



**Waithaka v Golden Africa Kenya Limited (Cause 4 of 2023)  
[2024] KEELRC 2835 (KLR) (15 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2835 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS  
CAUSE 4 OF 2023  
B ONGAYA, J  
NOVEMBER 15, 2024**

**BETWEEN**

**PETER GATHOGO WAITHAKA ..... CLAIMANT**

**AND**

**GOLDEN AFRICA KENYA LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant filed the memorandum of claim on 19.06.2023 through Eric Mose & Company Advocates. The claimant claimed unlawful and unfair termination. He further claimed for:
  - a. Unpaid salary for May, June and July 2022 Kshs. 258,000.00.
  - b. 12-months' salary compensation Kshs. 1, 032, 000.00.
  - c. Unpaid leave for five – months in 2022 Kshs.35, 833.00.
  - d. Service pay for 8 years Kshs. 344, 000.00.
  - e. One-month salary in lieu of termination notice Kshs.86, 000.00.
  - f. Total claim Kshs. 1, 755, 833.00.
2. The claimant prayed for judgment against the respondent for:
  - a. A declaration the termination was unlawful and unfair.
  - b. Payment of Kshs. 1, 755, 833.00 as claimed plus interest.
  - c. Respondent to deliver a certificate of service.
  - d. Costs of the suit.
  - e. Any other reliefs that the Honourable Court may deem just and fit.



3. The claimant was employment by the respondent as Operator Tank Farm by a contract of service dated 12.03.2015 for two years effective 11.03.2015 to 11.03.2017 with an option of permanent employment subject to satisfactory performance and terms and conditions of service agreed upon by the parties. By a letter dated 01.08.2015 he was promoted to Tank Farm Supervisor at a gross of Kshs. 80,000.00 per month.
4. On 25.05.2022, there was attempted theft at the respondent's premises. By letter dated 30.05.2022, reference was made to that incident and the claimant suspended for 14 days to facilitate investigation. The letter stated that his May 2022 salary was withheld. The claimant reported at work on 13.06.2022 at the end of the 14 days' suspension and was handed a letter extending the suspension by 21 days effective 13.06.2022. At the end of the 21 days he reported on 04.07.2022 and was given the letter of summary dismissal dated 04.07.2022. The letter referred to theft of CPO (Crude Palm Oil) on 25.05.2022, the suspension, and the on-going investigations against the claimant as a person of interest for alleged involvement in the incident. The letter further stated, "In review of these circumstances and adverse mention against you, noting importance of integrity, honesty and the breach caused, we hereby terminate your services with immediate effect on the grounds of gross misconduct under the guidance of the Employment Act 44.(4) f & g and GAKL CODE". The claimant earned a gross of Kshs. 86,000.00 as at summary dismissal.
5. The claimant has pleaded that the summary dismissal was unfair because he had thwarted the attempted theft on 25.05.2022 and further, the respondent had failed to accord him due process of a notice and hearing per section 41 of the Employment Act, 2007.
6. The respondent filed the memorandum of defence dated 21.03.2024 through Clifford Odhiambo & Company Advocates. The respondent prayed that the suit be dismissed with costs.
7. The respondent's case was as follows:
  - a. It admitted that it employed the claimant as pleaded.
  - b. The claimant received the letter of suspension, the letter extending suspension and the letter of summary dismissal.
  - c. After the incident of 25.05.2022 the claimant disappeared, and made it impossible to conclude the disciplinary process.
  - d. The investigations disclosed that the claimant was the mastermind of the attempted theft. The police investigating the incident implicated him. He was dismissed on 04.07.2022.
  - e. The claimant was paid full terminal dues including salary for May, June, and up to 04.07.2022; service pay for 7 years and 3 months being duration served; and, payment for unutilised leave.
  - f. The suit had been filed in bad faith to intimidate the respondent to withdraw the criminal case against the claimant and others implicated in the incident.
  - g. The claimant did not thwart the theft as alleged for him.
  - h. The claimant continued to disappear to avoid arrest and prosecution and was subsequently arrested and charged in Mavoko Criminal Case No. E1056 of 2022 thereby making it impossible to continue rendering service to the respondent.
  - i. The claimant thwarted opportunity for a disciplinary process and was paid all final dues.



8. The claimant testified to support his case and the respondent's witness (RW) was Perpetual Wainaina, the respondent's human resource officer. Final submissions were filed for the parties. The Court has considered all material on record and returns as follows.
9. There is no dispute that the parties were in a contract of service and which was terminated as mutually pleaded for the parties.
10. The 1<sup>st</sup> issue for determination is whether the termination was unfair. The evidence is that the letter of suspension and subsequent letter extending suspension advised the claimant that investigations were on going. The claimant received the two letters. He was not thereafter invited to a disciplinary hearing or given notice of allegations that were levelled against him. He was instead given a letter of summary dismissal. The Court finds that as urged and submitted for the claimant, the summary dismissal was unfair for want of due process of a notice and a hearing as envisaged in section 41 of the Act. As at summary dismissal, the claimant was awaiting the outcome of the investigation and which would lead to a disciplinary process. The disciplinary process was never initiated. RW testified that indeed no disciplinary proceedings were carried out. RW further testified, truthfully so, that the suspension letters did not require the claimant to respond. On his part, the claimant testified that while on suspension he was not given allegations and was not required to reply, at all.
11. The Court finds that the respondent has not established that due procedure was followed per section 41 of the Act on notice and a hearing. While making that finding, the Court returns that the respondent's account that the claimant disappeared cannot be trusted because the respondent has confirmed that after the incident on 25.05.2022, the claimant cooperated, received the two letters of suspension, and, subsequently received the letter of summary dismissal. Nothing has been shown that may have prevented the respondent from initiating and continuing the disciplinary process as prescribed in the law. The Court finds that the evidence shows that the claimant cooperated by complying with terms of the suspension letters and reporting to the respondent on scheduled dates. The claimant did not disappear as alleged for the respondent. Accordingly, the summary dismissal was unfair for want of fair procedure.
12. The respondent pleaded that the claimant was summarily dismissed under section 44 (4) (g) and (f) of the Act. The section provides that, it amounts to gross misconduct where, "(f) in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or (g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property." The claimant testified that he was arrested and charged per exhibit R4 being a charge of conspiracy to commit a felony contrary to section 393 of the Penal Code dated 08.11.2022. The claimant had long been dismissed on 04.07.2022 and in that consideration it cannot be said that as at termination, the ground contemplated in section 44(4) (f) could be valid as per section 43 of the Act because the claimant had not been arrested and unavailable for 14 days. Similarly, as at 04.07.2022, it cannot be said that the ground as contemplated in section 44(4) (g) had accrued because, there could be no reasonable suspicion in absence of a criminal charge and the claimant having been assured of on-going investigations. The claimant testified that he reported to the police station 7 times while he was on suspension and after arraignment, the criminal case was listed severally when the witnesses, the respondent's employees failed to attend and the case subsequently collapsed for want of attendance of the said prosecution witnesses. The Court finds that it cannot be said that the reasons were valid per section 43 of the Act or were fair as relating to the claimant's conduct, capacity or, the respondent's operational requirements as envisaged in section 45 of the Act.



13. Accordingly, the Court returns that the summary dismissal was unfair both in procedure and in merits or substance.
14. The 2<sup>nd</sup> issue is whether the claimant is entitled to money as claimed. The Court returns as follows:
- a. The Court has considered the factors to consider in awarding compensation per section 49 of the Act. The claimant had a clean and exemplary record of service. The recognition letter dated 06.06.2016 on claimant's living "The HAS Way" confirms that the claimant upheld the respondent's values of integrity, trust, honesty and teamwork. The aggravating factor is that the respondent designed an investigation during the claimant's suspension and promised a review of the case after the investigation but instead suddenly terminated the employment by summary dismissal and without due notice of particularised allegations and hearing the claimant to establish culpability, if any. The further aggravating factor was that the claimant was emplaced on unpaid suspension including withholding of the 25 days he had already worked in May 2022. The Court finds that the claimant's case establishes a proper case for the award of 12-months' maximum compensation making Kshs. 86,000.00 x 12 thus Kshs.1, 032, 000.00 as prayed for. The claimant is also entitled to one-month's pay in lieu of termination notice thus Kshs. 86,000.00 per payslip exhibited for April 2020. For terminal dues on salary for May, June to 04.07.2022; payment for prorated leave in 2022; service payment; and, terminal dues consequential to termination, the Court upholds the computation by the respondent per statement of final dues dated 04.07.2022 making a gross of Kshs.468, 750.00. RW testified that there was no record of accounts or bank statement as evidence that the claimant's final dues had been paid to Sheria Sacco to settle the Sacco loan per the memorandum of understanding between the Sacco and the respondent. The claimant testified that in fact, the Sacco loan was outstanding and had not been settled as alleged for the respondent. The Court considers that the claimant is entitled to all the amounts awarded herein less the amount settling his liability to the Sacco within the terms of the memorandum of understanding and upon the parties' mutual verification of such outstanding amounts and subsequently, due settlement as just.
  - b. The claimant is entitled to a certificate of service. Considering the margins of success, the respondent will pay the claimant's costs of the suit.

In conclusion, judgment is hereby entered for the claimant against the respondent for:

1. The declaration that the summary dismissal was unfair and unlawful.
2. The respondent to pay the claimant a sum of Kshs. 1, 586,750.00 (less PAYE) by 15.12.2024 failing interest to be payable thereon at court rates from the date of this judgment until full payment.
3. The respondent to deliver the claimant's certificate of service by 15.12.2024.
4. The respondent to pay the claimant's costs of the suit.
5. The Deputy Registrar to cause return of the court file herein to the Machakos Sub-registry forthwith.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 15<sup>TH</sup> NOVEMBER 2024.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

