



**Aketch v West Kenya Sugar Company Limited (Employment and Labour Relations Cause E021 of 2023) [2024] KEELRC 13191 (KLR) (19 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13191 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E021 OF 2023**

**JW KELI, J  
NOVEMBER 19, 2024**

**BETWEEN**

**DENNIS OMONDI AKETCH ..... CLAIMANT**

**AND**

**WEST KENYA SUGAR COMPANY LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant following the termination of his services filed suit against the respondent vide statement of claim dated 10<sup>th</sup> November 2023 seeking the following reliefs:-
  - i. A declaration that the Claimant’s dismissal from employment was wrong, unfair and unlawful.
  - ii. A declaration that the Claimant is entitled to payment of the dues for the remainder of the contract and bonus amounting to KShs.5,030,434.79/-.
  - iii. General damages for unlawful termination of contract.
  - iv. Interest on the above for the time of filing suit till payment thereof.
  - v. Costs of this suit.
  - vi. Any other reliefs that may be granted by the court.
2. The claim was filed together with the list of documents of even date with the bundle of documents, witness statement of the claimant of even date and verifying affidavit of the claimant of even date. On the 1<sup>st</sup> March 2024 the Claimant filed in court on even date Supplementary list of documents being the Final Bill of quantities after inclusion of Anti- Termite Treatment and the contract between West Kenya Sugar Ltd and Shiv Construction Company and the bundle.
3. The Respondent entered appearance through the law firm O&M Law LPP on the 16<sup>th</sup> November 2023, and on even date filed a response to the statement of claim. On the 8<sup>th</sup> January 2024, the



Respondent filed a witness statement of Duncan Abwao of 16<sup>th</sup> December 2023 together with a list of documents of even date and the bundle of the documents. On the 9<sup>th</sup> February 2024, the Respondent filed a supplementary list of documents dated 4<sup>th</sup> February 2020 together with the bundle of documents (pages 43-48). On the 22<sup>nd</sup> February 2024, the respondent filed a further supplementary list of documents dated 20<sup>th</sup> February 2024 and the bundle of documents (pages 49-71).

## Hearing

4. The claimant's case was heard on the 13<sup>th</sup> February 2024 where the claimant was the only witness of fact. He produced as his evidence documents under list of documents dated 10<sup>th</sup> November 2023 as C-Exhibits 1,2,4—17. Documents 3 being email dated 17<sup>th</sup> May 2021 from Neil Hellings was marked as MFI-3 for production by the author. The claimant was cross-examined by counsel for the Respondent, Mr. Ondawo. The witness was stood down and the hearing postponed to 23<sup>rd</sup> February 2024 pending the calling of Neil Hellings to produce MFI-3. On the 23<sup>rd</sup> February 2024 the counsel for the claimant, Ms. Ngaruiya, informed court they were unable to get Neil to appear in court to produce MFI-3 and the said document was marked as withdrawn. On the 19<sup>th</sup> March 2024 when the case was coming up for further hearing the Claimant informed court that they wished to reopen the claimant's case in view of the Respondent's supplementary documents and theirs. The defence counsel had already changed. The court reopened the claimant's case to start afresh. On the 12<sup>th</sup> June 2024 the claimant was sworn in afresh and relied on the document as outlined above. He was cross-examined by the new counsel for the Respondent, Mr. Wachira, and re-examined by his Counsel Ms. Ngaruiya. The claimant's case was marked as closed.
5. The Respondent's case was heard on the 9<sup>th</sup> July 2024 where its witness of fact Duncan Abwao gave sworn testimony. He adopted his witness statement as his evidence in chief, produced as respondent's evidence documents under list dated 16<sup>th</sup> December 2023 as D- exhibits 1-12 as listed, supplementary documents under list dated 4<sup>th</sup> February 2024 (pages 43-48) as D-exhibits 13 and supplementary documents dated 20<sup>th</sup> February 2024 (pages 49-71) as D-exhibit 14. On even date the witness was cross-examined by counsel of the claimant Ms. Ngaruiya and re-examined. The defence case was marked as closed.

## Written Submissions

6. The parties filed written submissions after closure of the hearing. The claimant's written submissions dated 9<sup>th</sup> September 2024 were drawn by Njaari Ngaruiya & Co Advocates. The respondent's written submissions dated 1<sup>st</sup> October 2024 and drawn by O&M Law LLP.

## The claimant's case in summary

7. The Claimant adopted as his evidence in chief witness statement dated 10<sup>th</sup> November 2023. Interestingly the witness statement was signed by Njaari Ngaruiya & Co. Advocates instead of the Claimant. The statement was admitted without any objection. In summary, the Claimant had a contract for 2 years for the period 1<sup>st</sup> July 2021 to 30<sup>th</sup> June 2023. The Claimant stated he got another offer and the CEO having seen the offer talked to the Managing Director and among others, he was to be paid KShs. 100,000 as a bonus. The Claimant states that the Respondent failed to pay the agreed bonus. During the hearing the Email by Neil (the CEO) on the bonus was marked for identification as "MFI-3" and later withdrawn as the maker could not be produced. That was the only evidence in support of the payment of KShs.100,000/- as a bonus.



8. The Claimant's case was that his termination was unlawful as he was accused of approving contractor's source documents with higher rates than approved amounts and during his disciplinary hearing his explanation that payment certified was less than what was due in the application for payment was unsuccessful. He said the disciplinary proceedings were skewed to ensure he did not complete his contract. The respondent alleged he was dishonest/irresponsible while carrying out his duty as project manager. The claimant states the payment was to be done as per the invoice not the application by the contractor. The Claimant contended the action by Respondent was to stop him from claiming the amount requested as bonus.
9. In support of his claim the Claimant at the hearing of his case, produced documents marked as (C-Exh 1, 2, 4-19) as listed below:-
  1. The contract of employment dated 17<sup>th</sup> May 2021.
  2. Email dated 14<sup>th</sup> November 2022 forwarding the same documents to Dennis Aketch.
  3. Email by Mr. Neil Heillings on bonus - Withdrawn.
  4. Show cause letter dated 13<sup>th</sup> October 2022 with bill analysis attached
  5. Invite to appear before disciplinary committee hearing letter of 26<sup>th</sup> October 2022.
  6. Minutes of disciplinary hearing.
  7. Letter terminating contract dated 22<sup>nd</sup> November 2022.
  8. Letter appealing term 23<sup>rd</sup> December 2022 vide email
  9. Minutes of hearing 12<sup>th</sup> January 2023.
  10. Letter dated 19<sup>th</sup> January 2023 upholding termination.
  11. Approved invoice dated 13<sup>th</sup> June 2022.
  12. Application for valuation No. 2 received by Claimant on the 11<sup>th</sup> June 2022.
  13. Payment certificate of KShs. 8,267,256.00
  14. Work completion certificate of KShs.755,560.64 dated 16<sup>th</sup> June 2022 approved by CEO to Claimant.
  15. Local Purchase Order of KShs.34,751,798.09.
  16. Demand letter dated 10<sup>th</sup> June 2023.
  17. Supplementary documents of 1<sup>st</sup> March 2024.
  18. Email bill of quantities after inclusion of Anti-termite Treatment.
  19. Contract between West Kenya Sugar Ltd & Shiv Construction Company.

### **Respondent's case**

10. The respondent's case was as per the witness statement of RW, Duncan Abwao, who adopted his witness statement and the list of documents as outlined above.
11. RW told the Court the claimant had a contract of 2 years dated 19<sup>th</sup> March 2021(C- Exh 2). During his tenure of service, he was issued with 2 show cause letters and cleared of the accusations (D-Exh 3).



As relates to the suit, the claimant was issued with a show cause letter dated 12<sup>th</sup> October 2022 (C-Exh 4) on allegations of failing to check the bill of quantities for groove cutting under the final bill of quantities hence causing a possible loss of Kshs. 400,000 to the respondent (C- Page 35 was the bill of quantities). Vide letter dated 15<sup>th</sup> October 2022 the claimant responded to the show cause and failed to address the issue raised save to insist no loss had been suffered by the respondent. The claimant denied signing on the application for valuation with groove cutting of Kshs, 550 instead of the agreed rate of Kshs. 81(C-Exh 12). Vide a letter dated 26<sup>th</sup> October 20022 the respondent invited the claimant to a disciplinary hearing for 29<sup>th</sup> October 2022(C-Exh-5). The claimant was informed of the right to be accompanied by an employee of his choice or any other witness. RW stated that the claimant did not give a satisfaction explanation as per the minutes of the disciplinary proceedings (D-Exh 7). The decision of the committee was communicated to the claimant and it was decided his services should be terminated (D-Exh 8). On the 23<sup>rd</sup> December 2022, the claimant appealed against the termination (D-Exh 9). The claimant as invited for appeal hearing chaired by the Group Human Resources Manager and the Chief Executive Officer of the respondent. The appeal was heard on the 12<sup>th</sup> January 2023 and minutes produced as D-Exh 10. At the appeal, the claimant did not raise any new grounds or give a plausible explanation to change the verdict which was upheld(D-Exh 11-decision on appeal). The claimant cleared with the company and was issued a cheque of Kshs. 752,377 being his terminal dues which he requested to be banked on his behalf and that was done on 23<sup>rd</sup> March 2023(D-Exh 12 - tabulation of dues and proof of payment).

## DETERMINATION

### Issues for determination

12. The claimant in written submissions raised the following issues for determination:-
  - i. Whether the Claimant's termination was substantively fair
  - ii. Whether the Claimant's termination was procedurally fair
  - iii. Whether the Claimant is entitled to the remedies sought
13. The respondent in written submissions addressed similar issues and the court thus adopts the issues by the parties namely:-
  - a. Whether the Claimant's termination was substantively fair.
  - b. Whether the Claimant's termination was procedurally fair.
  - c. Whether the Claimant is entitled to the remedies sought.

### Issue a. Whether the Claimant's termination was substantively fair

14. The employer under section 43 of the *Employment Act* can only terminate employment for valid reasons. The section reads:-

“43. Proof of reason for termination

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.”
15. Section 45(2) qualifies the reasons under section 43 (above) as follows:- “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—
    - a. related to the employee’s conduct, capacity or compatibility; or
    - b. based on the operational requirements of the employer; and..”

### **Claimants’ submissions on the substantive fairness**

16. The claimant submitted that according to the letter of termination of contract dated 22<sup>nd</sup> November 2022(C-Exh8)) the respondent was dismissed on account of “approving the Contractor’s source documents that occasions payment thereof” running afoul of section 44(4)(c), which offence attracts summary dismissal. The source document referred to is the application for payment which is a document that was prepared by the contractor- Shiv Construction Co. Ltd.
17. The Claimant submitted that at cross-examination, the Respondent’s witness stated that for a contract of this magnitude, it is expected that the contractor will have all the documents from the date of the tender, contract, and the rate of every item quoted. The claimant inserted a table comparing payments no. 2 and 3 under the project and stated the processes followed were the same. The same was noted by the Court. In payment No. 2 application for valuation of payment was made by the contractor of Kshs. 9,439,460.44, payment certificate was done by Engineer Markan for Kshs.8,267,256 on 8<sup>th</sup> June 2022, Invoice was submitted dated 13<sup>th</sup> June 2022 by contractor Kshs. 8,267,256 and completion certificate by the claimant of 16<sup>th</sup> June 2022 for Kshs. 8,267,256. The Claimant submitted the same process was followed for Payment No. 3.
18. The claimant contended that it was clear from the above illustration that the process of payment was standard for both the 2<sup>nd</sup>(contested) and 3<sup>rd</sup> applications(uncontested); being:- The Contractor would prepare the Application for valuation, the same would be collected by the Project Manager (Claimant) and given to the Consultant Engineer- Markan Engineering Ltd, the Consultant then approves the work done and that payment is due to the contractor but he has to adjust the Contractor’s application for valuation in accordance with work done and the correct rates. The consultant prepares a payment certificate and hands over to the Project Manager. The Project Manager compares the Application for valuation as prepared by the Contractor and the Payment certificate as prepared by the Consultant. He gives the same to the Contractor to adjust and prepare an invoice with the adjusted rates which in both the contested payment and uncontested payment was significantly lower than what the contractor applied for. The invoice is prepared by the Contractor and a work completion certificate prepared by the Project Manager is forwarded to the Accountant for payment. The claimant submitted that even if the Contractor applies for a higher figure, the Consultant alongside the Project Manager do not have to honor the said rates as applied for by the Contractor, instead and in all payments have been adjusted at a much lower value by the Consultant and Project Manager. That the Claimant demonstrated that the invoice would be prepared by the Contractor before the completion certificate and the invoice would be adjusted to conform with the payment certificate prepared by the consultant Engineer.



19. The claimant further submitted that in the Payment No. 2 which is in question in this suit, the payment was not made in accordance with the application as made by the Contractor but payment was only made using the invoice itself. That it was evident in page 19 of the Claimant's documents that the invoice that has been okayed at the foot of the invoice bears the amount of Kshs 8, 267, 255.00. This same payment has the words "ok. Go ahead for payment." By the CFO – Chief accounting officer (page 26 of the Claimant's documents.) The figures applied for by the contractor and those approved by the claimant in his role as a project management officer are starkly different.
20. The claimant invited the court to pay heed to the Claimant's evidence in chief that in the Application for Valuation (on pages 43-44 of the respondent's bundle) referred to in the letter of termination of contract dated 22nd November 2022, the initials "approved" across the document were not written by the claimant but by the Consultant (Markan Consultant). The Claimant's signature appears at the very bottom against the date of 11/06/2022 which is the same date on which he also received the payment certificate- 11/06/2022 (page 46 of the respondent's bundle).
21. The Claimant submitted that under section 43(1) as read with section 47(5) of the *Employment Act*, the employer is required to prove the reasons of termination and that the reasons advocated for the termination must be valid and justifiable in order to pass the test of substantive fairness. According to section 43(2), the said reasons are ones which the employer genuinely believed to have existed at the time of terminating the employee.
22. The claimant relied on the provisions of the Employment Act in Section 45 sub-section 1 and 2 (a) for emphasis thus:-

"Unfair termination

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;"**

23. The Claimant in support of his case relied on the decision in the case of *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR, and stated that the Court of Appeal affirmed the trial court findings that substantive fairness had not been achieved as despite adequate explanations given by the aggrieved employee at the instigation of the employer, the explanations were not considered. The Court of Appeal went on to affirm the duty of the employer to prove the reasons for termination or dismissal are valid/ fair and justified. The Appellate Court at page 10 stated;

‘ The onus was really on the Appellant to show that the dismissal was justifiable after the response made by the Respondent both in his documentary and oral evidence. In the case of *Pius Machafu Isindu vs Lavington Security Guards Ltd* [2017] eKLR this court had the following to say on the burden of proof;

There can be no doubt that the Act which was enacted in 2007 places heavy legal obligations on employer in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The Employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove the grounds are justified (section 47 (5) amongst other provisions.....”

24. The Claimant further submitted that at the center of the respondent's allegation is that the alleged acts of gross misconduct by the claimant were likely to result to loss to the company had the payment



been made in accordance with the application for payment. However, it was clear that the roles of the various professionals were delineated. The claimant was also able to show yet in futility, that as a project manager, there was no dereliction of duty on his part as he ensured that the correct rates were used when preparing his completion certificate and therefore there would be no possible loss occasioned to the company as alleged. It was noteworthy that the Claimant was not asked to prepare an Application of valuation or to correct it, his work was to value the work applicable rates and come up with a figure that should be paid to the Contractor bearing in mind the Local Purchase Order which forms part of the Claimant's supplementary bundle of documents.

25. On reasons which the employer genuinely believed to have existed at the time of terminating the employer, the claimant submitted that the allegations contained in the Notice to Show Cause letter dated 12th October 2022 were clearly answered through the response letter dated 15th October and subsequently at the disciplinary and appeal hearings conducted by the respondent.
26. The Claimant submitted that the complainant who is the accountant of the Respondent was uncertain about some aspects of the payment processes himself, a case in point (on page 20 of the Respondent's bundle) when he expressed the confusion on the movement of documents. Being a process that was likely to leave an indelible mark on the applicant's career, this was an aspect that should have been interrogated by the respondent to ensure fairness in the process.
27. The claimant further submits that on Page 10 of the Claimant's bundle of documents on the minutes of the disciplinary hearing the Accountant who was not availed (sic) during the disciplinary hearing stated the following;

“Martin, what rate did you pay in the 2nd payment? At the rate of Kshs 550. What document is used to counter the LPO? There's a document that comes from civil at the beginning of the project inclusive of all the work done as well as the rates.”

28. The claimant further submitted which the court opted to quote in verbatim: -“ It is evident that the Accountant had ALL the documents as he stated he had obtained a document from the Civil Department at the beginning of the project.

However, at page 12 of the Claimant's document, the Accountant feigns ignorance and says; ‘the Application document was the only supporting document we had hence used that for comparison.’ With due respect My Lady, the Accountant has already stated that he gets documents from the Civil department from the beginning. Why would he get a document from Civil department ab initio if not to compare rates and the contract sum? Why does he call it a document yet the documents are clearly labelled invoice or application for valuation? It is imperative to note that all accusations came seemingly from the Accountant Martin who spoke seemingly on both sides of his mouth. The Claimant insisted that finance (Martin) does not pay according to the Contractor's application but on the Completion certificate.

...Did the Disciplinary Committee then ask itself why is the Application for valuation was more and the Completion certificate less? The accountant is also economical with the truth when he states in the Appeal Hearing that he paid for a rate that was not approved of Kshs 550 for groove cutting and not 81. The Respondent's witness was not successful either at trying to answer in cross-examination why the rate certified for payment was significantly less.”(cited by Court in verbatim)



29. In the upshot the claimant submitted that his employment was unfairly terminated as there was no proof on the scale of a balance of probability that the respondent “approved” on the vendor’s source document and that the higher figure was paid out by the Finance Department. The claimant relied on the invoice approved for payment on page 26 of his documents. (Emphasis by Claimant in the submissions captured in bold)

**Respondent’s submissions on substantive fairness.**

30. The Respondent on the reasons for termination, relied on the letter of termination of services of the claimant dated 22<sup>nd</sup> November 2022 (page 22 of respondent’s documents ) where it was stated “ from the report gathered in the due process through your submissions and evidence that was presented , on 31<sup>st</sup> October 2022 it was established that you failed to ensure approved rates were applied while computing valuation. Your actions in line with this matter surmounts to misconduct as stipulated in the Employment Act 2007 clause 44( 4)(c)…” and the letter upholding the termination after the appeal and dated 19<sup>th</sup> January 2023(page 37of respondent’s documents ) where after the appeal the reasons of termination was further stated as follows:- “based on the following facts confirmed during the appeal hearing-
- i. You appended you signature on a valuation of approval documents despite the glaring error on groove cutting rate yet agreed that that signatures are an indication that one has ascertained the contents of the documents,
  - ii. As part of your responsibility as a projects officer you failed to cross-check documents and (..not legible) that the rates on payment certificates tallies with the rates in the approved BoQs and subsequently the final account on the project expenses.
  - iii. Accounts department confirmed that payments had been made to the contractor with the wrong rates for grove cutting indicates on the approved BoQs
  - iv. The company had a right to certain level of performance in you being one of the manager(s) and in this case you clearly failed on what was a quite serious matter.”
31. The respondent submitted that from the notice to show cause to appeal verdict the claimant was at all material times aware of the reasons for termination as cited above. That the material documents were found at page 56 of respondent’s documents being the application for valuation Payment No. 2 and the bill of quantities at page 52 of respondent’s documents . That it was not in dispute the approved rates for groove cutting was Kshs. 81 and not Ksh. 550 which the claimant agreed was the wrong rate. That the Claimant admitted the signature appended at the bottom of the application was his. Based on the evidence the Respondent found the claimant was negligent in his duties and it did not matter whether or not there were financial consequences. The respondent questioned why the claimant received the application for valuation if the application was not a payment document.
32. The respondent submitted that during the hearing the claimant diverted from his testimony in his appeal on the process which he told the employer stated to be:-
- a. Contractor raises an application for payment / application for valuation
  - b. Consultant raises a payment certificate
  - c. Project manager raises a completion certificate
  - d. Contractor raises payment invoice



- e. Payment is made.
33. That in the instant case, the completion certificate by the claimant was after the contractor raised his invoice (page 54 of the Respondent's documents ) before the works were certified as complete by the project manager, the claimant (page 59 being the certificate of completion).

### Decision

34. The court in the determination of substantive fairness in this case relied the legal framework in the Employment Act to wit:- under the provisions of section 43 on validity of reasons for termination, section 45(2) on the establishing of fair reasons and section 45 (7) on the burden of proof of the reasons being on the employer.
35. The court finds that, at the center of the respondent's reasons for termination of the contract was the alleged acts of gross misconduct by the claimant which it stated exposed it to potential financial loss had the payment been made in accordance with the application for payment.
36. The Claimant admitted it was his role to check payments under the project. The court finds he was assisted by an Engineer Markan (consultant) from the payment documents relied on by the parties being the application for payment by the contractor, the payment certificate prepared by Engineer Markan, the completion certificate by the claimant, and the invoice by the contractor. The Claimant admitted to having received the application, signed and submitted it to the Engineer for preparation of the payment certificate. The respondent stated that the signature by the claimant in the application signified approval of the items on the application which included a wrong rate on an item of groove cutting being Kshs. 550 instead of agreed rate of Kshs. 81(page 56 of the Respondent's documents). The agreed rates were not in dispute (page 35 of claimant's documents was the bill of quantities indicating groove cutting item as Kshs 81). The claimant did not flag the wrong rates in the application for valuation(Payment No. 2) which was among the documents he submitted to accounts department of the Respondent together with the invoice, payment certificate and the completion certificate for payment) . The claimant said he signed the application on receipt and that was not approval. On why he never signed the invoice on the receipt, the Claimant stated it was an oversight.
37. The Claimant admitted that one of his responsibilities was to check payment documents. He said he verified the rates, and that he was not satisfied the rates were correct and admitted he did not indicate so. During the re-exam, the claimant e told the court the valuation of the Application was by the Engineer. The Claimant contended that during the disciplinary hearing, he explained the variation of the amount of KShs.9,439,460.44 in the Application for Valuation and the paid amount of KShs.7,554,560/- but this was ignored. On appeal, the court finds that the Claimant submitted his workout in respect to payment no. 2 which he alleged was used in the preparation of the completion certificate (page 16 of claimant's documents -workout), which workout, the court returns was at substantial variance with the certificate of completion(page 48 of the Respondent's documents ).
38. The burden to prove reasons for termination of employment lie with the employer, the respondent, under section 45(7) of the Employment Act to wit:- " (5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer."
39. To discharge this burden the Respondent stated its case as summarized above and presented its witness for cross-examination. The Respondent Witness (HR Officer) told the court the issue was the invoice being dated 13<sup>th</sup> June 2022 and the certificate of completion was dated 16<sup>th</sup> June 2022. That the invoice



is supposed to be prepared after certificate of completion. That wrong rate for groove cutting was quoted for Kshs. 550 instead approved rate of Kshs. 81 in the application for valuation No. 2 (page 46 of the Respondent's documents ) and was flagged by accounts and not the Claimant who signed as approval. The flagging of the wrong rate was at late stage of payment. The claimant stated he only signed and the word approved was by Markan.

40. During cross-examination by counsel for Claimant, Ms Ngaruiya, Respondent Witness told the court that there was LPO for sum of KShs.34,751,798/-, and there was bill of quantities of the project. There was a consultant for the project called Markan. The Claimant was a project management officer working with a team of consultants, the engineering department to finance. The engineering team was the technical team. The project management officer kept records of the project. The Respondent's Witness confirmed it was the Application for payment that had an issue leading to termination. The Respondent Witness confirmed under the Application sum of KShs.9,434,460.44 was due for payment. Markan Consulting prepared a certificate of payment for KShs.8,267,256 inclusive of VAT. Respondent Witness relied on page 16 of the minutes of disciplinary hearing and told the court if the payment had been done for groove cutting item at KShs.550/- they would have suffered loss.
41. The Respondent's Witness(RW) stated that the Accounts department relied on the documents submitted by the claimant (pages 49-71 of the Respondent's documents) as one record and not just the LPO. The accounts department referred to the bill of quantities to flag the groove-cutting rate in an application for valuation for KShs.550.
42. RW witness admitted minutes of the appeal did not capture that the payment approved by the Claimant was lower than in the application for valuation No. 2. RW stated that the page 56 of their documents, the application for valuation was signed by the Claimant and the contractor. He stated that in paragraph 11 of his statement, he had stated the Claimant was negligent. During the hearing, the respondent stated that negligence was demonstrated for the failure of the Claimant to flag wrong rates of groove cutting in the Application for valuation which he signed and the same was taken to mean he approved.
43. RW told the court the Claimant had a duty to verify each line item and in paragraph 7 of his statement he had explained possible loss.
44. The court having heard the witnesses and evaluated the evidence returns that the reason for termination of the services of the claimant of negligence of duty was proved on a balance of probabilities. The Claimant admitted to having signed the application for payment and failed to flag the wrong rates of groove cutting indicated as KShs.550/- instead of the approved figure of KShs.81/- under bill of quantities(page 35 of claimant's documents). The court did not believe the claimant's signature was a signal of receipt of the Application as he had not signed the invoice on receipt from the same contractor. The claimant in submissions did a comparison with subsequent payment no. 3. The court noted at page 65 (Payment No. 3 application for valuation) the item groove cutting was still billed at rate of Kshs. 550 and this time was flagged as Kshs. 81. The claimant did not sign the said application as he did in payment no. 2. The court deduced that by the fact of making a subsequent application of payment at the rate of Kshs. 550 for grove cutting the contractor had, more likely than not, invoiced at the rate of Kshs. 550 for groove cutting under payment No. 2 at the rate of Kshs. 550 hence the repeat of the price in subsequent application for payment No. 3.
45. The claimant confirmed to the court his role was to check payments under the project. The court noted that the claimant emphasized the accounts should only have relied on the invoice. The payment certificate was prepared by Engineer Markan on the 8<sup>th</sup> of June 2022 and signed by the claimant on the 11<sup>th</sup> of June 2022 indicates gross amount of Kshs. 8267,256 (inclusive of VAT) had no itemization



(page 45 of respondent's documents). The invoice for Kshs. 8,267,256 (inclusive of VAT was dated 13<sup>th</sup> April by Shiv Construction Co. Ltd (page 49 of Respondent's documents ) while the completion certificate was signed by the claimant on 19<sup>th</sup> May 2022 of the same amount as per the payment certificate payable less retention fee of 5%, 3 % withheld tax and 2% withheld VAT of the bill net payable Ksh. 7,047,055.96. The completion certificate was issued after the invoice meaning it did not rely on the completion certificate. None of the three documents (payment certificate, invoice and the completion certificate) had itemization of what the payable bill amount was for. It was not unreasonable for the accounts department to countercheck with the application for valuation signed by the claimant on the 11<sup>th</sup> of June 2024 (page 56 of the respondent's documents) which was signed, written approved and was itemized. The application indicated the contested groove cutting as billed at Kshs. 550 and not an approved rate of Kshs. 81. The claimant was obliged to be diligent in his work and flag the wrong rates when he signed the said application. This is in contrast with payment no. 3 where in the application for valuation the figure of Kshs. 550 (groove cutting ) was repeated and this time was flagged as wrong and figure of Kshs 81 was indicated on the application. The claimant failed to defend the process he followed both at the disciplinary hearing and before the court.

46. The court returns that the process followed by the claimant was not verifiable as he even gave contradictory evidence on which process comes first, invoice or completion certificate. The application document was submitted to the accounts department together with the invoice and completion certificate. The Court returns that the claim of possible loss relying on such a document was a real fear that the Respondent believed to exist.
47. Under section 45(2) of the *Employment Act* a reason for termination of contract is valid and fair if it relates to the employee's conduct, capacity and compatibility or based on the employer's operational requirements. In this case, the Court returns that the reason related to the employee's conduct. The court upholds to apply in the instant decision relied on by both parties in *Postal Corporation of Kenya v Andrew K. Tanui* [2019] e KLR Where the Court of Appeal held:-

‘The onus was really on the Appellant to show that the dismissal was justifiable after the response made by the Respondent both in his documentary and oral evidence. In the case of *Pius Machafu Isindu vs Lavington Security Guards Ltd* [2017] eKLR this court had the following to say on the burden of proof;

There can be no doubt that the Act which was enacted in 2007 places heavy legal obligations on employer in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The Employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove the grounds are justified (section 47 (5) amongst other provisions.....” The Court holds that the dismissal of the Claimant was justified to the satisfaction of the criteria set out in the decision and as stated in the cited legal provisions.

48. In the upshot the court holds the termination of the contract of employment of the claimant was substantially fair as the reasons have been held to have been justified.

#### **Issue b. Whether the termination was procedurally fair**

49. On procedural fairness section 41 of *Employment Act* applied to wit:-

‘41. Notification and hearing before termination on grounds of misconduct

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.”

### **The Claimant’s submissions**

50. The Claimant contended that recognizing that the offense for which the claimant was reprimanded for attracts summary dismissal, the case of *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR is instructive to the extent that it set down the minimum requirements for procedural fairness as follows:

(an explanation of the grounds of termination in a language understood by the employee;

- a. the reason for which the employer is considering termination;
- b. entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;
- c. hearing and considering any representations made by the employee and the person chosen by the employee.)

51. That the forth facet of procedural fairness was further emphasized in the case of *Kenfreight (E.A.) Limited v Benson K.Nguti* [2016] eKLR where the court held that;

“...an employer is duty-bound to explain to an employee in the presence of another employee or a union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition, an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service is taken...”

52. The claimant submits that there is nothing on record especially on the part of the respondent to show that they actually considered the representations made by the claimant. That it would appear that the disciplinary processes were only set in action and paced to tick certain boxes to show compliance with section 41.

53. That the letter dated 26th October 2022 inviting the claimant to a disciplinary hearing does not indicate whether his explanation was regarded. Secondly, the verdict statement (at page 23 of the respondent’s documents) does not factor the rebuttal of the accusations by the claimant but only goes ahead to rehash the allegations made in order to give a stamp of legality.

54. The claimant submits for the foregoing, the respondent’s dismissal of the claimant was procedurally deficient for failing to consider the representations made by the claimant.

55. The court deduced from the claimant’s submissions that the main issue raised with the process was that the claimant’s representations were not factored at the first instance of the disciplinary hearing and at the appeal by the employer.



56. The Respondent responded to the issue of consideration of the claimant's representations in its written submissions and relied on the minutes of the first instance disciplinary hearing proceedings of 31<sup>st</sup> October 2022 (page 16-20 of the Respondent's documents ) and of appeal at page 31-34 to submit that the claimant opted not to have a witness, that the verdict of the disciplinary hearing communicated to the claimant vide letter dated 18<sup>th</sup> November 2022 (page 21 of respondent's documents) stated inter alia," further reference is made(to the) disciplinary hearing that was held on the Monday, October 31 2022. The oral and written submissions regarding this matter were analyzed and verdict was reached upon." That the termination letter (page 24 of Respondent's documents) referred to the Claimant's response.
57. The court having analysed the documents produced on the disciplinary process by both parties, returns that there was compliance with the provisions of section 41 of the *Employment Act*(supra) and that the claimant was given fair opportunity to be heard. The minutes reflected his representations which are also captured in the letters communicating the verdict of the disciplinary committee and the appeal.
58. The court holds that there was procedural fairness. In the Upshot the termination is held as substantially and procedurally fair.

**Issue c. Whether he was entitled to reliefs sought**

59. The termination was lawful and fair. The employee is only entitled to wages for work done. No award for the remainder of the contract. On the bonus claim, the Claimant at cross-examination admitted no project was completed during his service. That completion was based on documents and none was produced. He had kept records of the projects. The Claimant withdrew the document marked MFI-3 which was email by Mr. Neil the CEO on payment of KShs.100,000/-. There was no other document to support the claim of the sought bonus based on KShs.100,000/- per month for 24 months being KShs.2. 4 million. The claimant was paid is final dues which he did not dispute (D-Exb 12).
60. In conclusion, the claim dated 10<sup>th</sup> November 2023 is held to be without merit and is dismissed with costs to Respondent. It is so Ordered.

**READ, DELIVERED AND SIGNED VIRTUALLY FROM NAIROBI THIS 19<sup>th</sup> DAY OF NOVEMBER, 2024.**

**JEMIMAH KELI**

**JUDGE**

In the presence of:

Mr. Wachira for the Respondent

No appearance for Claimant

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