountability is called for. As the CFO, the claimant had bigger accountability beyond what he held while employed as the accountant. In the case of *Celina Nadite & 19 others v National Police Service Commission* [2019] eKLR the court held that where an employee fails to give a proper account of his financial probity and integrity, the employer is allowed under the provisions of Section 43 of the *Employment Act* to lawfully terminate his employment. In the case of *Violet Kadala Shitsukane v Kenya Post Savings Bank* [2020] eKLR the Court of Appeal in addressing a similar matter held that;

Banks are custodians of their customers' funds and other valuables of a personal nature and operate in a highly sensitive environment therefore, in order to inculcate and maintain customer confidence, banks and their staff are required to maintain a high degree of integrity, prudence and financial probity. It follows that where a staff's conduct in relation to funds and valuables belonging to customers points to fraud, such a staff risks termination of his or her employment. ...

52. In this case, the insurance sector is finance-sensitive and the position held by the claimant as CFO is similar to that of a financial custodian and other valuables. A demand letter from him that is erroneous is capable of affecting the financial position of the respondent and such an error as admitted is capable of initiating fraudulent transactions. This is noted in the case of *Agnes Murugi Mwangi vs. Barclays Bank of Kenya Limited* (2013) eKLR and *Evans Kamadi Misango v Barclays Bank of Kenya Limited* (2015) eKLR where the court held that;

... in the business of handling other people's money and in order to maintain customer confidence, they must demonstrate a high degree of integrity and financial probity. This standard must of necessity extend to the employees of the Bank who are its face. The Claimant's conduct fell below this standard and I find that the Respondent had a valid reason for terminating her employment

53. In this case, the claimant was called to account for his conduct and admitted to gross acts of misconduct. Acting without consulting other departments particularly the underwriting department to be informed of the due premiums and the dates the policies were incepted was in gross violation of his employment letter and the trust and confidence expected of him by the respondent. The claimant was invited to a disciplinary hearing and failed to explain his conduct and hence found culpable of



dishonestly, negligently and recklessly issuing or causing to be issued a payment demand to Master Stroke Insurance Agency for Misort Africa Ltd for payment of a premium of Ksh.18, 508,212 when he knew or ought to have known that the outstanding amount was ksh.13, 837,287. With proper account and tabulation in consultation with the underwriting department, the claimant should have issued a proper demand notice. In further acts of negligence and recklessness, the claimant failed to give proper dates for the policy documents. He stated that the policy under which the payment demand was issued was incepted in May 2018 when in fact the policy was incepted in February 2018.

54. The response by the claimant was that the underwriting department has been known to take time to correct errors in statements whether debit or credit so it's not unusual for agents or clients to raise issues with our balances. This only added to acts of negligence and reckless handling of his duties. As the CFO he should have sealed all these gaps as the officer entrusted to secure the financial soundness of the respondent.
55. These acts exposed the respondent to risk and fraud. The claimant was under a letter of employment and policy to secure the finances of the respondent. He failed in his duties.
56. The claimant was taken through the motions of fair procedure and disciplinary hearing as outlined in the case of *Postal Corporation of Kenya vs. Andrew K. Tanui* [2019] eKLR which required the respondent to issue him with notice with an outline of the allegations made against him and attend the disciplinary hearing with a representative of his choice. These rights were secured and the elements of Section 41 of the *Employment Act* can be discerned as addressed by the Court of Appeal in the case of *Oyombe v Eco Bank Limited (Civil Appeal 185 of 2017)* [2022] KECA 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.
57. The court finds that there were valid, justified and genuine reasons leading to termination of employment.
  58. On the remedies sought by the claimant, compensation is not due upon the finding that employment was terminated lawfully and upon due process.
  59. The claim for payment until the claimant attained 60 years is not justified upon the findings above that employment was terminated for valid reasons.
  60. The claim for the unpaid balance of salary in lieu of notice at Ksh.4, 601,520 is because the claimant was entitled to 6 months' notice but was only paid for one (1) month. Under clause 13.2 of the letter of employment dated 10 March 2017 parties agreed that termination of employment would be upon 6 months' notice for a senior employee such as CFO, or vice president (VP). The reasons leading to the termination of employment taken into account by the respondent, they opted to pay the claimant in lieu of notice for one month. On this basis, the agreed notice pay is due being 6 months, and the claim for 5 months in unpaid notice pay is due.



The claim for Ksh. 4,601,520 is hereby found justified.

61. On the claim for vesting share value, through a letter dated 1<sup>st</sup> July 2015, the claimant was offered share value by the respondent. This was to vest in three tranches, subject to continued employment at the time each tranche was due. The claimant got the initial two tranches and with the termination of employment for valid reasons, he is removed from claiming the last tranche post-employment.
62. A certificate of service is due at the end of employment. This should be issued following Section 51 of the *Employment Act*.
63. On costs, the claims made analyzed above, each party should meet its costs.
64. Accordingly, the only claim that arises is unpaid notice pay of 4,601,520 which should be paid within the next 30 days after which the same shall accrue interests at court rates from the date of this judgment and until paid in full. For costs, each party bears its 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

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Page 5 of 5

