



**Kosgey v Eastern Produce Kenya Limited (Cause 48 of 2020)
[2023] KEELRC 1050 (KLR) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1050 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE 48 OF 2020
NJ ABUODHA, J
APRIL 28, 2023**

BETWEEN

MOSES KIMELI KOSGEY CLAIMANT

AND

EASTERN PRODUCE KENYA LIMITED RESPONDENT

JUDGMENT

1. By a memorandum of claim filed on May 13, 2020, the Claimant averred that:
 - (i) At all material times relevant to this suit, the claimant was an employee of the respondent having been appointed on September 5, 1995 and accepted the appointment on October 15, 1995.
 - (ii) That the claimant was unlawfully and unprocedurally terminated from his employment by the respondent on the May 5, 2020 *vide* a letter signed by the representative of the company by way of summary dismissal.
 - (iii) The claimant avers that the summary dismissal was unprocedural, unfair illegal and malicious as the allegations by the respondent were not substantiated at all and did not meet the requirements of case of summary dismissal.
 - (iv) The respondent purported to initiate the process of a disciplinary action against the claimant and issued a suspension letter to the claimant on April 16, 2020, which letter did not specifically state the reasons of suspension therefore hampering the claimant's right to defend himself or seek relevant documents.
 - (v) That the claimant was only given 3 days upon receipt of the letter for defending himself which time was too short.



- (vi) That the claimant was charged and convicted by the respondent on charges of dereliction of duty especially as regards security and public relations issues with the community which are not within his authority to deal with as that was within purview of the government administrators.
- (vii) That the respondent charged the claimant with offences or occurrences that were committed or omitted when the claimant was on leave.
- (viii) The chairman hearing the charges and the team had a predetermined outcome of the disciplinary process and the process was just a mere formality and a sham as he had even been told to resign.
- (ix) That the process was done at the height of corona vims pandemic in Kenya and the claimant could not access the office nor the relevant witnesses.
- (x) The disciplinary notice was issued on April 17, 2020 requiring die claimant to attend disciplinary meeting within the next 2 days which was not enough notice.
- (xi) The claimant was required by the respondent to attend the disciplinary meeting by himself within the limited timelines and or be represented by an employee of the respondent, which is against the laws of natural justice as there would be intimidation, coercion or bias.
- (xii) Even after the hearing, the verdict was issued and the claimant required to appeal on grounds framed by the respondent which is unprocedural and illegal.
- (xiii) That the accusations against the claimant were serious and endemic to the respondent company and have been there even before the claimant become manager of Kibabet estate.
- (xiv) The claimant avers that he went out of his way to settle to problems that he was accused of and reported every security issue to relevant authorities and none of the accusations was proved.
- (xv) For reasons complained above the claimant has suffered loss and damage as he has been unlawfully denied his income in salary and other benefits.
- (xvi) The Claimant's terms of employment were permanent terms and was to retire at the age of 60 years and the Claimant had years to retire, hence claims as follows:
 - a) The sum of Kenya shillings one sixty' three thousand three hundred and thirty three (163,333) moodily being die basic salary per month due for next nine years (17,639,964)
 - b) The sum of Kenya shillings forty one thousand four hundred and four (41,404) monthly being the amount due for house allowance and incidentals there to as he was provided with company housing, for 9 years (4,471,632)
 - c) The sum of Kenya shillings one sixty three thousand (163,333) basic salary for three months in lieu of notice. (489,999)



- d) The sum of Kenya shillings eighty thousand (80,000) annually being the sum due for medical allowance for 9 years (400,000)
- e) The sum of Kenya shillings eleven thousand three hundred and thirty three (11,333) monthly being the sum of Kibabet allowance per month, for 5 years (679,980)
- f) The sum of Kenya shillings one hundred and ten thousand monthly being mileage allowance (330,000).

2. The Respondent opposed the claim and filed a memorandum of response in which it averred among others that:

- (i) The Respondent denies the Claimant's allegations and claims in this cause and states as follows:
 - a. The Claimant violated the terms of his employment by negligence and dereliction of his duty. This constituted gross misconduct thereby resulting in his summary dismissal on April 23, 2020.
 - b. The Claimant's dismissal was justified in the circumstances and was carried out in accordance with the applicable provisions of the law.
 - c. This cause is brought in bad faith and the Claimant's claims in these proceedings are false, misleading and misadvised.
 - d. The Claimant is not entitled to the orders sought.
- (ii) The Respondent thus denies that the Claimant's dismissal was unprocedural, unfair, illegal and malicious as alleged and further states as follows:
- (iii) The Claimant was initially employed by the Respondent as a Field Trainee Assistant on September 5, 1995. Over the years, the Claimant was appointed in various roles by the Respondent. As at the date of his termination, the Claimant discharged his duties as the Respondent's Senior Estate Manager at Kibabet Estate. As per the Claimant's job description, the Claimant was inter alia in charge of planning and monitoring of all the operations of the estate and all staff working there.
- (iv) During the tenure of his employment, the Claimant was expected to and agreed to strictly observe the Respondent's policies more specifically the Respondent's Code of Conduct and Ethics. As the Respondent's employee, the Claimant was expected to inter alia carrying out his duties in a professional manner and use his expertise and effort to ensure the protection of the Respondent's property and assets. The Claimant was expressly in the said Code of Conduct and Ethics prohibited from diverting the Respondent's property for personal and/or unauthorized use for personal gain. The Claimant is put to strict proof of the contrary.
- (v) On or about the April 16, 2020, it came to the Respondent's attention that the Claimant may have been involved in serious breaches of the Respondent's policies. The allegations levelled against the Claimant were as follows:
 - a) Negligence and dereliction of duty; and
 - b) Conducting his duties in a manner that violated the Respondent's image or adversely affected its business or brought the Respondent into disrepute.



- (vi) The Respondent wrote to the Claimant highlighting the aforesaid allegations of misconduct and suspending him with immediate effect from his duties with full pay pending an investigation into the aforesaid allegations. The Respondent also notified the Claimant of his right to access records for purposes of assisting with the investigation and/ or to aid him in any disciplinary process (if need be). Therefore, the Claimant's allegations that his right to seek documentation was hampered is denied and the Claimant is put to strict proof thereof.
- (vii) The Respondent relied on among others, statements that had been made by various witnesses during the investigation to determine the Claimant's case. On conclusion of the investigations, the Respondent established inter alia that:
- a) The Claimant negligently performed his duties being in charge of Kipkoigen Division resulting in frequent cases of malicious damage to the Respondent's property and general breakdown in the performance of the security team due to lack of leadership.
 - b) The Claimant failed to address grievances within the security team, other employees and the neighbouring Kipkoror Community' resulting in a breakdown of relations.
 - c) The breakdown of relations was contributed to by the Claimant and one Pius Korir who they' closely associated with by illegally grazing on the Respondent's property prompting others from the Community to also graze illegally on the Respondent's property.
 - d) The Claimant verbally terminated three (3) employees i.e. Miller Kimutai Maiyo, Richard Kimaiyo Lagat and Barnaba Rotich and thereafter reinstating two (2) of them i.e. Richard Kimaiyo Lagat and Barnaba Rotich unilaterally in complete disregard to the company disciplinary procedures and exposing the Respondent to risk of potential lawsuits.
 - e) The Claimant knowingly failed and/ or refused to carry out lawful and proper written instructions within the scope of his duties from his reporting manager.
- (viii) Following the outcome of the investigations, the Respondent issued the Claimant with a Notice dated April 17, 2020 inviting the Claimant to attend a disciplinary enquiry and/ or hearing (hereinafter disciplinary hearing). The disciplinary hearing was scheduled to take place on the April 21, 2020 at the Respondent's Nandi Office. The allegations of misconduct which were to be addressed at the meeting were clearly set out in detail in the said letter.
- (ix) The Claimant attended the disciplinary hearing as scheduled and was given a fair opportunity to defend himself against each of the allegations levelled against him. At the hearing, the Claimant as well as the Respondent's witnesses testified and the Claimant was given an opportunity to question each and every witness.

From the hearing, it was established that:

- a. The Claimant undermined his security duties which resulted in an increase of malicious damage to the Respondent's property.



- b. The Claimant contributed and failed to address grievances within the security team, the other employees and the neighbouring Kipkoror community resulting in a breakdown of relations between the employees and the neighbouring Kipkoror community and the Estate.
 - c. The breakdown of relations was further aggravated by the Claimant and one Pius Koirir who illegally grazed their sheep and goats on the Respondent's property prompting others from the neighbouring community i.e. Kamuny, Kapolaso, Kapollessos among others to illegally graze their herds on the Respondent's property.
 - d. The Claimant failed to follow clear stipulated company disciplinary procedures by verbally terminating three (3) employees and thereafter unilaterally reinstating two (2) of them exposing the Respondent to risk of potential lawsuits.
 - e. The Claimant failed to carry out written instructions from his reporting manager to institute disciplinary procedures against the three (3) employees he had arbitrarily dismissed from employment amounting to insubordination.
 - f. As a result of the aforesaid negligence and dereliction of the Claimant's duties, the Respondent incurred huge losses and damage to its property and was exposed to risk of potential lawsuits.
- (x) On considering the representations at the hearing, the Respondent found that the Claimant's actions amounted to gross misconduct and the reasons provided by the Claimant were inadequate and unsatisfactory. The Respondent thus resolved to summarily dismiss the Claimant for gross misconduct on April 23, 2020.
 - (xi) On the April 24, 2020, the Claimant wrote to the Respondent appealing against its decision to terminate his employment. The Respondent wrote back to the Claimant on April 27, 2020 requesting the Claimant to fully elaborate on the grounds of his appeal to enable the chairperson of the appeal hearing to understand and consider the basis of his appeal. The Claimant wrote back to the Respondent on the April 29, 2020 explaining in detail further his grounds of appeal. The Respondent vide a letter dated April 30, 2020 invited the Claimant to attend an appeal hearing scheduled to take place on the May 4, 2020 at the Respondent's Nandi office.
 - (xii) On the material date, the Claimant attended the Appeal hearing as scheduled. The Respondent considered the grounds raised in the Claimant's appeal but found no justifiable reasons to vary its decision to terminate the Claimant's employment. Consequently, the Respondent wrote to the Claimant on May 5, 2020 upholding its decision to summarily dismiss the Claimant. Any averments made by the Claimant to the contrary are denied and the Claimant is put to strict proof thereof.
3. At the time the Claimant testified in the main that he recorded a witness statement on May 2, 2019, which he sought to adopt as his evidence in chief.
 4. The Claimant further stated that he relied on his documents filed with the claim.
 5. In cross examination the Claimant stated that he was appointed Senior Estate Manager and worked there for about three years. It was his testimony that he was terminated on account of accusation



regarding his work as Estate Manager. He further stated that his role was to maintain staff discipline in line with the Respondent's policy. He was also responsible for securing the Respondent's assets and also exercised security docket.

6. It was further the Claimant's evidence that he was suspended pending investigations and later issued with a notice to attend a disciplinary hearing. The suspension letter specified the allegations against him. The Claimant also stated that he attended the disciplinary hearing with Wesley and Korir who were his chosen representatives.
7. Mr Kosgey further informed the Court that he was given ample time to prepare for hearing. It was further his testimony that he terminated the three employees and that the charges against them were prepared after their termination. He defended the termination saying it was done quickly because payroll was closing.
8. Concerning Pius he stated that he was an ungraded employee and that he was not the only one ungraded staff who was allocated supervisory duties. He however conceded that his supervisor Mr Richard Koech was concerned about him allocating ungraded staff supervisory duties.
9. The Claimant stated that the disciplinary hearing was biased and that he was asked to resign. The Claimant also stated that at the conclusion of the disciplinary hearing, he was issued with a termination letter and that the letter stated the grounds for the termination. He appealed against the termination but the appeal was unsuccessful. Shown the document at page 21 of his bundle of documents he admitted saying that he took responsibility for the damage and further that he had earlier been issued with a warning letter. He further stated that he had fired three employees but reinstated two of them and that he was trained on disciplinary procedures. Upon termination he was paid his terminal dues and that he signed receipt for them.
10. In re-examination, he stated that he did not dismiss the three employees and that he simply removed them from the payroll. Concerning Pius Korir, it was his evidence that he was the person on the ground and could rely on him. He defended his action as in the best interest of the company.
11. The Respondent's witness Mr Richard Koech informed the Court that he worked for the Respondent as a General Manager and had worked for 26 years. He informed the Court that he was familiar with the case and relied on his witness statement and documents filed by the Respondent as his evidence in chief. According to him, the Claimant was in charge of discipline and was also to address the grievances of staff under him.
12. According to Mr Koech, there were security concerns and that the Claimant was not addressing the employees' grievances. He further stated that the termination of the three employees was not properly done in that procedure was not followed. The Claimant later reinstated two of them and left out one without giving any reason.
13. Regarding the issue of malicious damage to property, it was his evidence that this had happened even before the Claimant proceeded on leave and that by March the Claimant had returned from leave. Concerning ungraded staff, it was his evidence that it was not common practice for ungraded employees to take over supervisory duties. They had to be appointed in writing.
14. In cross examination, he stated that encroachment was a common problem and that it was the Claimant's responsibility to drain the swamp. He was the team leader and was once congratulated for the good work. However the complaints against the Claimant never arose from the drainage of the swamp.



15. Concerning the employees that were terminated by the Claimant, it was his evidence that they did not have to be removed from the payroll pending investigations. He further stated that security was a collective responsibility but the Estate Manager (the Claimant) took more responsibility.
16. Section 47(5) of the [Employment Act](#) placed the burden of proving that an unfair termination has occurred on the employee while the burden of justify or proving reason for termination is on the employer. The burden of proof placed by law herein is mutually exclusive and failure by one party does not discharge the other's burden.
17. Further Section 45(2) of the [Act](#) deems a termination unfair if the employer fails to prove that the reason for the termination is valid and the reason for the termination is a fair reason related to the employee's conduct, capacity or compatibility and further that the termination was carried out using a fair procedure.
18. The Claimant herein alleged that the termination of his employment was unfair because (among others) the suspension letter did not specifically state the reasons for suspension, he was given only three days upon which to defend himself and that he was charged and convicted of dereliction of duty especially as regards security and public relations with the community which were not his responsibility to deal with.
19. The Respondent on the hand justified the dismissal on grounds that it came to its attention on or about April 16, 2020, that the Claimant may have been involved in serious breaches of Respondent's polices which included dereliction of duty and conducting his duties in a manner that violated the Respondent's image or adversely affected its business.
20. According to the Respondent the Claimant negligently performed his duties at Kipkoigen Division resulting in frequent cases of malicious damage to Respondent's property, failure to address grievances within the security team and neighboring Kipkorir Community. The Claimant was further accused of verbally terminating the contract of three employees and thereafter reinstating two of them unilaterally in complete disregard to the company disciplinary procedures.
21. On the issue of suspension, the Claimant was suspended to enable further investigation over allegation that he may have been guilty of breach of the company rules and or standards namely negligence dereliction of duty and conduct which violated the employer's image or adversely affected its business.
22. The letter never delved into the details of these accusations. The letters never gave the details of these allegations but it is noteworthy as well that he letter called for no response from the Claimant. The letter merely informed him that he still remained the Respondent's employee and further that his suspension was on full pay and further that he had access if needed, to records for purposes of assisting with investigation or assisting him prepare for any further disciplinary process.
23. On April 17, 2020, the Claimant was formally issued with a notice to attend a disciplinary hearing. The notice contained the charges against the Claimant together with their particulars. The letter further informed the Claimant of his rights.
24. It was the Claimant's evidence that he attended the disciplinary hearing accompanied by two witnesses and that he participated in the same. Further the Claimant neither in his pleadings nor in evidence before the Court alleged that he never had adequate time to prepare and further he asked for more time but was refused.
25. On the issue of security and relationship with the team and the local community, the Claimant first of all conceded that security was part of his docket. He further did not deny that Mr Pius Kori to whom he delegated some of his responsibilities was an ungraded staff but defended his action saying Korir



was not the only ungraded staff to whom supervisory duties had been delegated and further that Korir was his person on the ground. The Respondent denied this allegation. Hence it was incumbent on the Claimant to call evidence to vouch for the allegation that it was normal to delegate supervisory duties to ungraded staff.

26. Concerning verbal termination of the three members of staff, the Claimant did not deny he did so but stated that this was done quickly because the payroll was almost ready.
27. A termination of employment has to be done in accordance with the *Employment Act* or contract of employment. The Claimant never produced any evidence to support his allegation that a termination of employment can be hurriedly done when the payroll was almost ready.
28. Applying the provisions of Section 47(5) and 45(2) of the *Employment Act* and to the facts and documents as presented by parties to this claim, the Court has become of the view that the Respondent has discharged to the required standards, the burden of proof cast upon it by Section 47(5) and 45(2) of the Act while the Claimant has failed to do so.
29. The Court therefore finds and holds that there existed valid and justifiable reason for the termination of the Claimant's serve and in doing so the Respondent followed a fair procedure.
30. The claim is therefore found without merit and is hereby dismissed with costs.
31. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 28TH DAY OF APRIL 2023

ABUODHA JORUM NELSON

JUDGE

In the presence of:-

.....for the Claimant

..... for the Respondent

