



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kimani v Abercrombie & Kent Limited (Cause 2459 of 2016)  
[2023] KEELRC 371 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 371 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 2459 OF 2016  
L NDOLO, J  
FEBRUARY 16, 2023**

**BETWEEN**

**HELLEN WAITHERERO KIMANI ..... CLAIMANT**

**AND**

**ABERCROMBIE & KENT LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. By way of a Statement of Claim dated 24<sup>th</sup> November 2016 and filed in court on 29<sup>th</sup> November, 2016, the Claimant initiated the present suit against the Respondent, alleging unlawful dismissal and non-payment of terminal dues.
2. The Respondent filed a Memorandum of Defence dated 7<sup>th</sup> February 2017, to which the Claimant responded on 21<sup>st</sup> April 2017.
3. At the trial, the Claimant testified on her own behalf and the Respondent called six (6) witnesses; Silas Muraguri, the Transport Operations Manager; Fiona Bangua, the Customer Service Manager; Joseph Mwangi Kagema, the Assistant Financial Controller; Steve Njenga, a Customer Service Officer; Geoffrey C. Mwangi, the Human Resources and Administration Manager; and Claire Anampio, the Tour Manager.
4. The parties also filed written submissions.

**The Claimant's Case**

5. The Claimant states that she was employed by the Respondent on 1<sup>st</sup> August 2003, in the position of a Spanish Speaking Customer Service Officer.



6. The Claimant worked for the Respondent until 25<sup>th</sup> July 2016 when she was dismissed, following a complaint by one of the Respondent’s customers.
7. The Claimant maintains that her dismissal was unlawful and unfair as the Respondent failed to follow lawful procedure as prescribed under the Employment Act. She now seeks the following reliefs:
  - a. Unpaid salary.....Kshs. 342,015
  - b. 3 months’ salary in lieu of notice.....205, 209
  - c. 4 months’ portorage allowance.....12,000
  - d. 4 months’ airtime allowance.....8,000
  - e. 12 days’ leave pay.....27,361
  - f. Pension.....267,134
  - g. Severance pay for 13 years.....444,619
  - h. 12 months’ salary as damages for unfair dismissal.....820,836
  - i. Costs plus interest

### **The Respondent’s Case**

8. In its Memorandum of Defence dated 7<sup>th</sup> February 2017 and filed in court on 18<sup>th</sup> February 2017, the Respondent admits having engaged the Claimant in the manner stated in her Statement of Claim.
9. The Respondent however denies the Claimant’s allegations that she was dismissed from employment unlawfully and unfairly. The Respondent maintains that the dismissal, on account of gross misconduct, was lawful and procedural.
10. The Respondent accuses the Claimant of violating the Respondent’s Rules and Regulations, by directly selling a day trip to Lake Nakuru to the Respondent’s customers at Kshs. 56,000. Further, the Claimant proceeded to engage a hired private vehicle being registration number KAL 367L to transport the customers to Nakuru.
11. The Respondent states that the Claimant was duly invited to a disciplinary hearing on 26<sup>th</sup> July 2016, prior to her summary dismissal.

### **Findings and Determination**

12. There are two (2) issues for determination in this case:
  - a. Whether the Claimant’s dismissal was lawful and fair;
  - b. Whether the Claimant is entitled to the remedies sought.

### **The Dismissal**

13. The Claimant’s dismissal was communicated by letter dated 28<sup>th</sup> July 2016 stating as follows:

“Dear Hellen Kimani

Re: Summary Dismissal From Employment



We refer to our letter dated 26<sup>th</sup> July, 2016 and your response letter admitting you fraudulently received Kshs. 56,000/- from a client(s) on 14<sup>th</sup> July, 2016. Further we refer to a disciplinary hearing held on 26<sup>th</sup> July, 2016 where you reconfirmed to have requested the client(s) to pay the above amount in order to provide a safari to Nakuru National Park. In the meeting you accepted to have received the amount in cash. You used a third party vehicle KAL 367H to transport the clients. Your response letter and adduced evidence during the meeting clearly found you guilty of the offence.

According to the Company Rules and Regulations your action is a gross misconduct offence which is liable to summary dismissal. You are therefore summarily dismissed from employment with effect from 28<sup>th</sup> July, 2016.

After you return all the company properties you will be paid as follows:

1. Salary for 28 days worked in the month of July 2016.
2. Salary for 04 accrued leave days.
3. Pension withdrawal benefits as per the current rules to be paid on a separate cover.

Less:

1. Any outstanding company advance
2. Kshs. 56,000 (Fifty Six Thousand Shillings only), amount in reference where you received fraudulently from the client.
3. Statutory deductions.
4. Any outstanding amount with Kentours Sacco.

Yours faithfully,

Abercrombie & Kent (k) Ltd.

(signed)

Geoffrey C. Mwangi

Human Resources & Admin. Manager”

14. Section 43 of the *Employment Act* requires an employer to demonstrate a valid reason for terminating the employment of an employee. The burden of proof under this provision falls under what is commonly known as ‘the reasonable responses test’ which is well captured in the following excerpt from the Halsbury’s Laws of England, 4<sup>th</sup> Edition, Vol. 16(1B) para 642:

“In adjudicating on the reasonableness of the employer’s conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee’s conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable



employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if it falls outside the band, it is unfair.”

15. This rendition was adopted by the Court of Appeal in its decision in *Reuben Ikatwa & 17 others v Commanding Officer British Army Training Unit Kenya & another* [2017] eKLR.
16. It is not in contest that the Claimant sold a private safari to the Respondent’s customers. In this regard, the Respondent produced the Claimant’s hand written note dated 26<sup>th</sup> July 2016 stating:

“I Helen Kimani admit to have sold a day trip to ARISTIZABIL Francisco Mr./Yepes Margarita Ms. On 14<sup>th</sup> July. And to not have communicated to the office of the same.

I apologise for the above Fraud and it will never happen again.

Yours Faithfully,

Hellen Kimani”
17. The Respondent’s third witness, Joseph Mwangi Kagema testified that the Claimant had also admitted having used a company movement sheet given to her by the Respondent’s Fleet Officer, Dominic Nyaanga, as a cash receipt.
18. The Respondent’s first witness, Silas Muraguri told the Court that investigations had revealed that Motor Vehicle registration number KAL 367U, which was used to ferry the guests to Nakuru, belonged to the Technical University of Kenya and that the driver was not one of the Respondent’s employees.
19. The Respondent’s fourth witness, Steve Njenga confirmed having received a complaint from two of the Respondent’s customers; Aristizabil Francisco and Yepes Margarita, who expressed their displeasure with their safari. The customers complained about the motor vehicle used as well as lack of water, company sticker and HF radio.
20. The Respondent’s sixth witness was Claire Anampio, the Tour Manager.

She confirmed having been part of the team that carried out the investigations on the Claimant’s conduct with regard to the safari that led to her dismissal.
21. With the Claimant’s unequivocal admission, which she did not recant and which was backed by the testimony of the Respondent’s witnesses, I find and hold that the Respondent had a valid reason for dismissing the Claimant as required under Section 43 of the *Employment Act*.
22. That settled, the next question is whether in executing the dismissal the Respondent followed due procedure. In her testimony before the Court, the Claimant confirmed having been issued with a show cause letter to which she responded, admitting the charges levelled against her and offering an apology. She further confirmed having been invited to a disciplinary hearing after which the Respondent’s verdict was communicated to her.
23. The Respondent’s fifth witness, Geoffrey Mwangi testified that the Respondent had in place an elaborate disciplinary procedure that was adhered to by the disciplinary committee.
24. The Respondent’s second witness, Fiona Bangua, confirmed having invited the Claimant to a disciplinary hearing and informing her of the allegations levelled against her. Bangua further confirmed having received a response from the Claimant in the form of an apology letter that the Claimant submitted to Bangua in the presence of the Transport Operations Manager, Silas Muraguri.



25. The Respondent's third witness, Joseph Mwangi Kagema who chaired the disciplinary meeting, told the Court that the Claimant was accorded an opportunity to make her representations. Kagema confirmed that the Claimant admitted having directly engaged with the Respondent's customers.
26. In her written submissions, the Claimant took issue with the disciplinary proceedings, which she termed as trial by ambush. She claims to have been intimidated as the disciplinary panel was made up of team heads. She also complains that she was not accompanied by any employee or representative of her choice, contrary to the provisions of Section 41 of the Employment Act.
27. On its part, the Respondent submits that the Claimant has failed to discharge the burden of proving that her dismissal was unlawful and unfair.  
  
The Respondent asserts that, having admitted that she had acted contrary to the Respondent's Rules and Regulations, the Claimant could not lay a claim for unlawful or unfair dismissal from employment.
28. Regarding the procedure followed in the dismissal transaction, the Respondent maintains that due process was observed as the Claimant was accorded an opportunity to make her representations prior to the dismissal, as required under the mandatory provisions of Section 41 of the Employment Act.
29. I have looked at the steps taken by the Respondent in handling the Claimant's case and I am satisfied that the procedural fairness requirements set by Section 41 of the Employment Act were adhered to. The Claimant did not raise any issues regarding the procedure at the shop floor and her claim that she was intimidated was not supported by any credible evidence.
30. In the result, I find and hold that the Claimant's dismissal was lawful and fair. The claims for damages and notice pay are therefore without basis and are disallowed.

**Other Claims**

31. In response to the claim for leave pay, the Respondent produced leave records showing the Claimant's leave balance as four (4) days. I will therefore allow the claim in accordance with the Respondent's admission.
32. The claim for salary for July 2016 is also admitted and is allowed.
33. The claims for portage allowance and airtime allowance were not proved and are dismissed.
34. No basis was established for the claim for severance pay which also fails and is disallowed.
35. Regarding the claim for pension, the Respondent has expressed its willingness to facilitate the withdrawal process, subject to the Claimant completing the appropriate exit form. It is therefore not necessary to issue any orders under this head.
36. In the end, I enter judgment in favour of the Claimant as follows:
  - a. Leave pay for 4 days.....Kshs. 9,120
  - b. Salary for July 2016.....68,403
  - Total .....77,523
37. This amount will attract interest at court rates from the date of judgment until payment in full.
38. Each party will bear their own costs.

Orders accordingly.



**DELIVERED VIRTUALLY AT NAIROBI THIS 16<sup>TH</sup> DAY OF FEBRUARY 2023**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Ndurwa for the Claimant

Mrs. Sagini for the Respondent

