



**Kamau v Eldoret Water and Sanitation Company Limited (Cause
28 of 2019) [2023] KEELRC 978 (KLR) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 978 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE 28 OF 2019
NJ ABUODHA, J
APRIL 28, 2023**

BETWEEN

FREDRICK KAMAU CLAIMANT

AND

ELDORET WATER AND SANITATION COMPANY LIMITED .. RESPONDENT

JUDGMENT

1. The Claimant herein filed a statement of claim on July 15, 2019 against the Respondent seeking for the following reliefs;
 - a. A declaration that the Claimant's termination of employment by the Respondent was unlawful, unprocedural and unfair.
 - b. Upon grant of prayer 1 above, the claimant be granted an award as prayed for in the statement of claim as compensation for unfair termination.
 - c. Reinstatement of the Claimant to his position prior to his dismissal with all attendant benefits and privileges.
 - d. Costs and interest of this suit
 - e. General damages for unfair, unprocedural, unconstitutional suspension and dismissal from employment.
 - f. Any other further and/or better relief as this honourable court may deem just and fit to grant.
2. In that statement of claim, the Claimant avers that at all material times, he was an employee of the Respondent as a Computer Operator , Job grade 4 in the Respondent's Commercial Services Department on permanent terms vide an appointment letter dated August 28, 2003 at a monthly gross salary of Kshs 83,845.



3. According to the Claimant, on May 2, 2016 and prior to receiving the notice to show cause letter on August 26, 2016, the Claimant had sent an Internal Memo to the Head of Commercial Services Department notifying him of fraudulent activities in the system he had been tasked to work on after realizing the occurrence of the same.
4. He averred that on September 26, 2016, he received a notice to show cause letter regarding the same fraudulent activities in which he responded to on August 27, 2016.
5. The Claimant further stated that on September 2, 2016, he was sent on compulsory leave by the Respondent for an indefinite period after which on May 16, 2017, the respondent suspended the claimant for a period of fifteen months at half pay on a claim by the Respondent that the said move was to pave way for investigation of allegations by the Respondent that there were several Mpesa payments uploaded by the Claimant's system account into the billing system without corresponding entries from Mpesa.
6. It was the Claimant's case that on March 20, 2018, he was subjected to interrogation by the Respondent's disciplinary committee without any charges being levelled against him and that on September 3, 2018, he was wrongfully and unlawfully terminated from employment by the Respondent.
7. The Respondent filed a Memorandum of response on February 12, 2020 and denied that it unfairly, illegally and unprocedurally terminated from employment.
8. According to the Respondent, the Claimant was dismissed from service for gross misconduct after he failed to offer explanation for various Mpesa payments uploaded into the Respondent's system and missing from the Safaricom site, and which conduct amounted to negligence of duty which occasioned the respondent financial losses. This conduct according to the respondent, clearly contravened the provisions of the claimant's appointment letter and also Section 44(4) (c) of Employment.
9. The Respondent contended that the Claimant's actions resulted to outright violation of the terms of the Claimant's letter of appointment, the Claimant's job description and the Respondent's company terms and conditions of service.
10. The Respondent contended that the claimant was duly informed by the Respondent of the reasons for his termination and what he needed to show cause for that he was given a chance to be heard, he put in a written response to the charges, and he attended a disciplinary hearing in the presence of a representative of his choice and where he was accorded ample time to defend himself.
11. According to the Respondent, the Claimant was dismissed upon conclusion of the disciplinary hearing against him found that there was justifiable reason to have him dismissed and which recommendations the Managing Director, and thus the Respondent cannot be faulted for such a decision.
12. It was the Respondent's case that the Claimant's offence for negligence of duty amounted to gross misconduct and unethical behaviour unbecoming of an employee, and which occasioned the respondent financial loss, thus inviting the most severe punishment. The court was thus urged to dismiss the suit.
13. At the oral hearing, the Claimant testified that he was employed by as a computer operator in August 2003. According to the Claimant, on May 2, 2016, he sent an Internal Memo to the Head of Commercial Services Department notifying him of fraudulent activities on the system he had been tasked to work on after realizing the occurrence of the same.



14. He stated he was suspended on May 16, 2016 and that he remained on suspension for 15 months and that he was on half salary.
15. CW1 stated that he was invited for a disciplinary hearing in March 2018 where he defended himself against the accusations levelled on him. According to the Claimant, he received a termination letter on September 3, 2018.
16. He maintained that the said termination was unlawful as he lost certain benefits. He further averred that he was not issued with a notice prior to the termination, was not paid his terminal dues and neither was he issued with a certificate of service.
17. He contended that he has not been prosecuted over the alleged offence.
18. On cross examination, he maintained that he had his private password to the system and that someone had access to his password and used his profile to access the system.
19. In re-examination, the claimant maintained that he was the one who detected the losses and raised the alarm. He stated that the system was infiltrated by 3rd parties and that one Mr Korir was terminated after it was established that he accessed the system without authority.
20. The Respondent called Ruth Chepchumba Tuwei in furtherance of its case who testified as RW1. She introduced herself as the Respondent's acting Human Resource officer and adopted her witness statement dated October 29, 2021 as her evidence in chief.
21. In summary, RW1 in her statement averred that an internal audit was conducted by the Respondent's Auditor which revealed that bill payments which had been done by way of Mpesa between January 2016 and May 2016 were missing from Safaricom site despite the said payments having been uploaded into the system.
22. According to RW1, the Claimant was terminated from employment as a result of the aforesaid discrepancy as this was negligence on his part and failure in his oversight role.
23. RW2, was Stephen Owiti, the Respondent's internal auditor. He testified that he conducted an audit on the Respondent's billing system and that the audit established that the Respondent lost Kshs 2,215,501 through paybill and that the statement showed that in the billing system, some accounts were cleared yet there were no corresponding Mpesa payment.
24. He further averred that a forensic audit was done and a report was prepared which report recommended that the Claimant and one Mr Keitany be held responsible for the wrong entries.
25. According to RW2, the investigation established that Safaricom statements came in downloadable format and that the Claimant could download the statements and that only the Claimant had access to download the statements.
26. With that evidence, the Respondent closed its case and the court directed parties to file written submissions.
27. The Claimant filed his written submissions on January 10, 2023 whereas the Respondent filed its submissions January 20, 2023.
28. The Court has taken into consideration the said submissions while writing this judgment.



Determination

29. From the pleadings on record, the evidence of the parties and the submissions, the issues that arise for determination in this case are as follows:-
- i. Whether the Claimant's employment was terminated fairly, legally and procedurally
 - ii. Whether the reliefs sought are merited
30. As regards the first issue, it is trite law that before an employer terminates an employee's employment, the employer must not only prove that it had valid reasons for the said termination but must also ensure that the laid down procedure has been followed.
31. Section 43 of [Employment Act 2007](#) provides *inter alia*;
- 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 within the meaning of section 45.
 - 2 The reason 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
32. From the above provisions of the Act, the burden of proof in employment related claims is on the employer to prove the reason for the termination as valid in any legal proceedings.
33. Section 43(2) of the [Employment Act](#) defines reasons for termination to be matters the employer at the time of termination genuinely believed to exist, and which caused the employer to terminate the employee.
34. Further, Section 45(1) of the [Employment Act](#) provides that “ No employer shall terminate the employment of the employee unfairly. A termination of employment by an employer is unfair if the employer fails to prove:-
- a That the reason or reasons 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 was that the Employment was terminated in accordance with fair procedures”.
35. The Claimant in support of his case has averred that he was wrongfully and unlawfully terminated from employment by the Respondent without any legal justification.
36. In a rejoinder, the Respondent has maintained that the Claimant was dismissed from employment on account of negligence in the performance of his duties which occasioned the Respondent financial losses.
37. Were the reasons advanced by the Respondent valid for the termination of the Claimant to hold as being lawful?
38. The Claimant testified and stated that he was employed as a computer operator and that his duties among others was to download the reports and forward the same for processing. He averred that he only had limited access. He however conceded that that someone had access to his password and used



his profile to access the system as a result of which the system was compromised leading to the loss of funds.

39. In the case of *Thomas Sila Nzivo v Bamburi Cement Limited* [2014] eKLR, the court observed as follows: -

“The Respondent had reasonable and sufficient grounds to suspect the Claimant of having acted to the substantial detriment of the Respondent and its property, and was justified in summarily dismissing the Claimant under Section 44 [4] [g] of the Employment Act 2007. The Employer was not required to have conclusive proof of the Claimant’s involvement; it was only expected to have reasonable and sufficient grounds. The physical audit, the discovery that no oil was available even as the Claimant protested he received such oil...all gave the Respondent reasonable and sufficient grounds to act against the Claimant.”

40. The question then that this court seeks to answer is whether the Respondent had valid grounds for suspending and eventually terminating the Claimant from employment.

41. Flowing from the time the Claimant was suspended until the investigations were done as evidenced by the audit report which the Respondent acted on in terminating the Claimant, it is the finding of this court that the reasons provided for the termination by Respondent were valid as provided for under Section 43 of the Employment Act.

42. The next issue I need to address is whether there was procedural fairness in the manner in which the Claimant was terminated as provided for under Section 41 of the *Employment Act, 2007* which provides that:-

“An employer shall before termination the employment of an employee, on grounds of misconduct, poor performance or physical incapacity explain to the employee in a language the employee or shop floor Union Representative of choice present during this explanation”

43. In the instant case, the claimant averred that there was no procedural fairness in his termination from employment. The respondent on the other hand maintained that it followed the due procedure before terminating the claimant from employment.

44. I have perused the record at length and particularly the documents forming part of the Claimants exhibits. I have noted that that there were several correspondences between the Claimant and the Respondent before he was terminated from employment.

45. The Claimant was issued with a show cause letter which he responded to followed by a series of to and fro communications requiring explanations on the alleged loss of funds by the Respondents under the Claimant’s watch.

46. As regards the allegation that the Claimant was not given an opportunity to defend himself, the Court has perused the letters captioned Invitation to appear before a disciplinary committee dated February 9, 2019 and March 13, 2018. A reading of the said letters reveal that the claimant was informed to bring his witnesses for the hearing, and was given adequate time to enable him prepare for his defence.

47. To this end, the Court is left wondering what else the respondent was required to do to ensure that the process of termination was fair. It is the finding of this court that respondent has proved that the termination of the Claimant was done in accordance with fair procedure as required by section 41 and 45 of the Employment Act.



48. Having found that the Respondent’s dismissal was grounded on a valid reason, and that there was procedural fairness in terminating his services, it follows that the Claimant is not entitled to the reliefs he is seeking and therefore this claim is found without merit and the same is hereby dismissed with costs.

49. It is so ordered.

DATED AT NAIROBI THIS 24TH DAY OF APRIL, 2023

DELIVERED VIA VIRTUAL COURT THIS 28TH DAY OF APRIL 2023

ABUODHA J N

JUDGE

In the presence of:-

.....for the Claimant

..... for the Respondent

