



REPUBLIC OF KENYA



KENYA LAW
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**Munyinyi v Toyota Kenya Limited (Cause 315 of 2019)
[2023] KEELRC 521 (KLR) (2 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 521 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 315 OF 2019
L NDOLO, J
MARCH 2, 2023**

BETWEEN

ABIGAEI MUNYINYI CLAIMANT

AND

TOYOTA KENYA LIMITED RESPONDENT

JUDGMENT

Introduction

1. The dispute in this case was triggered by the Claimant's dismissal on 27th February 2019.
2. The Claimant states her case in a Statement of Claim dated 16th May 2019 and filed in court on 17th May 2019. The Respondent filed a Memorandum of Reply dated 24th July 2019 to which the Claimant responded on 25th September 2019.
3. At the trial, the Claimant testified on her own behalf and the Respondent called Peter Wanjala.
4. At the time of writing this judgment, only the Claimant had filed final submissions.

The Claimant's Case

5. The Claimant states that she was employed by the Respondent on 16th March 2007 as an Assistant Management Accountant. She was promoted to the position of Finance Manager on 9th August 2016.
6. The Claimant claims to have had a stellar performance record throughout her employment with the Respondent.
7. On 15th February 2019, the Claimant was suspended to allow the Respondent to conduct further investigations, following a forensic audit report On 'the Hino Special Service Campaign Project'.



8. On the same day, the Claimant was served with a show cause letter, citing allegations of her culpability which led to an estimated loss of Kshs. 20,110,682. She was required to respond by 3.00 pm on 18th February 2018.
9. Still on the same day, the Claimant was served with a notice requiring her to attend a disciplinary hearing scheduled for 20th February 2019.
10. The Claimant avers that her suspension was not lifted. She adds that she was not furnished with the forensic audit report, which the Respondent termed as confidential.
11. The Claimant delivered her written response on 18th February 2019 and on 20th February 2019, she attended a disciplinary hearing.
12. The Claimant contends that the disciplinary hearing was procedurally unfair and an affront to her right to fair labour practices for the following reasons:
 - a. The Claimant was invited for a disciplinary hearing on the same date she was suspended to pave way for completion of investigations on the findings of the forensic auditors;
 - b. The Claimant was invited for a disciplinary hearing on the same date she was suspended and directed to provide a written response to the show cause letter, based on an incomplete investigation;
 - c. It was procedurally unfair to invite the Claimant for a disciplinary hearing before receipt and consideration of her response to the notice to show cause. This clearly shows a predetermined decision to terminate the employment of the Claimant;
 - d. The draft forensic report was prepared by Deloitte, a consultancy firm which is not part of the structural organs or departments of and or within the Respondent, which firm also sat in the proceedings leading to the Claimant's dismissal;
 - e. The Respondent declined to furnish the Claimant with a copy of the forensic audit report;
 - f. The persons who sat as part of the disciplinary committee members included the following:
 - i. Dennis Nganga-Manager, Deloitte;
 - ii. Eric Thuku-Associate, Deloitte.
13. The Claimant accuses the Respondent of ceding control of the disciplinary proceedings to officers from Deloitte. She states that the meeting held on 20th February 2019 was investigative in nature and not a disciplinary hearing as defined in law.
14. The Claimant further states that there is no provision in the Respondent's Employee Handbook that permits third parties to sit in disciplinary committees of the Respondent. She adds that the meeting of 27th February 2019, at which she was served with the dismissal letter, was not properly constituted as it was only the Human Resource Manager present, while the Handbook requires a witness to be present.
15. The Claimant takes issue with the letter of summary dismissal for lack of clarity on the reason for dismissal.
16. The Claimant asserts that even though she was involved in the Special Service Campaign, by virtue of her being the Finance Manager, the Respondent did not provide a job description, terms of reference or key performance indicators on control of costs specifically related to the Project.



17. The Claimant further asserts that for the duration of the Special Service Campaign Project, no issue was raised regarding her performance. She adds that she duly responded to all the issues raised in the show cause letter.
18. According to the Claimant, there was a predetermined decision to terminate her employment. In this regard, she claims that she was immediately replaced with someone from South Africa.
19. The Claimant seeks the following remedies:
 - a. A declaration that her dismissal was unlawful and unfair;
 - b. 12 months' salary as compensation for unfair termination;
 - c. Pension deductions for the month of February 2019 amounting to Kshs. 40,000;
 - d. 1 month's salary in lieu of notice;
 - e. Costs.

The Respondent's Case

20. In its Memorandum of Reply dated 24th July 2019 and filed in court on 25th July 2019, the Respondent confirms the existence of an employment contract dated 16th March 2007, between itself and the Claimant.
21. The Respondent admits that the Claimant was suspended by letter dated 15th February 2019, to pave way for further investigations into allegations of gross misconduct.
22. The Respondent states that the Claimant was given an abridged version of the investigation report, which was in relation to her only. The Respondent explains that it could not have given the whole report to the Claimant because the report discussed other employees as well and such information was classified and confidential and inconsequential to the Claimant's case.
23. The Respondent further states that after conclusion of the investigations, the Claimant was issued with a notice to show cause, giving her an opportunity to respond to the issues giving rise to her suspension.
24. The Respondent avers that the suspension was lifted and adds that the meeting of 20th February 2019 was a proper disciplinary hearing.

The Respondent takes the view that in any event, there is no legal requirement that a suspension must be lifted before a disciplinary hearing is held.
25. In further response, the Respondent states that the disciplinary hearing was conducted in full compliance with the law, with the Claimant being accompanied by the Respondent's Credit Manager, Alice Munene.
26. Regarding the presence of officers from Deloitte at the disciplinary hearing, the Respondent states that there were auditors from the said firm, as the technical nature of the matter necessitated the presence of experts, in order to explain and elaborate their findings and answer any questions the Claimant and other members of the Disciplinary Committee may have.
27. The Respondent maintains that the experts from Deloitte, did not take control of the disciplinary hearing, although they asked questions and offered explanations. The Respondent further maintains that the decision to summarily dismiss the Claimant was not reached by the Deloitte team.



28. Regarding the timeframe adopted in the disciplinary process, the Respondent defends its action by stating that part of a fair disciplinary process is to ensure that disciplinary hearing takes place as soon as possible, when the events leading to the hearing are still fresh in the minds of the parties.
29. The Respondent adds that the Claimant had had several meetings and discussions with the investigative audit firm, which formed part of the investigations. According to the Respondent, the hearing of 20th February 2019 was the last meeting of several through which the Claimant had been in correspondence with the audit firm. The Respondent states that the Claimant had, on several occasions, been granted the opportunity to respond to the issues raised against her.
30. In defending the scheduling of the disciplinary hearing, the Respondent states that the investigation team had made tremendous progress in the investigations and had also informed the Respondent of the completion date. The suspension was therefore not to allow investigations to be done but rather to conclude them.
31. The Respondent's case is that it had a valid reason for dismissing the Claimant and that it adhered to proper procedure in the dismissal transaction.

Findings and Determination

32. 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

33. The Claimant was dismissed by letter dated 27th February 2019, stating as follows:

“Dear Abigael Munyinyi,

RE: Summary Dismissal

Reference is made to the HINO SSC call back and repair project of approximately 430 Hino vehicles during the period from 1 August 2016 to 30 September 2018 where you had specific responsibilities assigned to you in addition to your general oversight responsibilities as Finance Manager of the Company. Reference is also made to our show cause letter dated 15th February 2019 and your response received on 18th February, and the Disciplinary hearing dated 20th February 2019.

We wish to inform you that after careful consideration of your case in and view (sic) of the available evidence, we have reasonable and sufficient grounds to conclude that you wilfully neglected to carry out your duties as is expected of your role as the Finance Manager that resulted in financial losses to the company.

The above acts/omissions have not only led to loss of trust and faith in you but are also gross misconduct and in breach of your Employment contract, warranting summary dismissal.

Consequently, you are hereby summarily dismissed from the services of the company with immediate effect.

Kindly return all company items in your possession immediately and obtain a dully filled clearance certificate upon which you will be paid your final statutory dues less any monies you may owe the Company. Failure to do so will result in the value of these items being



deducted from your final dues. Your certificate of service will be issued upon completion of the clearance process.

Yours Sincerely,

For: Toyota Kenya Limited

(signed)

Adrian Stelzer

Gm Hr And General Affairs”

34. This letter discloses the reason for the Claimant’s dismissal as wilful neglect to carry out her duties as Finance Manager in a special service campaign call back and repair project of approximately 430 Hino vehicles. According to the Respondent, money was lost as a result of the Claimant’s neglect.
35. While denying this allegation, the Claimant told the Court that there were no specific roles assigned to her in the project. She stated that she was not involved in the operational costs of the project.
36. The dismissal letter was preceded by a suspension letter, a show cause letter and an invitation to a disciplinary hearing, all dated 15th February 2019.
37. The suspension letter states in part:

“Following the Forensic Investigations Report on the HINO SSC project, the company is carrying out further investigations and you are hereby suspended with immediate effect from the Company until investigations are complete. This is to allow for further investigations.”
38. While the show cause letter required the Claimant to respond by 18th February 2019, it would appear that the Respondent had already made up its mind that her case would be escalated to a disciplinary hearing. The letter inviting the Claimant to the disciplinary hearing states inter alia:

“As part of the procedure the management wants to avail you the opportunity to defend yourself in line with what you will respond with reference to your show cause reply and has scheduled a disciplinary hearing on Wednesday 20th February 2019 at 9.00 am at the Jidoka Boardroom, 3rd floor of the Head Office.”
39. Having read these letters, the Court was left with the question why the Claimant was required to respond to the show cause letter if a decision had already been made that she would face a disciplinary hearing.
40. In its decision in *Janet Nyandiko v Kenya Commercial Bank Limited* [2017] eKLR the Court of Appeal stated the following:

“Section 45 of the *[Employment] Act* makes provision inter alia, that no employer shall terminate an employee unfairly. In terms of the said section, a termination of employment is deemed to be unfair if the employer fails to prove that the reason for termination was valid, that the reason for the termination was a fair reason and the same was related to the employee’s conduct, capacity, compatibility or alternatively that the employer acted in accordance with justice and equity. The parameters of determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority



is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to terminate the employee; the communication of that decision to the employee and the handling of any appeal against the decision. Also not to be overlooked is the conduct and capability of the employee up to the date of termination. Section 41 enjoins the employer, in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands, the reasons for which the employer is considering to terminate the employee's employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice, and to hear and consider any representation which the employee may advance in response to the allegations levelled against him by the employer..."

41. In the present case, the process to which the Claimant was subjected was not only unusually rushed, but was also muddled up in a way that the demarcation between the investigation and the disciplinary process was completely blurred. This may explain the Claimant's assertion that she was not subjected to a disciplinary hearing.
42. What is more, the prominent role played by the forensic auditors at the meeting of 20th February 2019 presented an investigative rather than a disciplinary meeting. Indeed, in defending the attendance of the auditors at this meeting, the Respondent states that the subject matter under discussion being technical in nature, required the presence of the auditors.
43. In my understanding, the disciplinary meeting contemplated under Section 41 of the *Employment Act* is an internal process to be conducted by the employer after completion of investigations and due notification of clear charges to the affected employee.
44. The Claimant further faults the Respondent for not availing the investigation report to her prior to the meeting of 20th February 2019. The Respondent's witness, Peter Wanjala testified that the Claimant was issued with an abridged version of the report but he could not confirm when this was done. The Claimant denied receiving any such report.
45. In its decision in *Rebecca Ann Maina & 2 others v Jomo Kenyatta University of Agriculture and Technology* [2014] eKLR this Court held that:

“...in order for an employee to respond to allegations made against them, the charges must be clear and the employee must be afforded sufficient time to prepare their defence. The employee is also entitled to documents in the possession of the employer which would assist them in preparing their defence. The employee is further entitled to call witnesses to buttress their defence.”
46. The Respondent failed this test and the meeting held on 20th February 2019 could not pass for a disciplinary hearing as required by Section 41 of the *Employment Act*. At best, this was an investigative meeting which ought to have been followed by a duly convened disciplinary meeting with adequate lead time for the Claimant to prepare her defence.
47. Flowing from the foregoing lapses on the part of the Respondent, I find and hold that no valid reason was established for the Claimant's dismissal and she is therefore entitled to compensation for wrongful and unfair dismissal.



Remedies

48. In the result, I award the Claimant twelve (12) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's long service and the Respondent's unlawful conduct in bringing the employment relationship to an end.
49. I further award the Claimant one (1) month's salary in lieu of notice.
50. The claim for pension deductions was not proved and is disallowed.
51. Finally, I enter judgment in favour of the Claimant as follows:
- a. 12 months' salary in compensation..... Kshs. 5,760,000
 - b. 1 month's salary in lieu of notice..... 480,000
- Total.....6,240,000
52. This amount will attract interest at court rates from the date of judgment until payment in full.
53. The Respondent will also pay the costs of the case.

Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 2ND DAY OF MARCH 2023

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JUDGE

Appearance:

Mr. Ogutu for the Claimant

Mr. Wandati for the Respondent

