



REPUBLIC OF KENYA



KENYA LAW
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**Mburu v CIC General Insurance Limited (Cause 53 of 2019)
[2023] KEELRC 807 (KLR) (27 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 807 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 53 OF 2019
M MBARÚ, J
MARCH 27, 2023**

BETWEEN

JAMES COLLINS MBURU CLAIMANT

AND

CIC GENERAL INSURANCE LIMITED RESPONDENT

JUDGMENT

1. This file was placed together with ELRC Cause No. 54 of 2019 – Duncan Gitugo v CIC General Insurance Limited for hearing because they are closely related and the witnesses are the same save for different claimant. For ease of reference and adjudication, each is to be treated differently save for this background and the respondent is the same and the analysis and findings are replicated herein.
2. This being the first file, the proceedings herein shall be replicated in ELRC Cause No. 54 of 2019.
3. The claimant is a male adult. The respondent is a limited liability company primarily carrying out insurance business in Kenya.
4. On August 14, 2013 the respondent employed the claimant as a Sacco Assurance Officer and issued him with a contract of employment and which employment was also regulated under the Human Resource Guidelines.
5. On September 28, 2018 a claim by an insured of the respondent was reported to the respondent through one of its agents in relation to motor vehicle KBW 349G. The claim was received by the claimant as an employee of the respondent and in the relevant department. After explaining the process and documents required to the insured the claimant booked the claim then forwarded the data to another employee one Duncan Kithinji who was then, based on the records then forwarded to the department tasked with processing and investigating the claimant.



6. On the October 19, 2018 the respondent served the claimant with notice to show cause why disciplinary action should not be taken against him for fraud and knowingly circumventing motor vehicle assessment procedures with the intent of defrauding the company. The claimant was said to be part of a fraud syndicate in relation to a claim involving vehicle registration number KBW 349G.
7. On the October 25, 2018 the claimant, despite the fact that the allegations were incongruous and lacking of any evidence of fact or material substance and he replied to the show cause notice letter and on October 31, 2018 the claimant was sent on 14 days compulsory leave pending investigations. On November 5, 2018 the respondent invited the claimant to a disciplinary hearing but he had not been issued with the investigations report or any information with regard to the alleged fraud syndicate.
8. On November 26, 2018 the claimant was issued with notice of summary dismissal on the grounds that there was fraud and corruption with regard to his processing the claim over Motor vehicle registration KBW 345G.
9. The claim is that there was no due process and employment terminated unfairly and contrary to section 45 of the *Employment Act*, 2007 (the Act).
10. The claim is also that the respondent in authoring the letter terminating employment defamed him with malicious intent and damaged his character and reputation by indicating that he was engaged in fraudulent activities and sharing it out which has damaged his prospects of employability in a sector highly regulated and has since not been able to secure new employment as word went round that he had engaged in fraud which was not the case. Such defamatory matter has compounded the damage of unfair termination of employment contrary to unfair labour practices, the decision to terminate employment was rushed and pre-determined and whatever the claimant did to defend himself was not taken and claims the following;
 - a. A declaration that employment terminated unfairly;
 - b. A declaration that the statutory requirements for summary dismissal were not adhere to;
 - c. Payment of terminal dues;
 - d. Payment of all commissions and bonuses due to the claimant arising from Sacco business;
 - e. 12 months compensation for unlawful termination of employment;
 - f. Certificate of Service be issued;
 - g. Damages for defamations; and
 - h. Costs of the suit.
11. The claimant testified that on September 28, 2018 while on duty a client Patrick Kimathi who was well known to him informed him of an accident that had happened the previous day and the claimant proceeded to advise him on the process to be undertaken to process his claim and he booked the claim with information received at the time and he placed the claim with he claims department through a colleague Duncan Kithinji who was an assistant claims analyst. Later the claimant was served with a show cause notice and disciplinary notice on alleged fraudulent claims and that the claim he had processed was not genuine which was not true since the respondent did own assessment of the vehicle and claim and paid the claim.



12. At the time of processing the claim, the claimant's computer had problems and had not been repaired and so he used another colleague's computer to process the claim and then he took his annual leave which he had applied for and had been approved by the respondent.
13. The claimant testified that upon receiving the claim, he did what he was required to do and termination of employment was unfair because he was faulted for attending to his duties.
14. The claimant also called Duncan Kithinji who supported his evidence.
15. The claimant called Moses John Kibera who testified that he is the Principal Officer of Dial-Up Insurance Agency and met the claimant 8 years ago when dealing with UN Sacco and had a mutual client. He was surprised to learn that the claimant had been dismissed from his employment over alleged fraud through a common friend who shared a social media page who asked if he knew that the claimant had been dismissed due to fraud. The mutual friend had the letter on his phone which was being circulated.
16. Mr Kibera also testified that he had known the claimant as an honest person which was required while working with the UN Sacco who required someone beyond reproach as had been allocated a desk at the UN offices. Mr Kibera was also concerned about his business taking into account the matters of the claimant and termination of employment over alleged fraud being circulated and he asked the claimant about it and was informed that the allegations being made were not true. In the insurance industry the net effect of such matter of alleged fraud is severe being the gravest sin one can commit because it hangs over his name and the claimant cannot get any other employment in the insurance sector.
17. The respondent is an underwriter of over 42 agencies who cannot employ the claimant even as a broker or agency since he may be taken to have been involved in fraud. Good faith once challenged renders his employability a problem
18. In response, the respondent's case is that the claimant was sent on suspension following irregular conduct in the manner in which a claim for payment for motor vehicle was made and by forwarding a claim to another employee was a matter outside his job description as a Sacco Assurance officer. The allegation by the claimant that the insurance claim was forwarded procedurally to his colleague Duncan Kithinji is misleading and false in view of the fact that the claimant later irregularly and inexplicably accessed another employee's work computer to forward the insurance claim to the department tasked with processing and investigating the claim which is clearly against policy.
19. The respondent followed the due process in terminating the claimant's employment and he was given the opportunity to respond to the allegations made and then attended the disciplinary hearing for oral hearing and upon review of all the matters about the claimant, the respondent was satisfied that termination of employment was justified. Investigations into the matter revealed that the claimant was using an insurance agency associated to him to process the claim which put him in a conflicted position and a clear violating of the respondent company policy.
20. The alleged defamation did not take place since the respondent only copied relevant officers to the letter terminating employment and did not share outside to third parties as alleged and the claims made should be dismissed with costs.
21. No records were filed with the Memorandum of Response.
22. In evidence, the respondent called Elizabeth Wanjiku Njuguna the human resource business partner who testified that the claimant was dismissed from employment for gross misconduct after circumventing procedures in processing a motor vehicle claim. The claimant worked for the respondent from August 14, 2013 until November 26, 2018 and following investigations, he was found



- to have knowingly and with intent to defraud the respondent, circumvented established motor vehicle claim reporting procedures while reporting the claimant pertaining to motor vehicle registration No. KBW 349G.
23. Through letter dated October 19, 2018 the claimant was asked to show cause why disciplinary action should not be taken against him for knowingly circumventing motor vehicle claims reporting procedures with intent to defraud the respondent but he failed to give satisfactory response and was invited to a disciplinary hearing held on November 12, 2018. The investigations had shown that the launch of the claim was questionable as it went against the respondent's claims procedures and processes. The claim despite being for a motor commercial claim was reported and handled at the CIC Motor Assessment Centre, a place procedurally reserved for reporting private motor claims and the person who send assessors instructions used someone else's computer without any authorisation. The selected assessor was picked manually to evade the system which would automatically pick an assessor to avoid biases and the vehicle was assessed in the owner's yard against the laid down procedures where the motor vehicle is to be accessed at a garage systematically selected from the CIC panel of garages.
 24. Ms Njuguna also testified that the claimant was invite to the disciplinary hearing unaccompanied and indicated that he was comfortable with the same and stated that the claim was reported to him by the owner of the vehicle Mr Kimathi on September 28, 2018 after the insured had tried to talk to his agents but was unavailable. The claimant did not disclose that he was affiliated to the agent, Nelcon Insurance Agency as he was the agent's referee on the agency's IRA certification application form and had previously sent a business booking request using the agency email address. The claimant stated that he had reported the claim to the respondent assessment centre to one Duncan Githinji on September 28, 2018, who then did not act on the email until October 1, 2018. In reaction, Duncan with intent to mask the tracking of this claim deceitfully used a colleague's email account to appoint an assessor while purporting that his computer was not working but it has since been established that this was not true.
 25. It became apparent that the claimant and Duncan had colluded to set in motion a motor vehicle claim that would bypass the respondent's reporting and processing procedures and this was found to be gross misconduct which justified summary dismissal.
 26. The witness filed the following records;
 1. The CIC General Insurance Claim Manual;
 2. brief on the disciplinary report; and
 3. Investigations report.
 27. At the close of the hearing, parties filed written submissions which are put into account.
 28. Part of the due process measures to be taken into account before an employer terminates employment is to ensure that upon an employee being issued with a notice to show cause to explain why employment should not be terminated pending investigations, is to conduct such investigations and based on the outcome, allow the employee to see the results before attending any disciplinary hearing. Sharing such information would in essence give opportunity to the employee having a chance to see what matters came out from the investigations and hence be able to respond effectively. Without the investigations report, the employee attending at the disciplinary hearing would simply be groping into the darkness with the employer well aware of the outcome of the investigations but the employee innocently attending without advantage of the same as held in *Olute v County Government of Siaya & another* (Cause E059 of 2021) [2022] KEELRC 13206 (KLR) (17 November 2022) (Judgment) that procedural fairness envisages a situation where the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a connected



statutory right to be informed of any evidence existing against the subject employee and naturally then; the employee should be allowed to give his responses therefrom. This in essence then requires that the employee be informed of the charges he has and a right to a proper opportunity to prepare and to be heard and to present a defence and his case in person, writing or through a representative or shop floor union representative if possible. Even in a serious case of gross misconduct, the motion of section 41(2) of the Employment Act 2007 (the Act) applies.

29. Whether the employer has genuine and justified reasons which may lead to summary dismissal, due process in addressing the same is bound in statute. Section 45(2) of the Act requires that;
2. A termination of employment by an employer is unfair if the employer fails to prove—
 - a. That the reason for the termination is valid;
 - b. That the reason for the termination is a fair reason—
 - i. Related to the employee’s conduct, capacity or compatibility; or
 - ii. Based on the operational requirements of the employer;and
 - c. That the employment was terminated in accordance with fair procedure.
30. On the one part, there must be a valid reason leading to termination of employment and the second part is that the employee must be taken through fair procedure. Such tenets go to the roots of what constitutes natural justice. an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction as held in Onyango Oloo v Attorney General (1986-1989) E. A 456, the Court held that;
31. A decision in breach of the Rules of Natural Justice is not cured by holding that the decision would otherwise have been right since if the principles of Natural Justice is violated, it matters not that the same decision would have been arrived at...denial of a right to be heard renders any decision made null and void ab initio.
32. In the case of Kenya Union of Commercial, Food & Allied Workers v Kisii Bottlers Limited [2021] eKLR the court held that the provisions of Section 45(2) of the Act are fundamental in addressing due process before employment is terminated. Without allowing the employee the opportunity to have the evidence collected against him so as to be able to defend himself, the employer negates the entirety of the due process while undertaking disciplinary proceedings.
33. In this case, the claimant was employed through letter dated August 14, 2013 and the letter has his terms and conditions of employment save, there is no reference to any policy documents or operational requirements for his employment as required to be brought to his attention upon employment pursuant to section 12 of the Act and specifically under sub-section 12(1) the employer is required to issue the employee with any rules with regard to disciplinary procedures or cause to be read and an explanation given to the employee in a language that the employee can understand;
- (1) A statement under section 10 shall—
 - a. Specify the disciplinary rules applicable to the employee or refer the employee to the provisions of a document which is reasonably accessible to the employee which specifies the rules;
 - b. Specify the person to whom the employee may apply—



- i. If dissatisfied with any disciplinary decision relating to the employee;
and
 - ii. For the purpose of seeking redress of any grievance relating to his employment and the manner in which an application shall be made; and ...
34. This lapse is glaring in this case to the extent that, whatever the claimant did at the shop floor, the respondent as the employer was exposed for lack of ensuring the claimant was issued with the policy documents applied to address operational matters such as processing claims for motor vehicles and how assessments were to be carried out. Without any record that the respondent took the claimant through such motions on how to receive a claim, how to process it and if he was not the correct person to do so, how to guide a customer/client in addressing the same, whatever practice took place and was applied at the shop floor, the claimant cannot be faulted.
35. The duty to ensure all workplace policies and procedures are issued and explained to the employee vests in the employer. It cannot be assumed that the employee will come in and immediately understand the employer culture and practices and apply. deliberate effort to issue and explain such policy and procedural matters necessary for the job vests in the employer.
36. Upon the claimant being taken through the disciplinary process without the advantage of having seen or read the investigations report, the entire process was devoid of any due process.
37. Ultimately, the claimant being denied the right of appeal however hopeless the respondent knew his case to be, such was not justified pursuant to section 45(5) (a) of the Act. The resulting decision to dismiss the claimant from his employment was unfair. It cannot be justified for lack of due process. Under the provisions of section 45 of the Act, termination of employment was unlawful.
38. The claimant's case was also that he suffered defamation when the respondent copied other officers on the letter of summary dismissal and the same got circulated and he saw the information on social media. The details with regard to who and how the information left the respondent to other persons in social media was not particularised and the witness who was called did not address a case of defamation to the required standard.
39. The respondent as a corporate has officers who got copied to the letter termination employment and persons who ordinarily are in management such as the Group CEO, MD-CIC General Insurance, and GM-GB Operations all who are senior officers who should know the human capital dynamics at the shop floor. Sharing these officers to the letter in no way can it be found to be defamatory. Such claim is found without basis.
40. On the findings above, notice pay is due pursuant to section 35 of the Act based on the last gross wage the claimant was earning at ksh.40,000.
41. Compensation is due pursuant to section 45 and 49 of the Act. The claimant worked for the respondent for 5 years and on the finding that there was no due process, compensation of 3 months gross wage is hereby found appraise all at ksh.12,000.
42. A Certificate of Service shall issue pursuant to section 51 of the Act.
43. Accordingly, judgment is hereby entered for the claimant against the respondent in the following terms;
 - a. A declaration that employment terminated unlawfully and unfairly;



- b. Compensation awarded at ksh.120,000;
- c. Notice pay ksh.40,000;
- d. A Certificate of Service shall issue; and
- e. Costs of the suit.

DELIVERED IN OPEN COURT AT MOMBASA THIS 27TH DAY OF MARCH, 2023.

M. MBARŪ JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

