



Leboi v Forum for African Women Educationalists Kenya (FAWEK) (Cause E671 of 2023) [2024] KEELRC 13492 (KLR) (20 December 2024) (Judgment)

Neutral citation: [2024] KEELRC 13492 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E671 OF 2023
SC RUTTO, J
DECEMBER 20, 2024**

BETWEEN

SULEIMAN MUSA LEBOI CLAIMANT

AND

**FORUM FOR AFRICAN WOMEN EDUCATIONALISTS KENYA
(FAWEK) RESPONDENT**

JUDGMENT

1. It is common ground that the Claimant was employed by the Respondent on a fixed term contract of two years with effect from 1st March 2022 as a Break Free Country Coordinator. It is also not in dispute that the Claimant was terminated from employment with effect from 6th February 2023 on grounds that he failed to fully account for funds given to him for the Imarisha Msichana activities held in Turkana and Narok counties.
2. According to the Claimant, his termination from employment was unjustified, unlawful and unfair. As such, his claim against the Respondent is for the sum of Kshs 1,400,000/= being notice pay and compensatory damages. He further claims exemplary damages and interests plus costs of the suit.
3. Opposing the Claim, the Respondent avers that it had a reasonable belief that the Claimant had committed gross misconduct. To this end, the Respondent has denied the Claimant’s allegations that he was unfairly dismissed from employment and consequently, has asked the court to dismiss the Claim with costs.
4. During the hearing which took place on 24th July 2024 and 23rd October 2024, both parties called oral evidence.



Claimant's Case

5. The Claimant testified in support of his case and at the outset, adopted his witness statement, as well as the list and bundle of documents filed alongside his claim to constitute his evidence in chief.
6. It was the Claimant's evidence that on or before 13th October 2022, he was invited to support the Imarisha Msichana Event in Turkana and Narok counties. The events were to take place from the 13th to the 26th of October 2022. He later received a notice to show cause for embezzlement of funds meant for the stakeholders attending the inception meetings in Turkana and Narok counties.
7. The Claimant averred that despite explaining his predicament on the allegations and that it was the role of the finance department to account for the funds, he was served with a termination letter on 6th February 2023.
8. His claim against the Respondent is for an order for compensation for illegal and unlawful termination of employment.

Respondent's Case

9. The Respondent called oral evidence through its Human Resource & Administration Officer, Mr. Robert Mutange, who testified as RW1. Similarly, RW1 adopted his witness statement as well as the list and bundle of documents filed on behalf of the Respondent, to constitute his evidence in chief.
10. It was the testimony of RW1 that the Claimant's job consisted of the following duties, inter alia: Coordinating Country Programme implementation in cooperation with other Break Free (BF) Partners by initiating quarterly coordination; Monitoring meetings with BF Consortium partners in the country; Supporting the team's adherence to internal policies and programme management standards; and Producing accurate and timely reporting of program status throughout its life cycle.
11. The Claimant was required to carry out his role with due diligence and efficiency in accordance with the accepted professional standards, sound management and apply technology as appropriate.
12. RW1 averred that from the preliminary observations raised by the Finance Officer - Ms. Lilian Bett on the 17th of January 2023, it was later established after thorough investigations that on or about 13th October 2022 and 26th October 2022, the Claimant misappropriated the Respondent's funds amounting to the sum of Kshs. 27,000.00 which funds ought to have been paid to the participants of the Imarisha Msichana Programme held at Narok and Turkana counties. According to RW1, this constituted an act of gross misconduct.
13. The Respondent investigated the Claimant's alleged misappropriation of the Respondent's funds. It was RW1's testimony that together with Fredrick Okelo- the Project Accountant, they conducted the investigations and interviewed the following witnesses: Lilian Bett-Finance Officer FAWA Africa, Naomi Kamitha-Project Lead and Fredrick Okelo-Project Accountant.
14. It was his testimony that the Claimant was also questioned as part of the investigations and attended an investigation meeting on 20th January 2023.
15. RW1 stated that the preliminary findings of the investigation were that:
 - a. In respect of Imarisha Msichana meeting held in Turkana County on 13th October 2022 out of Kshs. 338,244.00 entrusted to the Claimant, only Kshs. 321,244.00 was accounted for leaving a sum of Kshs. 17,000.00.



- b. With regard to Narok County on 26th October 2022 of the Kshs.273,000.00 entrusted to the Claimant, only Kshs. 263,000.00 was accounted for hence an outstanding unaccounted sum of Kshs. 10,000.00.
16. That vide an email of 21st January 2023, the Respondent notified the Claimant that it would recover the misappropriated sum of Kshs. 27,000.00 from his January salary. RW1 was emphatic that the said sum was recouped.
17. RW1 further stated that on the footing of the investigation report, the Respondent set into motion a formal disciplinary procedure in accordance with its disciplinary policy.
18. That on 30th January 2023 and 31st January 2023, the Respondent invited the Claimant to show cause and to attend a disciplinary hearing on the 1st of February 2023. He was provided with the findings of the investigation. That further, the Claimant was informed of his right to be accompanied to the hearing and was warned that a possible outcome of the hearing was dismissal.
19. Subsequently, the disciplinary hearing was held on 1st February 2023 and the Claimant was given a reasonable opportunity to state his case, ask questions and present evidence. Additionally, the Claimant tendered a written explanation to the show cause letter dated 30th January 2023.
20. RW1 further stated that at the close of the disciplinary hearing, the Respondent adjourned the hearing to consider its decision.
21. That when reaching its decision that the Claimant had not offered a reasonable explanation for the gross misconduct, the Respondent considered all the relevant evidence.
22. On 6th February 2023, the Claimant was terminated from employment on grounds of gross misconduct. He was informed of his right to appeal and was paid one month's salary in lieu of notice together with all terminal dues.
23. RW1 further stated that vide an email of 8th February 2023, the Claimant was reminded of his right to appeal. However, the Claimant did not appeal against the decision to dismiss him.
24. In RW1's view, the Respondent conducted a reasonable investigation and acted reasonably in all the circumstances in treating the gross misconduct as sufficient reason for dismissing the Claimant.

Submissions

25. On his part, the Claimant submitted that he expected to be treated with utmost fairness as provided in the Respondent's Human Resource Policy. According to the Claimant, the Respondent ignored and or refused to honour its own policy and predetermined the allegations made against him before he was accorded an opportunity to present his case.
26. In the same vein, the Claimant submitted that the Respondent deducted the sum of Kshs.27,000/= from his salary for January 2023 without his consent on the allegations that he had misappropriated funds meant for Imarisha Msichana Project. In his view, this was unfair, unlawful, improper and uncalled for as the Respondent had no proof of the said allegations. Submitting along the same lines, the Claimant posited that the Respondent proceeded to sanction him without any proper investigation and before giving him an opportunity to be heard.
27. The Claimant further submitted that his disciplinary hearing was held on 1st February 2023 way after he had been sanctioned on assertions that had not been proven.



28. In further submission, the Claimant stated that there was no evidence tendered by the Respondent on the allegations that he had misappropriated funds.
29. It was the Claimant's position that the Respondent had no proof nor sufficient reasons to terminate his employment on grounds of gross misconduct.
30. On the Respondent's part, it was submitted that the argument advanced by the Claimant that he was not accorded a fair hearing since the notice of 31st of January 2023 to appear before the disciplinary committee on the 1st of February 2023 was short, is an afterthought that lacks credible basis. In this regard, the Respondent posited that the Claimant did not seek to defer the disciplinary hearing scheduled for the 1st of February 2023 and instead, accepted to participate in the virtual meeting, appeared and fully participated.
31. In the same breath, the Respondent argued that the Claimant had adequate time to prepare himself and was aware of the accusations he faced which had been recounted in the Show Cause letter dated 30th January 2023. To buttress this position, the Respondent referenced the cases of Philip Njuguna vs Medical Relief International (Merlin) Case No. 285 of 2014 and Geoffrey Kirui vs Ekaterra Tea Kenya PLC ELR Cause No. E013 of 2023.
32. It was further submitted by the Respondent that it met the requisite key principles of procedural fairness in that; the Claimant knew the accusations against him; he knew that he was at the risk of dismissal; he was allowed to make representations at the disciplinary hearing and that he was allowed a right of appeal which right he did not exercise.
33. As such, the Respondent urged the Court to find that it has discharged the burden of proof, on a balance of probabilities that the procedure followed before terminating the Claimant's employment was fair and comports with the provisions of Section 41 of the *Employment Act*, hence procedurally fair.
34. The Respondent further submitted that the grounds of summary dismissal of the Claimant falls squarely within the ambit of what constitutes gross misconduct chronicled under Section 44 (4) (c) and (g) of the *Employment Act*.
35. Citing the case of Kenya Revenue Authority vs Reuvel Waithaka Gitahi & 2 others Civil Appeal No. 66A of 2017, the Respondent submitted that it had a reasonable and genuine belief that the Claimant was guilty of the misconduct of embezzling the sum of Kshs. 27,000.00. In the Respondent's view, this belief was based on a reasonable investigation.
36. The Respondent further urged the Court to hold that it had a fair and valid reason to genuinely believe that the Claimant had committed an act of gross misconduct to warrant summary dismissal.
37. According to the Respondent, by all indications and the wealth of evidence presented, it had reasonable sufficient grounds, and acted reasonably in treating as a sufficient or valid reason the fact that the Claimant had misappropriated the Imarisha Msichana Project funds in the sum of Kshs.27,000.00. In support of the Respondent's arguments, the court was invited to consider the cases of Thomas Sila Nzivo vs Bamburi Cement Limited Mombasa Cause Number 117 of 2013 and Amos Kitavi Kivite vs Kenya Revenue Authority ELRC Cause No. 1511 of 2018.

Analysis and Determination

38. Flowing from the pleadings, the evidentiary material on record as well as the rival submissions, the following issues stand out for determination:



- i. Whether the Respondent had a valid and fair reason to terminate the employment of the Claimant;
- ii. Whether the Claimant's termination was in accordance with fair procedure;
- iii. Is the Claimant entitled to the reliefs sought?

Valid and fair reason?

39. Section 43(1) of the *Employment Act* requires an employer to prove the reasons for termination and failure to do so, such termination is deemed to be unfair. Further in terms of Section 45 (2) (a) and (b), termination of employment qualifies as unfair if the employer fails to prove that the reason for the termination is valid, fair and related to the employee's conduct, capacity or compatibility; or based on its operational requirements.
40. In the case herein, the Claimant was terminated from employment on grounds that over the period of October-November 2022, he failed to fully account for the funds given to him for the Imarisha Msichana activities held in Turkana and Narok counties assigned to him despite clear requirements of the Finance Policy on project fund management.
41. In support of its case, the Respondent exhibited a copy of the incident report dated 23rd January 2023, in which it was noted that the Claimant attended the inception meeting held on 13th October 2022 in Turkana County and that he was issued with a cheque in the sum of Kshs 338,244/=. According to the said report, the Claimant only accounted for Kshs 321,244/= thus there was a balance of Kshs 17,000/=. The report further noted that the funds were not re-banked immediately as the Claimant shared the same with the project coordinator who represented the organization during the event.
42. With respect to Narok County, the report indicates that the Claimant attended the inception meeting which was held on 26th October 2022 and that he was issued with a cheque in the sum of Kshs 273,000/= but he only accounted for Kshs 263,000/= hence there was a balance of Kshs 10,000/= which was not re-banked after the event.
43. Further exhibited by the Respondent, was a list of participants who signed for transport in both Narok and Turkana counties but were not paid.
44. In his response to the notice to show cause, the Claimant admitted that Kshs 801,244/= was deposited into his account. According to him, he deposited back into the Respondent's Imarisha account, the sum of Kshs 37,476/= with respect to Turkana County and Kshs 48,150/= with respect to Narok County.
45. Despite the Claimant's assertions, there was no evidence to confirm that he made the said deposits into the Respondent's accounts. I say so noting that the Claimant stated that he made the payments from his Mpesa account and directly from his bank account. Therefore, this was evidence that was within his reach. As it is, only the Claimant had access to his Mpesa account and bank statements hence availing the evidence to the Respondent to prove that he fully accounted for the funds was not a tall order.
46. In addition to the foregoing, the Respondent's Finance Officer vide an email dated 17th January 2023, addressed to the Claimant among others, forwarded a schedule with the names of missing participants against Mpesa statements. She asked the team to confirm if they had the list of participants on the statements against the amounts.



47. Notably, the Claimant did not indicate let alone suggest that he challenged the contents of the said email and or forwarded Mpesa payments or bank statements to confirm that he paid all the participants contrary to the allegations by the Finance Officer.
48. What's more, as per the minutes of the disciplinary hearing, the Claimant admitted that he committed a mistake in giving out the funds without recording the stakeholder's details. He further told the panel that he was not sure of which stakeholder he was to give extra money as some came from far areas.
49. In view of the foregoing, I am led to conclude that the Claimant did not fully account for the funds that were deposited into his account for the Imarisha Msichana activities held in Turkana and Narok counties.
50. As such, the Claimant by his own conduct, availed to the Respondent a valid and fair reason to commence termination of his employment based on his conduct, within the meaning of Section 43 as read together with Section 45(2) (a) and (b) of the Act.
51. In so finding, I am mindful of the standard of proof applicable in employment cases. On this score, the court adopts the determination by the Court of Appeal in the case of Kenya Revenue Authority vs Reuwel Waithaka Gitahi & 2 others [2019] eKLR that the standard of proof is on a balance of probability, not beyond reasonable doubt, and all the employer is required to prove are the reasons that it "genuinely believed to exist," causing it to terminate the employee's services.

Whether the Claimant's termination was in accordance with fair procedure

52. The requirement of fair procedure is generally provided for under Section 45(2) (c) of the Act. The details of the specific requirements are well encapsulated under Section 41. These requirements are with respect to notification and hearing.
53. At the outset, it is noteworthy that when the issue of the unaccounted funds was raised by the Respondent's Finance Officer, the Respondent's CEO directed vide her email of 18th January 2023 that the unaccounted funds be deducted from the concerned employees' salaries for January 2023.
54. This position was confirmed by RW1 in his email of 18th January 2023. To this end, the sum of Kshs 27,000/= was deducted from the Claimant's salary for the month of January 2023. RW1 confirmed as much during his testimony before court.
55. According to the Respondent, the recovery was justified under clause 12.2.6 of the Human Resources Manual. Notably, this provision is under the head "SUMMARY DISMISSAL" and provides that "in cases of theft, FAWE will recover the loss from the staff members' terminal dues."
56. What I find unsettling about the Respondent's action of recovering the sum unaccounted for from the Claimant's salary for January 2023, is that the disciplinary process against the Claimant was yet to commence.
57. Indeed, from the record, the Claimant was issued with a notice to show cause dated 30th January 2023. Evidently, this was after the decision to deduct the sum of Kshs 27,000/= from his January 2023 salary had already been made.
58. It is not in doubt, that the recovery of the unaccounted amount from the Claimant's January 2023 salary was a sanction in itself. In accordance with the requirements of a fair process, the sanction should only have been undertaken following due process. In this case, due process was bypassed.
59. As it is, the recovery from the Claimant's January 2023 salary was not the end of the issue as he was thereafter subjected to a disciplinary process which culminated in his termination from employment.



60. From my perspective, the Respondent's action of recovering the unaccounted amount from the Claimant's salary implied that the Respondent considered him culpable of misappropriation of funds. In the circumstances, I cannot help but question why the Respondent would go ahead and take the Claimant through a disciplinary process when in its view, he was culpable of misappropriation of funds. Needless to say, this speaks to a premeditated process.
61. The other glaring aspect with regards to the disciplinary process the Claimant was subjected to, is the timeline he was given to appear before the disciplinary panel.
62. In this regard, the Claimant was asked vide an email dated 31st January 2023 sent at 16:04 to attend a disciplinary hearing scheduled to take place on 1st February 2023 at 9:30 am. Fundamentally, the Claimant had less than 24 hours to prepare and appear for the disciplinary hearing. It goes without saying that the notice period given to the Claimant to prepare for the disciplinary hearing was quite short and not reasonable.
63. On this issue, the court is guided by the determination of the Court of Appeal in the case of Nebert Mandala Ombajo vs Institute of Certified Public Accountants of Kenya (ICPAK), Nakuru Civil Appeal No. 62 of 2018, where it was held that: -
- “The respondent has not justified the urgency in undertaking the disciplinary proceedings on the 4th March, 2014 when the letters were only written on 3rd March, 2014. [27] Disciplinary proceedings are a grave matter for an employee as the consequences may be catastrophic to the employee's life. In the case of the appellant, the complaints against him were serious, and there is no doubt that he needed sufficient time to prepare psychologically, and if need be, get the best advice that he could. Any prejudice to the respondent by having the appellant in his place of work could easily have been addressed by sending the appellant on compulsory leave, or interdicting him during the pendency of the disciplinary hearing, so that both the appellant and the respondent would have had time to reflect on and prepare to address the issues arising in the disciplinary process. [28] The fact that the appellant nonetheless, did his best to respond to the allegations made against him and attended the disciplinary proceedings on the due date, did not ameliorate the prejudice that was caused to him by the inadequate notice. It was oppressive, unfair, and unjust, for the respondent to serve the appellant with a letter for a disciplinary hearing that was to take place the next morning. Such haste reduced the disciplinary hearing to a mere formality to achieve that which the respondent had already predetermined. There was no procedural justice and this vitiated the whole disciplinary process.” Underlined for emphasis
64. Applying the above precedent to the case herein, the court returns that the Respondent acted unjustly and unfairly in terminating the Claimant's employment contract.
65. Indeed, it is more than probable that given the short notice, the Claimant's level of preparation for the disciplinary hearing was impaired.
66. In the end, despite the Respondent having a valid and fair reason to terminate the Claimant from employment, acted unjustly and unfairly in effecting the said termination.
67. I must underscore that the mere fact that an employer issues an employee with a notice to show cause, invites him or her to tender a reply thereto and thereafter grants the employee an opportunity to appear for a disciplinary hearing does not in itself amount to a fair hearing.



68. It is this court's view that the entire disciplinary process ought to embody the elements of a fair hearing which entail among others, prior and adequate notice, presumption of innocence and due process. As highlighted herein, these elements were lacking in the Respondent's process.
69. For the foregoing reasons, the Court finds that in terminating the Claimant's employment, the Respondent did not act in accordance with justice and equity hence its actions were not in consonance with the requirements of procedural fairness and the spirit of Section 41 of the Act.

Reliefs?

70. As the Court has found that the termination of the Claimant's employment although for a fair and valid reason was not in accordance with justice and equity hence procedurally unfair, the Court will award him compensatory damages equivalent to two (2) months of his last salary. This award has taken into account the length of the employment relationship as well as the Claimant's own contribution to the termination of his employment.
71. The claim for notice pay is disallowed as it is evident from the record that the same was paid as part of the Claimant's terminal dues following his termination from employment.

Orders

72. The total sum of my consideration is that Judgment is entered in favour of the Claimant and he is awarded:
- a. Compensatory damages in the sum of Kshs 200,000.00 which sum is equivalent to two (2) months of his gross salary.
 - b. Interest shall apply on the amount in (a) at court rates from the date of Judgment until payment in full.
 - c. The Claimant shall also have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2024.

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STELLA RUTTO

JUDGE

In the presence of:

For the Claimant Ms. Wangui instructed by Mr. Mungai

For the Respondent Ms. Mutiso instructed by Ms. Migiro

Court Assistant Millicent

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of



Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

