



REPUBLIC OF KENYA



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**Nyakeruma v National Cereals & Produce Board (Cause 235 of 2018)
[2023] KEELRC 279 (KLR) (2 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 279 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 235 OF 2018
DN NDERITU, J
FEBRUARY 2, 2023**

BETWEEN

ZABLON M. NYAKERUMA CLAIMANT

AND

NATIONAL CEREALS & PRODUCE BOARD RESPONDENT

JUDGMENT

I. Introduction

1. In a Statement of Claim dated 29th August, 2018 and filed in court on 8th November, 2018 through Mwakio, Kirwa & Co. Advocates the claimant prays for: -
 - (a) A declaration that the termination of Claimant's employment on account of negligence was discriminative, malicious, unlawful, unfair, unprocedural and a fundamental violation of the rights of the Claimant.
 - (b) A declaration that the Claimant was discriminated upon.
 - (c) The terminal dues as tabulated herein below.
 - (d) A maximum compensation as per Section 49 (c) of the *Employment Act*, 2007.
 - (e) A Certificate of Service as per Section 51 of the *Employment Act*.
 - (f) Costs and interest of this Suit.
 - (g) Any other award as the Honourable Court deems fit to grant in the circumstance of this case.



Claims Arrangement

- (i) One month pay in lieu of notice
Section 36 of the Employment Act
Legal Notice No.117 of 2015
80,380 x 1.....Kshs.80,380/=
- (ii) Compensation for unfair termination
Section 49(1) (c) of the Employment Act
Gross pay x 12 months
80,380 x 12 months.....Kshs.964,560/=.
- (iii) Leave Prorate
From 1st January, 2016 – 4th October, 2016
21/ 12 x 20,380/30 x 9 months.....Kshs.42,199.50/=
- (iv) ¼ of Basic Salary plus full Housing allowance during the entire period of suspension as per Clause 13.8 of the Human Resource Policy Manual.
The Claimant was suspended in May, 2016 and Terminated in October, 2016 making a total of 5 months.
¼ of basic payoff Kshs.60,850/= plus House Allowance of Kshs.7,360/= x 5 months
.....Kshs.112,862.50/=.
- (v) Damages for discrimination.
- (vi) Gratuity assessed at 31% of the total yearly earnings based on last salary Kshs.80,380/= x 12 months x 31% 100
.....Kshs.299,013.60/=.
- (vii) Extraneous allowance for the entire period of service. Pursuant to clause 3.2(1), (2), 5.9(9) (4) and 5.9(10) of the HR Policy Manual. The Claimant worked between 7a.m. to 6p.m. daily a period that was more than 40 hours. 10% of 80,380/= x 12 months x 8 years of service.....Kshs.771,648/=.
2. Together with the statement of claim was filed a statement by the Claimant and a bundle of documents in support of the claim.
3. On 8th November, 2018 the Respondent through Oyomba, Mosota & Wamwea Advocates entered appearance and filed a memorandum of response to the claim on 22nd November, 2018. In their memorandum of response the Respondent prays that the Claimant's cause be dismissed with costs for want of merits.
4. The Respondent also filed a bundle of documents and witness statements.
5. On 5th December, 2018 the Claimant filed a reply to the response to the claim wherein he reiterated the contents of the claim.



6. On 12th May, 2021 the Claimant appointed Mathai Maina & Co Advocates to act for him in this cause in place of Mwakio, Kirwa & Co. Advocates.
7. This cause came up in court for hearing on 22nd March, 2022 when the Claimant (CW1) testified and closed his case. The defence was also heard on the same date when Ambrose Njoroge Mutua (RW1) and Charles Nzyoki Kisilu (RW2) testified and the Respondent's case was closed as well.
8. Counsel for the parties addressed the court and summed up their respective client's case by way of written submissions. Counsel for the Claimant filed written submissions on 9th May, 2022 while Counsel for the Respondent filed on 22nd June, 2022.

II.Claimant's Case

9. The Claimant's case is expressed in the statement of claim, the oral and documentary evidence of the Claimant (CW1), and the written submissions by his Counsel, and the same is summed up as hereunder.
10. The Claimant was employed by the Respondent on permanent and pensionable terms with effect from 1st November, 1989. He started off as a stacker and rose through the ranks to the position of depot assistant manager as his last designation.
11. His last posting was at Machakos Depot where he was the in-charge and his last monthly gross pay was Kshs.80,380/-.
12. However, the Claimant was terminated from employment vide a letter dated 4th October, 2016 on the basis that he had failed to exercise due care in the performance of his duty which caused or abetted irregular sale of Government of Kenya (GOK) subsidized fertilizer to the detriment of the Board (Respondent).
13. The Claimant appealed the said termination internally but his appeal was dismissed.
14. It is the Claimant's case that the said termination was irregular and unlawful for lack of both substantive and procedural fairness as provided for in the law and it is on that basis that the Claimant has filed this cause seeking the prayers set out in the introductory part of this judgment. He prays that his claim be allowed with costs.

III.Respondent's Case

15. The Respondent's case is contained in the response to the claim, the oral and documentary evidence adduced through RW1 and RW2, and the written submissions by Counsel, as summarized hereunder.
16. The Respondent's position is that the Claimant was terminated for lawful reasons and all the requisite procedural steps were taken in accordance with the law before, during, and even after the termination.
17. The Respondent asserts that the Claimant was careless and negligent in performance of his duty or that he was involved in mismanagement and theft of fertilizer that was meant to be sold and availed to farmers through subsidized prices as a result of which bags of the said fertilizer were lost or stolen to the detriment of the Respondent and genuine farmers who were intended to benefit from the programme.
18. The Respondent posits that the Claimant was afforded both substantive and procedural fairness before termination and thereafter, including tabulation of his dues, and that this cause is misconceived and an appropriate one for dismissal with costs.



IV. Issues For Determination

19. This court has carefully gone through the pleadings filed, the oral and documentary evidence tendered from both sides, and submissions by counsel for both parties and the court identifies the following issues for determination –
- a) Was the termination of the Claimant by the Respondent unfair and unlawful?
 - b) If (a) above is in the affirmative, is the Claimant entitled to the reliefs sought in the claim?
 - c) Who meets the costs in this cause?

V. Termination

20. The terms and conditions of employment of the Claimant by the Respondent are not really in dispute. As at the time of termination on 4th October, 2016 the Claimant was in employment of the Respondent in the designation of assistant depot manager, Machakos, at a gross monthly salary of Kshs.80,380/-. The Claimant commenced his employment with the Respondent in the position of a stacker with effect from 1st November, 1989 as per the letter of appointment of even date. As at the time of termination, therefore, the Claimant had served the Respondent for a period of over 25 years.
21. The process of termination of the Claimant was commenced by the Respondent by way of a suspension letter dated 7th June, 2016 wherein the Claimant was suspended from duty from the date of the said letter on allegations of irregular sale of GOK subsidized fertilizer at Machakos Depot wherein the Claimant was the in-charge. The said letter promised that the Claimant would be informed the exact nature of the allegations and also that he might be required to appear before the human resource advisory committee (HRAC) at a future date.
22. Vide a letter dated 2nd August, 2016 the Respondent informed the Claimant of the nature of the irregularities and alleged charges and or misconduct against him as promised in the letter of suspension. In part the Respondent wrote to the Claimant as follows –

“Our Ref: C/ST/5651

2nd August, 2016

Zablon Nyakeruma

Depot Manager

Thro’ Regional Manager – forwarded for Ag. RM

Nairobi/Eastern

Dear Mr. Zablon Nyakeruma

Irregular Sale Of Government Subsidized Fertilizer

Further to your suspension letter dated 6th June, 2016, Management has received a Security Department report dated 6th June 2016 that has implicated you in alleged irregular sale of Government-subsidized fertilizer at Machakos Depot, where you work as a Depot manager.

The report indicates that you failed to ensure due diligence in performing your duties of verifying the identity of farmers to whom you endorsed twelve(12) MOA forms in the name of various farmers with a total of 440 bags of fertilizer. The MOA forms were used to procure



fertilizer to be released to persons other than those whose names were appearing on the relevant MOALF Fertilizer Application Forms contrary to official guidelines on the sale of fertilizer.

Management hereby gives you three days from the day you receive this letter to explain your case in writing. Failure to which, management shall take such disciplinary action against you that it shall deem appropriate.

This letter is issued in duplicate. Please acknowledge receipt by signing and returning a copy to this office as soon as possible.”

23. The above show cause letter was served upon the Claimant on 5th August, 2016 and he acknowledged receipt thereof by endorsing on the copy as produced in court by the Respondent.
24. The Claimant responded to the show cause letter by way of a letter dated 8th August, 2016 wherein he denied all the allegations levelled against him. The Claimant’s defence was that he had followed all the procedures in the sale of the GOK subsidized fertilizer and he alleged that as far as the identity of the farmers was concerned it was the duty of the assistant chief, the chief, and the area agricultural officer to verify and authenticate the identity of the farmers and that his duty was only to authorize the release of the fertilizer. However, he admitted in his response that he had a duty to confirm the identity of the farmer and to authenticate the documents from the farmer who was supposed to appear physically for that purpose.
25. On the issue of irregular endorsement of forms brought to him by some farmers, the Claimant responded that he did so to enable the said farmers to obtain the fertilizer that they wanted from any other depot where they could find it as Machakos depot was allegedly out of stock. He alleged that he had identified all the farmers for whom he endorsed the forms.
26. One of the exhibits produced by the Respondent through RW1 is an audit report dated 5th September, 2016 detailing the irregularities that had been committed by the Claimant at Machakos depot. The testimony of RW1 is that farmers from as far as Narok, Sagana, Kiganjo, and Kitale allegedly obtained fertilizer from Machakos yet when contacted the said farmers denied ever travelling to Machakos and or obtaining the fertilizer as alleged.
27. It is on the basis of the foregoing that the Respondent summoned the Claimant to appear before the HRAC on 14th September, 2016 vide a letter dated 7th September, 2016 which was served upon the Claimant on 9th September, 2016 as endorsed by the Claimant on the copy produced in court.
28. In the letter of invitation alluded to above the Claimant was informed of his right to appear accompanied by a co-worker of his choice.
29. It is evident from the minutes of the disciplinary hearing that several cases of similar nature were handled between 13th and 15th September, 2016 including that of the Claimant which is in minute MIN/HRAC/09/2016/19: Machakos Case. The Claimant was alleged to have irregularly endorsed forms that enabled persons who were not genuine farmers to obtain over 440 bags of GOK subsidized fertilizer from Makueni Depot.
30. The HRAC concluded that the Claimant had failed in his duty in that there was no duly signed list of beneficiaries for sales and that the Claimant had sold fertilizer without having copies of specimen signatures of the purchasing farmers contrary to the applicable guidelines.
31. The HRAC recommended that the Claimant be terminated for negligence in performance of his duty.



32. The Claimant attended the hearing and insisted that he had committed no wrong but the HRAC disagreed with him.
33. It is on the basis of the foregoing that the Respondent terminated the Claimant vide a letter of termination dated 4th October, 2016. In part the Respondent cited the reason for termination as “you failed to exercise due care in the performance of your duty which caused or abetted the irregular sale of GOK subsidized fertilizer to the detriment of the Board”.
34. The Claimant appealed the termination in a letter dated 27th October, 2016 but the appeal was disallowed and the Claimant was informed accordingly vide a letter dated 16th March, 2017.
35. It is the foregoing process and the termination that the Claimant has challenged as unfair and unlawful for various reasons. The Claimant alleges that he was not given a hearing both at the disciplinary hearing and in the appeal.
36. This Court (ELRC) has now fairly settled the issue on what constitutes a fair hearing in disciplinary process. Many a decision have been rendered on this issue among them – Mary Chemweno v Kenya Pipeline Company Limited [2017] eKLR, Loice Otieno v Kenya Commercial Bank Limited [2013] eKLR, and Walter Ogal Anuro v Teachers Service Commission [2012] eKLR.
37. Section 43 of the [Employment Act](#) (the Act) provides as follows-
 - (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair with the meaning of Section 45.
 - (2) The reason or reasons or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.
38. Sections 35, 40, 41, 43, 44, 45, 46, 47, and 48 of the Act provide for various aspects of substantive and procedural fairness in the various forms of termination including redundancy and summary dismissal.
39. In terms of procedural fairness, it is the considered view of this court that the Claimant was afforded and accorded a fair procedure. The Claimant was duly informed of the alleged misconduct and charges against him and invited to defend himself by way of a written response, which he did. He was invited for an oral hearing and he was duly informed of the date and venue and of his right to come with a co-employee of his choice. He attended the hearing and he was given an opportunity to defend himself.
40. The Claimant now alleges that he was not given adequate time to defend himself. There is nothing on record to prove that indeed the Claimant raised that issue before, during, and or after the disciplinary hearing. In fact, that issue was not raised in the appeal and as such the same is hereby dismissed by this court as an afterthought intended to mislead the court.
41. In terms of the procedure adopted this court cannot fault the Respondent on the same and this court so holds.
42. In terms of substantive fairness the Claimant is alleged to have endorsed some forms for some unauthenticated farmers to obtain GOK subsidized fertilizer at Makueni Depot on allegations that there were no supplies at Machakos Depot.



43. An audit report, which in essence is an investigation report, revealed that no such farmers as alleged by the Claimant ever bought or presented themselves for the purchase of fertilizer as alleged. RW1 testified that he contacted some of the farmers who were alleged to have bought the fertilizer through the forms endorsed by the Claimant but found that none had made such purchases. That evidence was neither challenged nor dislodged by the Claimant in any way.
44. In the entire circumstances of this cause the only logical and plausible conclusion for this court to make is that the Claimant was either so negligent, careless, and or reckless in performance of his duty or that he was a party to, accessory, and or abetted illegal and irregular sale of the GOK subsidized fertilizer to the detriment of genuine farmers and his employer, the Respondent herein. Such misconduct is a good ground for dismissal or termination under Section 41 of the Act.
45. Again, this court cannot fault the decision by the Respondent to terminate the Claimant as it had genuine and honest reason for termination. The conduct of the Claimant was dishonest, illegal, and irregular to the detriment of the Respondent. This court agrees with the decision in *Moses Macharia Karama v National Cereals and Produce Board Eldoret ELRC No. 34 of 2017* as cited by Counsel for the Respondent.
46. By reason of the foregoing this court holds that the termination of the Claimant by the Respondent was fair and lawful both in substance and procedure and it is so declared.

VI.Reliefs

47. Having held that the Claimant was fairly and lawfully terminated, this court shall now consider each of the reliefs sought by the Claimant as set out at the introductory part of this judgment.
48. For avoidance of doubts the Respondent through RW2 produced documentary evidence indicating that the Claimant's terminal dues were tabulated and applied appropriately and that upon reconciling of the accounts the Claimant was found to be indebted to the Respondent in the sum of Kshs.219,508.92 which amount remains unpaid to this day. This computation was not challenged and or disputed by the Claimant and the same shall be considered in making any award to the Claimant, or as the case may be.
49. The Claimant alleged that he was discriminated against for the reason that co-workers who faced the same or similar charges as his were not terminated. However, during his testimony in court the Claimant did not adduce evidence to prove this allegation. In fact, he was challenged in cross-examination by Counsel for the Respondent to name specific comparable cases but the Claimant gave no specific cases or instances that would render this court to conclude that he was discriminated against – See the decision in *Omondi Justus Rang'ang'a & 28 Others v KCB Bank Kenya LTD ELRC at Nairobi Cause No. E618 of 2021* on what amounts to discrimination.
50. For the foregoing reasons prayers (a) and (b) as set out in the introductory part of this judgment are hereby denied.
51. Prayer (c) is for terminal dues as set out in the calculations set out in the claim. As noted above, the Respondent did tabulate the dues payable to the Claimant in an exhibit that was produced and duly admitted as evidence in this cause. The Claimant did not object to the said tabulation or discredit the same in any way.
52. The said tabulation clearly indicates that one month's salary in lieu of notice was considered and provided for. Leave days were also considered and provided for. The same applies for gratuity, which the Claimant did not prove that he was entitled to in any event.



53. It is now a settled position in law that gratuity is not a right. It is a gratuitous payment made by an employer to an employee usually in appreciation of a job well done subject to such terms and conditions as may have been agreed between the parties – See Pathfinder International Kenya Limited v Stephen Ndegwa Mwangi [2019] eKLR; Bamburi Cement LTD v Farid About Mohammed [2016] eKLR; and H. Young & Company EA Limited v Javan Were Mbago [2016] eKLR. The Claimant has not adduced evidence to prove that he is indeed entitled to gratuity. Under Clause 5.13.2 of the Respondent’s Human Resource Manual only employees on contract terms are eligible for gratuity. The Claimant was on permanent and pensionable terms and was hence not eligible for gratuity and there is no evidence adduced to convince the court otherwise.
54. On the issue of overtime or what the Claimant is calling extraneous allowance, the Claimant alleged that he worked from 7am to 6pm each day for eight years. However, there is no evidence from the Claimant explaining why he had to report to work at 7am yet his official working hours were between 8am and 5pm, with a one-hour lunch break. RW2 testified that any overtime work could only be undertaken with express prior permission. No evidence of such permission was adduced by the Claimant. Inasmuch as it is the duty of an employer to keep employment records under Sections 10 and 37 of the Act no such records would be expected to exist without the Claimant providing the evidence that he indeed applied and got approval to work overtime. For the foregoing reasons the Claim for overtime fails.
55. The other relief sought by the Claimant is for a quarter basic pay plus full house allowance for the period of suspension. The Court has looked into the tabulation of the final dues and it appears to this court that the Respondent did not consider this item in the said tabulations. However, the Claimant has not adduced evidence on the breakdown of the final gross pay of Kshs.80,380/-. The Claimant was suspended on 7th June, 2016 and terminated on 4th October, 2016. That is a period of four (4) months.
56. Based on Clause 13.8(4) of the Respondent’s Human Resource Manual the Claimant was entitled to quarter basic pay and full house allowance during the suspension. House allowance is normally pegged at 15% of the basic pay. For simplicity then the amount due to the Claimant under this head is calculated as $(\frac{1}{4} * 80,380/- * 4) + (15\% * 80,380/- * 4) = \text{Kshs.}128,608/=$.
57. The claim for compensation is obviously denied as the court has found that the termination was fair and lawful.
58. The Respondent produced a certificate of service in the name of the Claimant and RW2 indicated that the same is ready for collection by the Claimant at his convenience.

IV.Costs

59. The claim has failed to a large extent. However, in the interest of justice this court orders that each party meets own costs of this cause.

V. Disposal

60. In disposal of this cause, this court issues the following orders: -
- a) A declaration be and is hereby issued that the termination of the Claimant by the Respondent was fair and lawful both in substance and procedure.
 - b) However, the Claimant is awarded a total of Kshs.128,608/= for unpaid house allowance and salary payable during the period of suspension together with interest thereon from the date of this judgment less statutory deductions.



- c) All the other claims are denied for the reasons detailed in the judgment.
- d) The Respondent is ordered to deliver the certificate of service to the Claimant and or his Counsel within 30 days of this judgment.
- e) Each party shall bear own costs in this cause.

DATED, DELIVERED VIRTUALLY, AND SIGNED, AT NAKURU

THIS 2ND DAY OF FEBRUARY, 2023.

.....

DAVID NDERITU

JUDGE

