



**Mutuura v Embu Water and Sanitation Company Limited (Cause
E005 of 2022) [2023] KEELRC 124 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 124 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CAUSE E005 OF 2022
ON MAKAU, J
JANUARY 26, 2023**

BETWEEN

FELIX G N MUTUURA CLAIMANT

AND

EMBU WATER AND SANITATION COMPANY LIMITED RESPONDENT

JUDGMENT

1. The claimant was employed by the respondent as Managing Director under a 3 years contract from 29th July, 2020 earning a gross monthly salary of Kshs.550,000. On 15th October, 2021 he was suspended from work and on 26th October, 2021 he was served with a show cause letter giving him 7 days to respond to several allegations. He responded by his letter dated 9th November, 2021. Thereafter he was summoned for a disciplinary hearing on 18th November, 2021 and he appeared before the respondent's Disciplinary Committee. The said process culminated in his summary dismissal on 9th December, 2021.
2. The claimant was aggrieved and brought this suit alleging that his dismissal was wrongful and unfair because the reason for the same was not valid or justifiable and the procedure followed was not fair or in accordance with justice and equity. The suit seeks the following reliefs:-
 - a) A declaration that the suspension, disciplinary proceedings and ultimate dismissal of the claimant were a sham, unfair, unprocedural, wrongful, inequitable and unjust.
 - b) A declaration that the respondent is in breach of the claimant's right to fair labour practices under Article 41 of *the Constitution*, 2010.
 - c) That the respondent be and is hereby ordered to immediately reinstate the claimant to the position of Managing Director of the respondent without loss of any salary arrears, back pay, benefit or allowance.



- d) Respondent by itself, its servants and/or agents or otherwise howsoever be and is hereby enjoined from advertising for, interviewing for or filling the vacant position of Managing Director of Embu Water and Sanitation Company Limited pending the hearing and final determination of this suit.
 - e) That in the alternative but without prejudice, the respondent be and is hereby ordered to pay the claimant the sum of Kshs.19,698,378.18 being his gross salary and allowances for the balance of his contract of service period of 3 years with interest. The amount is made up as follows;-
 - i) Kshs.550,000 per month x 24 months remaining under the contract = Kshs.13,200,000/= plus interest.
 - ii) Kshs.250,000 being performance reward as per the performance contract plus interest.
 - iii) Gratuity at 31% of basic pay at the end of 3 years contract (Kshs.136,710 x 36 months) = Kshs.4,921,560.
 - iv) Unutilized leave days as at 9th December 2021 (69.5 days) = Kshs.1,326,818.18/=.
 - f) Compensation of 12 months for wrongful/unfair termination/dismissal plus interest.
 - g) General damages for breach of the claimant's right to fair labour practices plus interest.
 - h) Costs of the suit plus interest.
3. The respondent has filed its defence denying that the dismissal was unfair and wrongful as alleged. On the contrary, it avers that the termination of the claimant's fixed term was done lawfully by giving him notice as stipulated in the contract of employment. It further averred that the reason for the termination was valid and the procedure followed was lawful. Consequently, the respondent averred that the claimant has come to this court with unclean hands and the suit should be dismissed with costs.
4. The suit was heard in the open court when the claimant testified as CW1 and the respondent's Chairman Rev. Dr. Samuel Nginyi testified as RW1.

Claimant's Case

- 5. The claimant adopted his written statement dated 3rd February, 2022 as his evidence in chief and also produced a bundle of 25 documents in his list dated even date. In brief he stated that he joined the respondent from 1st October, 2018 but from 29th July, 2020, he was elevated to the position of Managing Director. His salary was reviewed to Kshs.550,000 per month.
- 6. Concerning his dismissal, he stated that the reason for the same was not valid or fair and the procedure followed to dismiss him was unfair. He contended that the committee dealing with his case was not properly constituted and it had some members who were conflicted including Rev. Dr. Samuel Nginyi, James Njeru Mubothi and Vimal Shah.
- 7. He stated further that his contract provided for his dismissal only if he was committed a criminal offence punishable by imprisonment. Further the management had signed an agreement promising not to sack any employee. Again, he stated that no independent investigation was done or report prepared as required under the HR Manual. Finally the claimant stated that his dismissal was for ulterior motive and malicious considering how the Chairman of the Board then and his successor exchanged letters about the validity of the dismissal.



8. Besides some of the offences indicated in the show cause letter and the dismissal letter were allegedly committed after 15th October, 2021 while he was away on suspension. Therefore he urged the Court to award the prayers sought adding that the newspaper notice about his dismissal has denied him employment from potential employers.
9. On cross-examination, by Mr. Amenia advocate, the claimant stated that a newspaper advert was published in December 2021 after his dismissal but the Chairman had written a letter reinstating him. He admitted that he was served with a show cause letter and thereafter he was called for disciplinary hearing. The meeting was held at a hotel on his own request.
10. He admitted that he cancelled a Board Retreat after consultation with the Board Chairman as was the procedure all the time. He further admitted that he swore an affidavit about legality of the Board's decision stating that there was a vetting lapse. He contended that there were Board minutes authorizing him to swear the affidavit.
11. He stated that his position is still vacant but there is someone who has been acting for over 9 months. He admitted that he was paid gratuity although he has not cleared with the company. He alleged that he was barred entry to the company to do his clearance.
12. He clarified in re-examination that Dr. Johannes Njoka was still the Chairman of the Board on 14th December, 2021 and he wrote to him to report to work. Further when service of High Court Petition No. 6 of 2021 was served upon the respondent, the claimant alerted the Chairman who told him to cancel the Board's retreat because the petition was against many agencies and it was questioning the qualification of some of the directors of the Board. The Chairman further authorized him to respond to the case.
13. Regarding the dues paid, he contended that he was not involved in the computation. He contended that he wrote an email requesting for the computation but it was given and then he filed this suit. He reiterated that his contract was for 3 years but he had 2 years left when he exited.

Defence Case

14. Rev. Samuel Nginyi (RW1) also adopted his written statement dated 7th March, 2022 as his evidence in chief and produced a bundle of 15 documents as his exhibits. He explained that the problem with the claimant started on 17th September, 2021 after cancellation of the Board retreat which was to appraise the claimant's performance. He contended that the claimant was ready for the appraisal and that is why he cancelled the retreat.
15. He stated further that the claimant paid workers to hold demonstrations. He contended some of the workers financed by the claimant to hold demonstrations were from Kirinyaga and Nyandarua water companies. He further contended that when the claimant was questioned about the matter he said that he was misled by the union.
16. RW1 stated that the claimant was suspended and an ad hoc committee was constituted to hear his case. He contended that the hearing was fair and report was prepared leading to summary dismissal of the claimant for insubordination and misconduct including swearing an affidavit without instructions.
17. RW1 stated that after the dismissal the claimant started interfering with company finances and even wrote to the respondent's bankers. As a result, the company published a notice that the claimant was no longer employee of the respondent.



18. Finally, RW1 stated that the claimant obtained injunction from the court barring recruitment of another person to fill the office of MD of the company and as such the company only uses an acting MD. He prayed for the suit to be dismissed with costs.
19. On cross-examination, RW1 denied that the claimant was properly appraised in August 2021 and contended that what happened was a collusion between the claimant and the former Chairman of the Board. He maintained that the claimant cancelled the Board retreat to avoid the proper appraisal.
20. RW1 admitted that the claimant's contract provided for dismissal if charged with criminal charges. He further admitted that there were no criminal proceedings against the claimant before his dismissal. He further admitted that the HR Manual provides for investigations before disciplinary proceedings are commenced. He stated that the investigations were done by the ad hoc committee.
21. He admitted that the ad hoc committee was composed of Dr. Winnie Gacugu (Chair), Vimal Shah, James Njeru and himself. He contended that the committee investigated and did the hearing and recommended for dismissal of the claimant. He contended that the claimant participated in the process.
22. RW1 admitted that James Njeru Mubothi, Vimal Shah and himself were sued as respondents in the Embu High Court Petition No. 6 of 2021 which was challenging their qualifications to the Board membership. RW1 admitted that one of the reasons for the claimant's dismissal was that he swore an affidavit in the said petition. RW1 denied that there was any conflict of interest in the committee investigating the claimant.
23. RW1 reiterated that the claimant was accorded fair hearing before dismissal as guaranteed under clause 7 of the HR Manual. He admitted that he did not need to indicate to the claimant that he had right of appeal because it is provided in the HR Manual. He further stated that the committee called 7 witnesses from the staff and stakeholders but the claimant called none even after being given the liberty to call witnesses and ask questions to the said 7 witnesses.
24. RW1 admitted that there was a return to work agreement between the respondent's Board and the management stating that there was to be no victimization or disciplinary action after resuming work. However, he clarified that only 2 out of 9 members of the Board signed the said agreement.
25. On re-examination RW1 stated that there was suspected misconduct that led to a committee being constituted to investigate the claimant. He contended that the claimant did not raise any objection to the process adopted against him and was given fair hearing. He reiterated that the claimant was paid his terminal dues after the dismissal. RW1 contended that the claimant never appealed against the dismissal and that he accepted the terminal dues paid to him.

Submissions

26. It was submitted for the claimant that Article 6 of his contract of employment provides for dismissal if he commits a criminal offence leading to imprisonment. It was observed that RW1 admitted that there were criminal charges against the claimant at the material time. It was further submitted that Article 8 of the contract provided for fair play between the parties but despite the claimant scoring 70.4% in an appraisal done on 20th August 2021, he was suspended only 2 months thereafter.
27. It was submitted further that investigation was not done before the disciplinary action as provided under clause 7.7.2(b) of the HR Manual. It was further submitted that clause 7.16 of the HR Manual provides that an officer may not be suspended from duty if disciplinary proceedings have been instituted against the officer and, when he has been convicted of serious criminal offence. It was



- submitted that the claimant was suspended contrary to the foregoing clause of the HR Manual because he was not facing any disciplinary proceedings nor had been convicted of a serious criminal offence. Therefore it was argued that proper procedure was not followed before the suspension and dismissal of the claimant.
28. It was further submitted that the evidence on record confirms that there was tension between the company and the workers concerning the High Court Petition No. 6 of 2021 challenging qualifications of some 3 directors. Therefore it was submitted that the genesis of the claimant's dismissal was the industrial action by workers concerning the issues raised in the said case and not any wrongdoing by the claimant. It was contended that if indeed the said litany of allegations were genuine there would have been warning letters issued to the claimant before the disciplinary process was commenced.
 29. As regards the conflict of interest, the reliance was placed on the case of *Vicky Kemunto v Independent Policing Oversight Authority* [2018] eKLR where disciplinary process undertaken by a conflicted person was declared a nullity. It was further submitted that the respondent's Board Charter forbids board members from taking part in decisions where they have conflicts of interest. It was contended that the 3 conflicted directors went against clear stipulation of the Board's charter.
 30. It was further submitted that the claimant was not given any opportunity to meet his accusers to ask them questions as promised in the letter inviting him to the hearing. It was contended that the claimant was only a victim of boardroom wars as can be seen from the letters by the former Chairman and the RW1 about the validity of the claimant's dismissal.
 31. Reliance was placed on the case of *Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others* [2019] eKLR and *Kenfreight (EA) Ltd v Benson K. Nguti* [2019] eKLR where the Court of Appeal dismissed appeals by employers on ground that a fair procedure was not followed. Consequently in this case the court was urged to award the reliefs sought by the claimant.
 32. On the other hand, it was submitted for the respondent that the claimant bears the burden of proof to demonstrate that the termination of his employment was unfair as entrenched at Section 47(5) of the *Employment Act*.
 33. It was further submitted that the respondent has discharged its burden of proving a valid reason for the termination as required by Section 43 of the Act. It was submitted that upon suspicion of several misconduct, having been committed by the claimant, the respondent established a committee under clause 7.8.3.2 and 7.8.3.2.3 of its HR Policy Manual to investigate, inquire and report on all the matters related to the allegations levelled against the claimant.
 34. A show cause letter was served on him pursuant to clause 7.7.2(a) of the HR Manual and the claimant responded. Thereafter 7 witnesses were interviewed, held disciplinary hearings and consultative meetings with stakeholders. In the end the committee made a finding that the claimant had violated the respondent's code of ethics by inter alia:
 - a) Willfully releasing confidential information to unauthorized persons without approval of the Board.
 - b) Maliciously swearing an affidavit on behalf of the company which was incriminating the same company.
 - c) Illegally issuing tenders and making illegal payments to the supplier without any resolution from the Board.



- d) Breach of integrity by funding demonstrations against the company using resources from the same company.
 - e) Illegally paying imported demonstrators from KIRIWASCO, Mathira Water, Othaya Water and MUWASCO among others.
35. As a result of the foregoing breaches, it was submitted that, a recommendation for dismissal of the claimant was made by the Committee and the Board approved the same. A termination letter was then issued on 9th December, 2021. It was reiterated that the dismissal was justified because of the said misconduct.
36. It was observed that during cross-examination the claimant failed to show any resolution of the Board authorizing him to swear an affidavit in HC PETITION 006 OF 2021. He was further unable to show that his alleged appraisal of 20th August, 2021 was done by the full Board. Finally he did not show any Board resolution authorizing him to cancel the Board retreat as he did vide the letter dated 15th September, 2021.
37. As regards the composition of the ad hoc Committee, it was submitted that the HR Manual provided that members of the committee could only come from the Board. Further it was submitted that the claimant did not show any written evidence that he protested against the composition of the Board. In view of the submissions above, the court was urged to find that the suit lacks merits and dismiss it with costs.

Analysis and Determination

38. Having carefully considered the pleadings, evidence and submissions before the court, the following issues commend themselves for determination:-
- (a) Whether the dismissal of the claimant was for valid and fair reason(s).
 - (b) Whether fair procedure was followed before the dismissal.
 - (c) Whether the reliefs sought are merited.

Reason(s)

39. Section 45 of the [Employment Act](#) bars an employer from terminating services of an employee unfairly. It further provides that termination is unfair if the employer fails to prove that the reason for the termination is valid and fair in relation to the employee's conduct, capacity and compatibility or based on the employer's operational requirements. The said burden of proof is emphasized in Section 43(1) and 47(5) of the Act.
40. In this case the reason for the termination was gross misconduct. The dismissal letter dated 9th December, 2021 stated that:-

“Our Ref: EWASCO/B.O. D/9/12/21(5) 9th December, 2021

Eng. Felix G. Mutuura

Box 10141 00400

NAIROBI.

Dear Eng. Mutuura



Re: Summary Dismissal for Gross Misconduct

Reference is made to your suspension letter dated 15th October 2021, show cause letter dated 26th October 2021, your subsequent written response dated 9th November and disciplinary hearing held on 18th November 2021 where the following allegations were leveled against you;

- i. Violation of code of ethics
- ii. Negligence of duty
- iii. Insubordination
- iv. Unauthorized use and disclosure of confidential company information
- v. Willful misuse of company property
- vi. Irregular award of tenders
- vii. Irregular payments

During the proceedings, it emerged that you flouted the EWASCO Financial Operations manual, *Public Procurement and Asset Disposal Act*, 2015 and EWASCO Human Resources and Procedures manual that you should have been enforcing and you grossly insubordinated the Board.

Having reviewed all the facts and taking into consideration your explanations, we are of the view that your actions amount to gross misconduct and a fundamental breach of the company's expectations.

We therefore write to inform you that the Board in a special meeting held on 9th December 2021, has resolved to summarily dismiss you from employment with EWASCO as the Managing Director with immediate effect.

In accordance with the employment contract, you will receive the following:

- i. Salary worked in the month of termination (net of all the taxes paid)
- ii. Any leave accrued but not taken
- iii. Any allowances accruing.

Your final dues, which take into account any recovery of any monies owed to the company will be processed and paid in full. You will also receive a certificate of service upon clearance from the company.

We would like to take this opportunity to wish you well in your future endeavors.

Yours sincerely,

Dr. Johannes Njagi Njoka

Chairman

Board of Directors



41. The claimant admitted in his testimony that he advanced money to the trade union to finance members meeting but the money was to be recovered from the union dues by instalments. He denied knowledge that the money was meant to finance demonstrations against the respondent.
42. The claimant further admitted that he swore an affidavit in HC PET NO. 006 of 2021 without Board approval but maintained that he consulted with the Chairman as it was the practice before. He again admitted that he wrote a letter dated 15th September, 2021 cancelling a Board retreat due to the said case after consulting with the Chairman.
43. He also admitted that he appointed a law firm to represent the respondent in a said case and paid him legal fees without Board approval and contended that the law firm was already prequalified and as such there was no need for Board approval before appointing or paying the lawyers.
44. The respondents maintain that the said actions by the claimant amounted to insubordination, breach of the company HR Policies and Procedures Manual, Code of Ethics and public finance management laws. Consequently, the respondents contend that the claimant committed gross misconduct and the dismissal was justified.
45. Having carefully considered the evidence and submissions presented, the court finds that the claimant made decisions and took certain actions which did not sit well with the majority of the respondent's Board. The said decisions and actions were allegedly done with consultation with the Chairman of the Board. Such actions and decisions included paying out Kshs.200,000 advance to the trade union at a time when there was threat of industrial action by workers; appointing a lawyer to represent the respondent in HC PET No. 013 of 2021; paying the lawyer over Kshs.2,000,000 when some Board members were questioning the appointment of the said law firm; swearing an affidavit on behalf of the respondent in the said petition; and cancelling the Board Retreat by the letter dated 15th September, 2021.
46. The claimant contended that a full Board approval was not required for the said decisions and actions but he did not table before the court any documentary evidence or provision of law that authorized him and the Chairman to make such decisions without requirement of the Board's approval. Without such evidence, this court is left with no option but agree with the respondent that the claimant insubordinated the Board and breached his contract under the guise that he acted in consultation with the Board Chairman.
47. The court must observe that, if indeed such consultation was done, the same was subject to ratification by the full Board which was never sought in this case. The claimant cannot hide under the wings of the Chairman without any legal or contractual basis for that. In any case the said Chairman did not give evidence herein to confirm that he indeed authorized the claimant to do the actions which offended the rest of the Board members.
48. The respondent has established on a balance of probability and supported by the said admissions by the claimant under oath that indeed there existed a valid and fair reason for terminating the claimant's contract of employment. The suspicion that the claimant was financing trouble making in the company, and that he was undermining the Board was not far-fetched. Under Section 43(1) of the *Employment Act*, the employer needs show that he genuinely believed that the reason for the termination existed at the time of the termination. That was the reasoning of the Court of Appeal in *Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others* [2019] eKLR.



49. However the said grounds were not valid reasons for summarily dismissing the claimant. Article 6 of his contract of employment provides that dismissal would only be done if the claimant committed a criminal offence punishable by imprisonment. The said Article provides;
- i. “The Board of Directors can terminate the contract if the Managing Director commits a proven fundamental breach of this contract, fails to consistently achieve the targets set, or is declared bankrupt by being given one month’s notice or one month’s salary in lieu of notice. The Board of Directors can summarily dismiss the Managing Director if he commits a criminal offence leading to imprisonment.
 - ii. In the event that the Managing Director satisfactorily performs the duties of the office but due to default on the part of the Board of Directors forces the Managing Director out of the Office without reasonable cause he shall be compensated for the remaining period of the contract period of the contract period and for all benefits that would have been due to him at the end of the contract period.
 - iii. The Managing Director can terminate the Contract by giving the Board of Directors Three Months (3) notice of his intention to terminate the contract or by surrendering three months salary in lieu of notice.”
50. RW1 confirmed that there were no criminal proceeding against the claimant at the material time. The contract is unambiguous and the courts duty is to enforce it as it is.

Procedure

51. Section 41 of the *Employment Act* provides that;
- “(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.”
52. In this case the claimant was served with a Show Cause letter. He requested for documents to help him prepare proper defence and he was given. He then responded and thereafter attended a disciplinary hearing before an ad hoc committee of the Board. The hearing was held away from the company offices at his own request. He was given a chance to call witnesses and ask questions but he attended alone. He never raised objection to the composition of the ad hoc Committee or the procedure followed during the proceeding. He did not appeal against the decision.
53. His complaint therefore seems to relate to the computation of the terminal dues paid to him which came after the disciplinary process had ended and the claimant yielded to his fate. Having carefully considered the facts of the case through the lens of Section 41 of the *Employment Act* and section 4 of the Fair Administrative Actions Act, the court finds that the dismissal of the claimant was done in accordance with a fair procedure since he was accorded a fair hearing.



54. Although he alleges that the composition of the ad hoc Committee was not proper because 3 of the members were conflicted, this court opines that such allegation is only an afterthought. The said allegation ought to have formed a reason for a protest or preliminary objection to the proceeding or even a ground of appeal to the Board against the dismissal. From the evidence on record, the claimant did not object to the proceedings and he even condoned the alleged composition by requesting committee to hold the hearing away from the company offices. It is therefore too late for the claimant to raise the objection to the ad hoc Committee at this time.

Reliefs

55. The claimant prayed for declaration that the suspension, disciplinary hearing and the ultimate dismissal were sham, unprocedural, wrongful, unequitable and unjust against him. However the said declaration is declined because there existed valid reason for termination of his contract and a fair procedure was followed. However the court reiterates the observation that the summary dismissal was not grounded on a valid reason as agreed by the parties under Article 6 of the contract of employment. Consequently, the court reduces the summary dismissal to a termination for a reasonable cause as contemplated under Article 6 of the contract of employment.
56. For the foregoing reasons the prayer for reinstatement of the claimant to his employment without loss of benefits is also declined. He is also not entitled to compensation of 12 months' salary for unfair termination or general damages for violation of right to fair labour practices since the termination was justified by a valid and fair reason and a fair procedure was followed before the termination.
57. The claim for salary for the remainder of the contract term is also declined because that was only a right if the contract was terminated without a reasonable cause. He is therefore awarded one month salary in lieu of notice being Kshs.550,000.00 under the said Article 6 of the contract.
58. The prayer for performance reward of Kshs.250,000.00 is also declined because the appraisal of the claimant's performance done by the chairman was never ratified by the Board.
59. However the prayer for accrued leave of 69 days is granted because no evidence in form of leave records was tendered to rebut the same. Besides the dismissal letter offered to pay any accrued leave days but not taken computing using the basic pay of Kshs.420,000.00 per month x 69/26 days = Kshs.1,114,615.40
60. The claim for gratuity is also granted pursuant to Article 4 (d) of the contract which entitled the claimant to 31% of his basic salary for the months worked. He worked from 29th July, 2020 to 9th December, 2021 equaling to 15 months. Hence Kshs.420,000 x 15 x 31% = Kshs.1,953,000.00
61. In conclusion I enter judgment for the claimant in the following terms:-
- a.) The summary dismissal is reduced to a termination for a reasonable cause.
 - b.) The Respondent to pay the claimant Kshs.3,617,615.40 plus interest at court rates from date of filing the suit.
 - c.) The said award shall be paid less statutory deductions and any sums paid after the separation as gratuity and accrued leave.
 - d.) Costs of the suit plus interest.

DATED, SIGNED AND DELIVERED AT NYERI THIS 26TH DAY OF JANUARY, 2023.

ONESMUS N MAKAU

JUDGE



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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE

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