



**Musili v Kansai Plascon Kenya Ltd (Cause E074 of 2023)
[2024] KEELRC 13525 (KLR) (27 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13525 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E074 OF 2023
DKN MARETE, J
NOVEMBER 27, 2024**

BETWEEN

PETER KIMANZI MUSILI CLAIMANT

AND

KANSAI PLASCON KENYA LTD RESPONDENT

JUDGMENT

1. This matter came by on the basis of a statement of Claim dated 2nd February, 2023. It does not display any issue in dispute on its face.
2. The Respondent in a Statement of Response dated 26th April, 2023 denies the claim and prays that the same be dismissed with costs.
3. The Claimant's case is that he was on 1st January, 2018 employed by the Respondent as a Marketing Assistant at monthly salary of Kshs. 28,500.00. On 1st June, 2022, he was promoted to Overall Stocks Controller at a pay of Kshs.90,000.00 per month. His duties included, *inter alia*, overseeing stock control and ensuring accurate inventory records in the system.
4. The Claimant's further case is that acting on his duties, in May, 2022 he raised issues in respect to stock shortages in Kisumu deport but received an unsatisfactory response forcing him to send two of his staffers there for a stock count. This ultimately culminated in audit report dated 12th June 2022 with a finding of a loss of Kshs.859,669.65. It also recommended criminal investigation and prosecution of the culprit(s.)
5. The Claimant avers that contrary to his expectation, he was served with show cause letter for failure to act. He appeared before a disciplinary committee- the whole of which was unfair and unprocedural. Despite protestation and outline of absurdity of the allegation owing to the fact that he is the one who unearthed the issues he was summarily dismissed.



6. The Claimant's other case is that the trial and summary dismissal was unfair and unprocedural in that he was never afforded an opportunity to present his defence. The disciplinary proceedings were conducted in a hostile atmosphere where he was shut down and not allowed to present his case.
7. The Claimant further avers that the trial and summary dismissal were unfair in the following aspect.
 - a. Respondent's failure to take into consideration the Claimant's response to the Show cause letter.
 - b. Respondent's failure to widely investigate following the audit report, but instead biasedly and unfairly targeting the claimant.
 - c. Respondent's failure to hear the claimant before the decision to summarily dismiss him.
 - d. The respondent's HR rudely dismissing the claimant's responses in the disciplinary hearing.
 - e. Respondent's failure to accord the claimant a right to appeal the decision made by the Respondent.
 - f. Summary dismissal being in contravention of the principles of the employment contract between the parties.
 - g. Respondent's failure to pay the claimant terminal dues.
8. Hitherto, the claimant had had a blemish free stint of service.
9. He claims as follows;
 - a. Salary October 2022 (11 days) Kshs.35,357.00
 - b. One(1) month salary in lieu of noticeKshs.90,000.00
 - c. Leave pay shs.90,000.00
 - d. Compensation for unfair termination Kshs.1,080,000,00
 - TotalKshs. 1,295,357.00
10. He prays as follows;
 - a. The court declares the summary dismissal unfair and
 - b. The court awards damages for the wrongful termination/unfair dismissal of the claimant.
 - c. The court awards the unpoaid claims as particularised under paragraph 11 making a total of Kshs.1,295,357.00
 - d. The respondent be compelled to issue the claimant a certificate of service.
 - e. Costs of this suit.
 - f. Interest of item (c) and (e) at court rates.
 - g. Any other relief this court deems fit to grant.
11. The Respondent's case is one of a denial of the claim.
12. It is her further case that the Claimant summary dismissal from employment on account of his negligence of his duty as set out in the summary dismissal letter of 7th October, 2022. He failed to carry out his duties and responsibilities set out in his job description as signed on 19th April, 2021.



13. The Respondent's further case is that the company lost Kshs.859,669.65 on his account and the Claimant was issued with a show cause letter. The Claimant was taken through a disciplinary process prior to termination and also paid his terminal dues. He then left.
14. The Respondent in the penultimate posits a case of lawful termination of employment and denies any owing to the Claimant, this having been paid as final dues to him.
15. The issues for determination therefore are;
 1. Whether the termination of employment of the Claimant by the Respondent was wrongful, unfair and unlawful.
 2. Whether the Claimant is entitled to the relief sought.
 3. Who bears the costs of this cause.
16. The 1st issue for determination is whether the termination of employment of the Claimant by the Respondent was wrongful, unfair and unlawful. The parties hold opposing position on this.

The his case. This is as follows;

Upon receiving the inventory transfer form the Claimant embarked on reconciling the paperwork and the SAP system. The Claimant states that he did not fail to perform his work in time as alleged; as generally there is no specific time as to recording a complete delivery of dispatched goods. In this case after reconciling the paper work and the system, it came to the Claimant's attention that the physical goods received in Kisumu had not been updated in the SAP system by the Inventory Management team in Kisumu. Thereafter, the Claimant sent an email dated 11th May, 2022 to Kisumu Inventory management team copying his supervisor (Chief Accountant) Geoffrey Makenzi questioning the anomaly and further sent two staff members to the Kisumu Depot to do a stock count.

17. This email elicited email correspondences produced herein as "Claimant exhibit - 5"as follows;

Email From Geoffrey Makenzi to Brian (who is based in Kisumu Depot)

and copied to the Claimant

Dated 15th June, 2022 at 13:57pm

"I don't get you please note, there is no way a transporter would only take silk wo and no other product, after all it is your duty to confirm each and everything before releasing the driver go we have nothing to discuss here even in a court of law how will you charge him"

Response from Brian to Geoffrey and copied to Claimant Dated 15th June, 2022 at 11:46 am

"Dear Makenzie, Yes the communication was for clearing the transit but is when I realized the paint did not come and had mistakenly signed the depot transfer.

As per process if the physical stock is not received normally we get in touch with you immediately so that it can be sorted out with the transporter which was communicated verbally to you and not via email."

Response from Geofrey to Brian and copied to Claimant



Dated 14th June, 2022 at 5:51pm

“Dear Brian, the communication we had was on clearing the transit, you are not new to our procedures, if something is missing you indicate on the documents before the transporter you give him a copy to locate the goods immediately when the matter is fresh in your minds. If you never did this tell me then how can you blame it on the transporter?”

Response from the Claimant to Brian Dated

13th June, 2022 3:31pm

“What do you mean you mistakenly signed” without confirming? A mistake of 300 tins cannot go unnoticed. As per the company policy, transit should be cleared immediately after stock after physical accounts to -282k (as you can see below), what about the remaining over -500k variance? We have been asking for weekly spotchecks just like the other depots, it would be easy to realize you have variance earlier enough.”

19. This was all a consequence of the Claimant investigations through an audit dated 12th June, 2022 that established a loss of Kshs. 859,669.65 and recommended criminal investigation into the matter.

Again,

The claimant avers that he did not fail to perform his work in time as alleged as generally there is no specific time as to recording of dispatched goods. It is the Claimant’s case that the Inventory management team in Kisumu had to keep the correct documentation, receipts and issuance of the stock as they are the stock custodians in the depot to enable the Claimant maintain accurate records of inventory and stock management. That it is impracticable for the Claimant to confirm physical availability of goods in the respective depot branch as the Inventory management team is the one on the ground to do so. ...the Claimant initiated the process leading to discovery of losses and reported the matter to the Respondent according to his job requirement.

Section 45 of the [Employment Act](#) provides for valid reasons for termination 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 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; Subsection 4(b) provides that: (4).A termination of employment shall be unfair for the purposes of this Part where a) ... b) It is found that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.

20. The Claimant employs the provision of section 45(1) (2) and 4(b) and 43(2) of the [Employment Act](#), 2007 which provides for the entities of a lawful termination of employment as follows;

Section 45 of the [Employment Act](#) provides for valid reasons for termination 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 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;

Subsection 4(b) provides that:

- (4). A termination of employment shall be unfair for the purposes of this Part where
 - a) ...
 - b) It is found that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.

... the Respondent did not conduct investigations as expected by the Claimant and directed by the audit report. The Respondent instead made the Claimant take responsibility for the losses, which is absurd since it was the Claimant who brought the issue to the Respondent's attention, in addition, the correspondences produced as Claimant exhibit-5 shows clearly who is to blame.

Further, section 43(2) provides thus;

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 employer.”

- 21. The Claimant in toto denies liability so as to lead to his termination of employment. It is his case that; That his disciplinary process was flawed in that he was issued with a show cause letter and invited to disciplinary proceeding the following day. There was no adequate time to prepare for his defence. He was not offered an opportunity to be accompanied by a fellow employee of his choice. He was not informed of his right to appeal against the decision of summary dismissal. His defence in response were never taken into account. The Respondent tendered no evidence in response to the Claimant's defence.
- 22. The Respondent on the other hand submits a case of lawful termination of employment in the following terms;

The Respondent has clearly stated that the Claimant was dismissed for failing to carry out his duties and responsibilities set out in the job description note as a result of which the Respondent lost Ksh.859,669.65 worth of unaccounted stocks. In the Audit report which is attached to the Claimant's list of documents the Claimant has admitted that there was loss of Kshs.859,669.65 and the said report is signed by the Claimant. At page 23 of the said report it states "...after reconciling physical count with system balances variances were detected amounting to Kshs.859,669.65 loss of inventories as shown below..." As per the job description note attached to the Respondent's list of document one of the duties of the Claimant was to conduct daily counts and reporting discrepancies between physical counts and computer records. The other duty was to maintain accurate record of inventory and stock management systems according to set standards. The Claimant was



also supposed to perform regular inventory audits in the Respondent's different depots etc. The said job description is signed by the Claimant. The Respondent states that the loss of Kshs.859,669.65 occurred due to the Claimant's failure to carry out his duties and responsibilities set out in the job description note. In particular the Claimant failed to conduct daily counts and to report discrepancies between physical counts and computer records in the Respondent's Kisumu depot thereby occasioning the loss of the said sum of Kshs. 859,669.65. He also failed to perform regular inventory audits in the Respondent's Kisumu depot thereby occasioning the said loss. He also failed to maintain accurate record of inventory and stock management systems according to set standards.

23. She therefore submits a case of the Claimant's failure to perform his part of the bargain leading to massive loss to the Respondent. This was met with summary dismissal after the Claimant was taken through appropriate disciplinary proceedings.
24. This matter is all telling. A scrutiny of the respective cases of the parties tilts this in favour of the Claimant. From the onset, the Claimant sounds a diligent worker who without instigation initiated investigations into the Kisumu stock issue and came up with a report which was notified to the Respondent. The Report brought out the loss of Ksh.859,669.65 with a recommendation for further investigation and prosecution of the culprit(s.) This was met with summary dismissal of the Claimant on allegation of failure to perform his duties and responsibility appropriately.
25. This court does not agree with the reasons and procedure for dismissal of the Claimant. I agree that he was not accorded the right atmosphere and space to conduct his case at the disciplinary proceedings. These were hostile and not accounting. They did not incorporate the basic and essential facets of section 41 and 43 of the Employment Act, 2007 on substantive and procedural fairness. I therefore find a case of unlawful termination of employment and hold as such. And this answers the 1st issue for determination.
26. The 2nd issue for determination is whether the Claimant is entitled to the relief sought. He is. Having worn on a case of unlawful termination of employment he become entitled for the relief sought.
27. I am therefore inclined to allow the Claim and award relief as follows;
 - (i)) One(1) months salary in lieu of notice Kshs.90,000.00
 - (ii) Salary for October 2022 (11 days) Kshs.35,357.00
 - (iii) Compensation for untaken leave Kshs.90,000.00
 - (iv) Six (6) months salary as compensation for unlawful termination Kshs.90,000.00x6..... Kshs.540,000.00Total of Claim Kshs. 755,357.00
 - (v) The costs of this cause shall be borne by the Respondent.

DELIVERED, DATED AND SIGNED THIS 27TH DAY OF NOVEMBER 2024.

D. K. NJAGI MARETE

JUDGE

Appearances:

1. Mr. Mutheke instructed by Munyithyia, Mutugi, Umara and Mzusna and Company Advocates for the Claimant.



PARA 2. Mr. Kioko holding brief for C.K. Chege instructed by C.K. Chege and Company Advocate for the Respondent.

