



REPUBLIC OF KENYA



KENYA LAW
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**Omenda v Gurudumu Sacco Society Limited (Cause 2588 of 2016)
[2023] KEELRC 727 (KLR) (16 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 727 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2588 OF 2016
K OCHARO, J
MARCH 16, 2023**

BETWEEN

ZIPPORA OMENDA CLAIMANT

AND

GURUDUMU SACCO SOCIETY LIMITED RESPONDENT

(Before Hon. Justice Ocharo Kebira on 16/03/2023)

JUDGMENT

Introduction

1. The Claimant came into the employment of the Respondent on or about the November 10, 1993 as an accounts clerk. An employment relationship that appears to have been on a smooth sail for more than two decades got into turbulence, when the Respondent issued her with a Notice to show cause why disciplinary action could not be taken against her, and subsequently summarily dismissed her on the September 27, 2016.
2. Holding that the dismissal was unfair, she through her statement of claim herein dated December 16, 2016, sued the Respondent seeking for the following reliefs:
 - a. A finding that the alleged summary dismissal of the Claimant amounts to unfair termination of employment.
 - b. Kshs 511,740 being the equivalent of the Claimant's 12 months' salary in compensation for unfair termination.
 - c. Kshs 42,645 being payment in lieu of Notice;
 - d. Interest on 2 and 3 above; and
 - e. Costs.



3. Subsequent to service of summons upon the Respondent, it filed a memorandum of appearance dated April 25, 2017, and a reply to memorandum of claim, wherein the Claimant's claim and entitlement to the reliefs sought were denied.
4. At the close of the parties' respective cases, the Court directed filing of written submissions, which directions have been complied with.

The Claimant's case

5. The Claimant testified on the 2nd June 2022, she urged the Court to adopt her witness statement herein filed contemporaneously with the statement of claim as her evidence in chief and the documents filed under the list of documents dated 16th December 2016, admitted as her documentary evidence. They were adopted and admitted respectively.
6. It was the Claimant's case that she first came into the employment of the Respondent on November 10, 1993 initially as an accounts clerk, with a starting salary of Kshs 2,000 and a monthly house allowance of Kshs 750.
7. The Claimant stated that she worked for the Respondent with dedication for more than two decades without any disciplinary issue. Her diligence and hard work earned her various recognition awards and certificates in the course of her said employment.
8. On the September 19, 2016, the Respondent issued her with a show cause letter requiring her to show cause why disciplinary action would not be taken against her over an alleged loss of Kshs 1,778. She was required to respond to the show cause letter within 1 day, in the defaulting a dismissal could ensue.
9. According to her, she found the Notice to be too short. The nature of the charge was one that required her to go through a lot of documents, considering that the transaction in issue took place a couple of years to the date of the letter, and her thinking that she needed to consult her immediate late supervisor, who then was on leave.
10. This prompted her to write a letter addressed to the vice chairperson, the secretary of the SACCO and SACCO manager, asking for more time to enable her adequately respond to the allegations.
11. She stated further, that she took the letter to the Treasurer, who declined to receive the same. She gave a copy thereof to the vice chairman, who held the view that the 14 days that she had sought therein was too long a period. He granted her 14 days to respond.
12. The Claimant further stated that she was suspended from duty on the day she was issued with a Notice to show cause.
13. She asserted that on the September 22, 2016 she was away nursing her sick mother and working on the response to the Notice to show cause, she received a text message from the Treasurer summoning her to the office immediately for a disciplinary hearing.
14. The Claimant stated that she got prompted to inform her lawyer Mr. William Olkala of the happenings and requested him to accompany her to the office. Counsel was not available for that purpose. He advised her to request for deferring of the hearing to September 27, 2016. She texted the Treasurer making the request.
15. In the meantime, she continued to prepare the response to the show cause letter. The response was ready on 26th September 2016. Before she would submit the response, she received another text, summoning her to report to work immediately.



16. She obeyed the instructions, got back to the office carrying along her response. On reaching the office, she was issued with a summary dismissal letter.
17. The show cause letter had cited loss of Kshs 1,778 as a ground upon which the Respondent was intending to take action against her. Surprisingly, however, the dismissal letter did put forth inter alia loss of Kshs 31,788,797, as a ground for the dismissal, this amount was coming up for the first time.
18. The dismissal letter was dated September 22, 2016, long before the lapse of the 7 days that the vice chairman had given the Claimant for the response to the show cause letter.
19. The Claimant appealed against the dismissal, however, her appeal was dismissed on a completely new set of grounds that had not formed the basis for the dismissal.
20. She was dismissed without being accorded any hearing, and therefore any opportunity to defend herself against the grounds that formed the basis for her dismissal.
21. The claim by the Respondent that it engaged a professional investigator is untrue as she was not at any time informed of any investigations. The alleged investigations were conducted after her dismissal.
22. At the time of dismissal, she was earning Kshs 42,645. The Respondent did not have any valid and fair ground to dismiss her from employment.
23. Cross examined by Mr. Kamau for the Respondent, the Claimant testified that she was issued with a Notice to show cause, dated 9th September 2016, and that the subject was in regard to an account of one Patrick Kinyanjui.
24. She asserted that the said Patrick had left the Respondent SACCO in the year 2014. She needed time to go through the record, to enable her respond adequately to the show cause letter. The Notice that the Respondent gave her was too inadequate.
25. She asserted that as far as she was concerned, there was no problem with that account.
26. The Respondent had given her 1 [one] day to respond to the letter. Considering the Notice period to be too insufficient she approached the Treasurer who had issued the letter to allow her more time, he declined. This prompted her to approach the vice-chairman who allowed her 7 days instead of the 14 days that she had sought. The vice-chairman verbally allowed her the 7 days.
27. The Treasurer called her to go for the disciplinary hearing on the September 22, 2016. On the September 22, 2016, she did not go for the disciplinary hearing as the 7 days that the vice-chairman had granted her were lapsing on the September 26, 2016. She was still preparing the response.
28. The Claimant stated that she wrote a message to the Treasurer, explaining to him, why she was not to attend the hearing on the September 22, 2016. On the September 26, 2016, she was called to the workplace by the Treasurer. As at that time she had duly prepared the response. The Treasurer refused to accept the response but handed her a dismissal letter.
29. The subject matter in the show cause letter was Kshs 1,778 but surprisingly the same changed at dismissal, the dismissal letter indicated the sum of Kshs 31,778.797.
30. As at the time of dismissal, her salary was Kshs 33,145. She had unutilized leave days.
31. In her evidence in re-examination, the Claimant stated that the Treasurer called her for the disciplinary hearing, only three days after the vice-chairman had allowed her 7 days to respond. In her text message, she explained to him, why she was not able to attend the hearing, she was still working on the response. The Treasurer didn't respond to her message.



32. In the dismissal letter it was alleged that the Kshs 31,788.797, was lost because of her actions and that of other members of staff. She was not told who they were. The letter referred to an investigation. She was not at all involved in any investigations.

The Respondent's Case

33. Though the Respondent did enter appearance and file a response to the Claimant's claim herein, it did not present any witness to testify on its case for reasons on record.

The Claimant's Submissions

34. Counsel for the Claimant submitted that as the Respondent did not call any witness to testify, the statement of response remained unsubstantiated. Reliance was placed on the holding in *Autar Singh Bahra and another v Raju Govindji*, HCCC No 548 of 1998, that:

“Although the Defendant has denied liability in an amended defence and counter claim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1st Plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the counter claim must fail.”

35. Counsel further submitted that in a matter where the Court is called upon to determine whether the employee's employment was fairly terminated, it can only answer in the affirmative. If only it is satisfied that the employer had justified grounds for termination and that there was adherence to procedural fairness.

36. According to Counsel, Section 41 of the *Employment Act* provides for the architecture for procedural fairness in Kenya. The employer must accord an employee facing disciplinary proceedings, a fair opportunity to be heard before termination.

37. As to what procedural fairness entails, the Court of Appeal decision in *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR was cited. The Court therein expressed:

“Four elements must be discernible for the procedure to pass muster: -

- i. An explanation of the grounds of termination in a language understood by the employee;
- ii. The reason for which the employer is considering the termination;
- iii. Entitlement of an employee to the presence of another employee of his choice when the explanation of the grounds of termination is made;
- iv. Hearing and consideration of any representations made by the employee and the other person chosen by the employee.

38. The employer is charged with the responsibility of demonstrating that there was procedural fairness in the termination of an employee's employment.

39. In this matter, the Respondent, the employer did not present any witness to testify. Therefore, no evidence was led on the procedural fairness of the termination. The burden of proving procedural fairness was not discharged.



40. Through her unrebutted evidence, the Claimant was able to demonstrate to Court that she was not subjected to a disciplinary hearing, whereat she was given an opportunity to defend herself. She was given a one day's Notice to respond to the show cause letter, and that the dismissal was in the circumstances of the matter issued prematurely.
41. It was further submitted that the right to be heard includes an employee's right to be given sufficient time to prepare his or her response. To buttress this submission reliance was placed on the holding in *Rebeca Ann Maina and 2 others v Jomo Kenyatta University of Agriculture & Technology* [2014] eKLR, thus:
- “I agree with Counsel for the Respondent that internal disciplinary proceedings are non-judicial in nature. However, in order for an employee to respond to the allegations made against them, the charges must be clear and the employee must be afforded sufficient time to prepare their defence.”
42. The fact that the Claimant's dismissal letter was dated September 22, 2016 while the response to the Show cause letter was due for the September 26, 2016, is all indicative that the decision to dismiss her was premeditated.
43. Section 43, 45 and 47 [5] of the *Employment Act* placed specific legal burdens on the Respondent to discharge. On this point the Claimant cited the decision in *Pius Macha Isindu v Lavingtone Security Guards Limited*. The provisions relate to substantive fairness. Having failed to adduce any evidence, the Claimant failed to discharge the burden[s]. consequently, the Court should find that the termination was substantively unjustified.
44. Having proved that the dismissal was both substantively and procedurally unfair, the Claimant is entitled to the reliefs sought in the statement of claim.

The Respondent's Submissions.

45. The Respondent distils two broad issues for determination in this matter:
- a. Whether the reason for the termination was wrongful / unfair.
 - b. Whether the Claimant is deserving of prayers sought.
46. On the first proposed issue Counsel for the Respondent submitted that Section 35 [4] [b] and 44 of the *Employment Act* 2011 bestows upon the employer the authority to dismiss an employee whom is deemed to have engaged in activities detrimental to the employer's business.
47. That the Respondent demonstrated to the Court that the Claimant made wrong entries to member accounts occasioning the Respondent loss of funds. That this was brought out at page 27. Claimant's bundle of documents, the investigations report.
48. That there is no dispute that the Claimant was invited for a disciplinary hearing. She did not present herself to defend herself. She squandered the opportunity. She cannot be heard to blame anybody. To buttress this point, the Respondent's Counsel placed reliance on Nairobi Civil Appeal No 109 of 1020 – *Social Service League MP Shab Hospital v Judith Agudo* [2021] eKLR and Nairobi Civil Appeal No 97 of 2016 – *Reuben Ikatwa & Seven others v The Commanding Officer British Army Training Unit Kenya & another* [2017] eKLR.
49. The Respondent contends that the architecture provided for, under Section 41 of the *Employment Act* was adhered to by the Respondent in the dismissal of the Claimant.



50. It was further submitted that the Respondent discharged its statutory burden under Section 47 [5] of the Act. It managed to prove that the Claimant breached her contractual duties.
51. The Respondent having demonstrated that procedural and substantive fairness were present in the dismissal of the Claimant, the reliefs sought cannot be availed to her.

Analysis and Determination.

52. Flowing from the material placed before this Court by the parties, are the following issues for determination:
 - a. What is the impact of the Respondent's failure to present evidence in this matter?
 - b. Whether the dismissal of the Claimant from employment was substantively justified.
 - c. Whether the dismissal of the Claimant from employment was procedurally fair.
 - d. Whether the Claimant is entitled to the reliefs sought or any of them.

Of the impact of the Respondent's failure to present evidence.

53. As stated herein before, the Respondent entered appearance and filed a response to the Claimant's claim. Consequently, at the close of pleadings, the matter got destined for hearing on merit. The Claimant testified on her case, while on the other hand the Respondent did not present any evidence in support of its defence against the Claimant's case, as it got into a hurdle that it failed to surmount. The Court declined to allow a witness who had no witness statement on record to testify for it.
54. This Court has now and again stated that where a Respondent files his or her reply to or statement of defence to a Claimant's claim, but nonetheless fails to present evidence before Court in support of the averments in the reply or defence, the reply or defence remains mere statements without any evidential value. Pleadings never take the place of evidence.
55. However, the fact that a Respondent has not placed evidence before Court, with the effect of the failure being as hereinabove expressed, does not in any manner take away the Claimant's responsibility to discharge those particular legal burden[s] that the law imposes on him or her.
56. The Court is cognizant of the fact that the Employment Act, under Sections 43, 41, 45 and 47 [5] places specific burdens on the employer to discharge in order for the Court to find that he or she terminated his or her employee's employment or dismissed the employee from employment, fairly and lawfully. In my view, a legal burden is only discharged by evidence, consequently, where a person charged with the burden doesn't present any evidence; it cannot be difficult for any tribunal or Court to conclude that the burden was not discharged.

Whether the dismissal of the Claimant from employment was substantively fair.

57. Section 43 of the Employment Act requires of the employer in a dispute like is herein, to prove the reason or reasons for the termination. Where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45. The Respondent did not place before me any evidence from which it can be said that he proved the reason for the termination of the Claimant's employment. By dint of the provisions of the provision, I do not hesitate to hold that the dismissal of the Claimant was substantively unfair.
58. The law under Section 45 [2] of the Employment Act imposes duty upon the employer after satisfying the requirement under Section 43, to demonstrate to Court that the reason[s] for the termination or



dismissal was valid, fair and in accord with procedural fairness. The Respondent did not discharge this burden.

59. The Respondent's Counsel made detailed submissions on these provisions and concluded that the Respondent did discharge the burden. With great respect, all that he did was giving evidence from the bar. Submissions will never be a substitute for evidence. I will ignore the submissions to the extent they appear to sneak evidence through the back door.
60. By reason of the premises foregoing, I hold that the dismissal of the Claimant from employment was substantively unjustified.

Whether the dismissal of the Claimant was procedurally fair.

61. Section 41 of the Act provides the architecture of procedural fairness in the Kenyan situation. The procedure provided under the provision that must be adhered to by an employer considering termination of an employee's employment, or summarily dismissing the employee is mandatory. The procedure has four components, and absence of all of them or one of them renders a termination or summary dismissal unfair. The components are:
 - i. The notification component, the employer must inform the employee the grounds/reasons upon which he considers terminating the employment.
 - ii. The hearing component, the employee must be given an opportunity to adequately prepare for, and make a representation on the grounds. The right to a hearing is conjoined with the right to accompaniment at the hip. The employee has to be allowed to be accompanied with a colleague [if he is not a member of a union] or a representative of the union, [if the employee is a member of a union].
 - iii. Consideration, the employer must consider the representation[s] made by the employee and the accompanying person before making a decision on the grounds.
62. It was the Claimant's case and I am persuaded, that the dismissal was absent of any procedural fairness.
63. The Claimant asserted that she was issued with a Notice to show cause on the September 19, 2016, and only given 1 [one] day to respond to the same. She contended further that the period given was inordinately short to enable her adequately respond to the same, considering that the transaction that had been made the subject matter therein, was one that took place in the year 2014. Going through the Respondent's records was imperative. I am persuaded by the Claimant that the period was given under the Notice to show cause was not an adequate Notice. This Court takes cognizance of the fact that whether a Notice is short or adequate is a matter dependent on the facts peculiar to each case. However, by all standards a one day's Notice cannot be said to be adequate by whatever standard.
64. Article 47 of the Constitution provides persons with the right to fair administrative actions, which inter alia are reasonable. In the circumstances of this matter, the action by the Respondent to give the Claimant a one day's Notice to make the response, and to terminate his employment before the date [following an extension by the vice-chair], as shall come out herein after shortly was one that fouled the right.
65. It was her case that she in the circumstances of the accusation, sought for an extension of time to respond to the Notice to show cause. The Vice Chairman granted her 7 days to respond. Effectively therefore, the due date for the response was September 26, 2016. Neither the Vice-Chairman nor the Treasurer of the Respondent were availed to counter this evidence. Consequently, the same stood unchallenged.



66. I have no doubt in my mind that where an employer has called upon the employee to answer to a show cause letter, no disciplinary hearing shall be undertaken and or action taken against her or him, before the due date of the response. The evidence that the Claimant was dismissed on the September 22, 2022 before the due date for the response, in my view stands on firm ground, and only indicates that the dismissal was without any hearing as contemplated in Section 41 of the *Employment Act*.
67. The Respondent's Counsel submitted that the Claimant did not discharge her burden under Section 47 [5] of the Act, establish that the dismissal was unlawful. Section 47 [5] provides:
- “For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”
68. I know that for some time, what this provision of the law requires remained blurred. However, I can confidently say that jurisprudence is now firm. It requires the employee to demonstrate prima facie that there was want of procedural fairness and or substantive justification in the termination or dismissal. Considering the unrebutted evidence by the Claimant, I am convinced that she managed to prove.
69. In sum, the dismissal was procedurally unfair.

Whether the Claimant is entitled to the reliefs sought or any of them.

70. The Claimant sought for compensation for the unfair dismissal, in the sum of Kshs 511,740. Section 49 [1] [c] gives this Court authority to make a compensatory award, in favour of an employee who has successfully assailed his or her employer's decision to terminate his or her employment or summarily dismiss him or her. The authority is discretionary, which has to be discharged in a judicious manner, without sympathy, whim or caprice. It is dependent on the circumstances of each case as they relate to the statutory conditions set in Section 49. I have considered that in this matter:
- a. Substantive and procedural fairness were completely absent;
 - b. The Claimant had worked for the Respondent for a period of more than two decades;
 - c. The picture that the Respondent in the circumstances of the matter seems one who was in a hurry to dismiss the Claimant;
 - d. Conduct of the Respondent's Treasurer which easily passes for an unfair Labour Practice; and
 - e. The fact that it has not been demonstrated that the Claimant contributed in any manner to the sanction;
- and conclude that she is entitled to the relief and an award of 10 [ten] months' gross salary. In her evidence under cross examination the Claimant testified that at the time of her dismissal her salary was Kshs 33,145. This is the salary I would use in computing the compensation. Under this head the Claimant is awarded Kshs 331,450.
71. The Claimant's contract was one terminable under the provisions of Section 35 of the Act by a twenty-eight [28] days' notice. No doubt the same was not issued. This entitles the Claimant to a Notice pay of Kshs 33,145 which I hereby award.
72. In the upshot, Judgment is hereby entered for the Claimant in the following terms;
- a. A declaration that the dismissal was both procedurally and substantively unfair.



- b. Compensation pursuant to Section 49 [1] [c] of the Employment Act, Kshs 331,450.
- c. One month's salary in lieu of Notice, Kshs 33,145.
- d. Interest on [b] and [c] above at Court rates, from the date of this Judgment till full payment.
- e. Costs.

READ, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF MARCH, 2023.

OCHARO KEBIRA

JUDGE

Mr. Mureithi for the Respondent.

Mr. Okemo holding brief for Juma for the Claimant.

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 March 15, 2020 and subsequent directions of April 21, 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 has 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 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.

A signed copy will be availed to each party upon payment of Court fees.

