



**Wambua v Savannah Cement Limited (Cause E4 of 2022)
[2024] KEELRC 2825 (KLR) (15 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2825 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS
CAUSE E4 OF 2022
B ONGAYA, J
NOVEMBER 15, 2024**

BETWEEN

JOSEPH MUTHUSI WAMBUA CLAIMANT

AND

SAVANNAH CEMENT LIMITED RESPONDENT

JUDGMENT

1. The claimant filed the memorandum of claim on 01.03.2022 through Nzilani Muteti Advocates. His case is that the respondent employed him on 01.07.2013 as a mobile plant operator at Kshs.30,000.00 per month and was dismissed on 19.03.2019 at a time his monthly salary was Kshs. 84, 672.14 per month.
2. The letter of summary dismissal was dated 18.03.2019 and it followed and referred to the show cause letters dated 11.01.2019, 30.01.2019 and 01.03.2019. It also refers to the disciplinary hearing on 11.03.2019. The respondent has exhibited the minutes of the disciplinary hearing which show that the claimant declined to receive each of the letters to show cause on account that he did not understand them because he denied the allegations as he was not aware of the incident as alleged.
3. The letter of summary dismissal stated that between 31.12.2018 and 01.01.2019 the claimant had engaged in attempted theft of Kenya Power high voltage cable running through the respondent's premises by assisting to pull it out using company wheel loader XCMG. Further, the refusal to accept the letters to show cause amounted to disrespect and insubordination towards his supervisors. He was therefore summarily dismissed with immediate effect and final dues computed to include days worked up to 18.03.2019; leave days accrued up to 18.03.2019 accrued pension contributions; and, a certificate of service to be issued. He was given a right to appeal in 7 days but which he appears to have failed to invoke.



4. The claimant alleges the dismissal was wrongful, unfair, unlawful and amounted to double jeopardy. He claimed as follows:
 - a. Payment of 15 years' salary to age 60 official retirement age Kshs. 84, 672.14 x 12 months x 15 years = Kshs. 15, 240, 985.20.
 - b. Three months' salary in lieu of termination notice.
 - c. Service of 6 years Kshs. 84, 672.14 x 6 years x 12 months Kshs. 6, 096, and 394.08.
 - d. Salary for 12 months from the date of termination on 18.03.2019 Kshs. 1, 016, 065.68.
 - e. The disciplinary proceedings were unconstitutional, unlawful, unprocedural, unfair, null and void and of no effect.
 - f. A declaration the termination was unfair.
 - g. Certificate of service.
 - h. Costs of the claim plus interest at court rates.
 - i. Any other relief the Honourable Court may deem just.
5. The respondent opposed the suit by filing the memorandum of defence and preliminary objection dated 21.06.2022 through the Federation of Kenya Employers. The respondent prayed that the claimant's suit be dismissed with costs and the termination be upheld as lawful and fair. The respondent pleaded as follows:
 - a. The respondent employed the claimant as pleaded.
 - b. The claimant was dismissed per the letter of summary dismissal.
 - c. The dismissal was fair upon the grounds in the letter for summary dismissal.
 - d. On the material night the claimant was the only machine operator on duty. He conspired to use the assigned wheel loader to pull out the electrical cable in issue. There were disagreements on the payments amongst the conspirators and the cable was abandoned at the site.
 - e. The claimant being the only operator on duty on that material night and operating the wheel loader, it was established that he had conspired in the attempted theft.
 - f. The respondent made submissions in the statement of defence.
6. The claimant testified to support his case. The respondent did not call a witness and did not attend at the hearing. The Court has considered the material on record and returns as follows.
7. The 1st issue for determination is whether the summary dismissal was unlawful and unfair as alleged. The Court finds that the claimant testified that he was accorded a disciplinary hearing. The procedure adopted by the respondent is found to have been fair as envisaged in sections 41 and 45 of the [Employment Act, 2007](#). The claimant was handed the letters to show cause but he refused to accept the delivery. Nevertheless, he was invited to a disciplinary hearing where he appears to have failed to exculpate himself. He was the only operator on duty and he confirmed by his own pleading at paragraph 6 (a) indeed a theft of the cable took place on 31.12.2018 and 01.01.2019 when he was on duty. On a balance of probability, he conspired as alleged. In any event, he failed to exculpate on the allegation of insubordination by rejecting the letters to show cause. On a balance of probability, the



claimant is found culpable of the reasons for summary dismissal. Accordingly, the summary dismissal was not unfair.

8. The 2nd issue is on remedies. The prayers on unfair termination are found unjustified and compensation in that respect is declined. As submitted for the respondent it is found as follows:
 - a. In view of the summary dismissal, the prayer for payment in lieu of termination notice is unfounded.
 - b. The prayer for service pay is unjustified, as it has not been shown to be based on a contractual or statutory provision.
 - c. Entitlement to pension dues is not in dispute and the same can be processed by the claimant taking due steps per applicable rules.
 - d. The certificate of service was not in dispute.
 - e. The rest of the claims and prayers are not justified as they lack contractual or statutory basis.
 - f. The claimant has not established a basis to be paid after the summary dismissal and as claimed and prayed for.
9. The claimant had filed the exactly the same claim in Nairobi ELRC No. 469 of 2019 which was struck out by the order given on 07.02.2022 on account that it had been filed in a court devoid of jurisdiction and that a fresh suit could be filed in Machakos Chief Magistrates Court or Mavoko Law Courts before expiry of the cause of action. That order appears not to have been questioned by way of a review cor appeal and the instant suit was filed. Be it as it may, the instant suit has been determined as found herein.
10. The Court has considered the margins of success and each party to bear own costs.

In conclusion, the suit is hereby determined with orders:

- a. The declaration that the claimant is entitled to be paid the pension benefits per applicable pension scheme rules and applicable law.
- b. The respondent to deliver the certificate of service.
- c. Each party to bear own costs of the suit.
- d. The Deputy Registrar to cause return of the case file to Machakos Sub-registry forthwith.

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

BYRAM ONGAYA

PRINCIPAL JUDGE

