



**Ndung'u v Segera Limited (Cause E008 of 2022)
[2023] KEELRC 1355 (KLR) (26 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1355 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CAUSE E008 OF 2022
ON MAKAU, J
MAY 26, 2023**

BETWEEN

JAMES WAHOME NDUNG'U CLAIMANT

AND

SEGERA LIMITED RESPONDENT

JUDGMENT

1. By the statement of claim dated 9th February, 2022 the claimant accuses the respondent of unfair termination of his employment and discrimination. He then prayed for the following reliefs:-
 - i. A declaration that claimant's termination from employment was illegal, unlawful, unfair and inhumane and that the claimant is entitled to payment of his terminal dues in full.
 - ii. Compensation for unfair and illegal termination.
 - iii. General damages for discrimination.
 - iv. An order for the respondent to pay the claimant his terminal dues amounting to Kshs.14,851,304.00.
 - v. Costs of the claim plus interest thereon.
2. The respondent filed a Response on 9th March 2022 denying the alleged unfair termination and averred that the termination was lawful and procedurally right. It averred that claimant committed gross misconduct and was accorded a fair hearing as required by *the Constitution* and the statutes. It further averred that it was entitled to dismiss the claimant summarily but exercised its discretion to reduce the dismissal to a normal termination.
3. The respondent also denied the alleged discrimination and dismissed it as baseless. Finally it averred that the claimant cleared with the company and signed a Clearance form which stated that he had no



further claims against the company. He was then issued with a certificate of service as required by the law. Therefore the respondent prayed for the suit to be dismissed with costs.

Evidence

4. The claimant filed a written statement and a bundle of 31 documents to support his case. In brief the claimant's case is that he was employed by the respondent as an Accountant. On 19th May, 2021 he received an email inviting him to a management meeting on 20th May, 2021. The purpose of the meeting was to discuss April financials. However he was surprised that the discussion changed to grilling session against him on issues of Accounting and HR matters. He felt ambushed by the turn of events because he was not given sufficient opportunity to prepare to discuss the HR allegations in the Accounting Department.
5. On the following day he was served with a show cause letter accusing him of willful neglect to perform work which was his duty to perform; use of abusive or insulting language; and knowingly failed or refused to obey a lawful and proper command. He responded to the charges by his letter dated 27th May, 2021.
6. On 31st May 2021, the respondent asked him to share his grievances with it and he did so on 1st June 2021. On 2nd June 2021 he received a letter inviting him for a disciplinary hearing on the following day 3rd June 2021 before the same managers he had met on 20th May 2021. In his view the termination of his employment was already pre-determined and the disciplinary hearing was a sham. The hearing was unfair according to him because the panel was the investigator, witness, prosecutor and the judge rolled together for a pre-determined outcome. The allegations were also not substantiated but he was dismissed on 15th June, 2021.
7. He further stated that the employer discriminated against him contrary to section 5 of the [Employment Act](#) by frequently changing his residential container houses. In one year he had moved to four different houses, one of which he was made to leave it to his junior officer because he was of a different race. He further stated that other senior managers were allocated permanent houses with attendant benefits while he was made to live in container housing. He was also made to work extra hours' on Sundays and Public holidays without pay.
8. The respondent filed statements from three witnesses and a bundle of 15 documents to fortify its defence. The HR manager Mr. James Wahome Ndung'u stated that the claimant was employed by the respondent from 4th October 2017 for a monthly salary of Kshs.155,000.00. His working hours were 48 spread in six days per week with 30 minutes break and one hour lunch break per day. He was also entitled to 21 days annual leave plus Kshs.2,000.00 leave travelling allowance.
9. On 21st May, 2021 the claimant was served with a show cause letter and he responded on 27th May, 2021. He was then invited to a disciplinary hearing on 3rd June 2021 on the charges raised in the show cause letter. He was also given the right to have another employee accompany him to the hearing but he opted to proceed alone. He also did not raise any issue with the composition of disciplinary committee either at the start, during or at the end of the hearing.
10. He further stated that the claimant articulated his case very well and thereafter he was supplied with the minutes of the proceedings. Thereafter the decision of the committee was conveyed to him on 15th June, 2021 giving him right of appeal within 7 days. His terminal dues were also computed at Kshs.1,050,822.00 he approved the same then it was wired to his bank account. He was also issued with a certificate of service dated 15th June 2021 and he signed a clearance form discharging the employer from any further claim. He contended that the respondent was entitled to dismiss the claimant for the



said misconduct but it reduced the dismissal to a normal termination in order to secure his terminal dues.

11. As regards the Zeitz Foundation, he stated that the claimant offered services on pro bono basis but resigned after some time and no disciplinary action was taken against him. According to the witness, the suit is in bad faith and an afterthought.
12. The respondent's Ranch Manager Ms. Benaiah Oduor Odhiambo also echoed the evidence by the HR Manager on the procedure followed before terminating the claimant's employment. He maintained that the claimant committed gross misconduct and he was accorded a fair hearing by a committee. Further, the committee exercised discretion by reducing the punishment of summary dismissal to a normal termination in order for him to qualify for terminal benefits.
13. He further stated that the terminal dues were tabulated and the claimant confirmed that it was correctly tabulated via email before it was paid. He was issued with certificate of service after clearance with the company. He further stated that the claimant never appealed against the dismissal letter.
14. The third witness was the respondent's Chief Finance Officer, Mr. Sohan Agrival who stated that the claimant's terminal dues were tabulated on 15th June, 2021. He then forwarded the draft tabulation to the claimant via email and the claimant wrote to the HR Manager confirming that the tabulation was fine. Thereafter he was advised that the claimant had cleared with the company and his final dues of Kshs.1,050,822.60 was wired to his bank account on 9th August 2021. Therefore, he contended that the claimant was paid all his entitlement upon termination and nothing is owing from the employer.

Submissions

15. The claimant framed three issues for determination namely; whether the termination of the claimant's employment was unfair and unlawful; whether he was discriminated at the work place; and whether he is entitled to the relief sought. He appreciated that the burden of proof of those issues was on himself.
16. As regards the first issue, he submitted that once he challenged the fairness of the termination, the burden of proof shifted to the employer by dint of section 43, 45 and 47 (5) of the *Employment Act*. For emphasis he cited the case of Pius Machafu Isindu v Lavington Security Guards Ltd (2017) eKLR where the court held that an employer has a duty under section 43, 45 and 47(5) of the Act to prove and justify the reasons for the termination of an employee's contract of employment.
17. It was submitted that the charges contained in the show cause letter dated 21st May 2021 were not true and have not been substantiated. They included the alleged use of abusive or insulting language; failure or refusal to obey a lawful command; and willful neglect to perform work. Therefore it was submitted that the reasons for the termination were not valid and justified because no evidence was tendered by the respondent to prove the allegations. No material evidence was presented to the court to demonstrate the alleged abusive or insulting language used against the respondent; or how he failed or refused to obey a lawful and proper command; and how he willfully neglected to perform his duties. In his view he explained himself and as the minutes for the hearing would reveal, he received instructions from several persons; and that the company policies and procedures were not applied consistently.
18. As regards the procedure followed, before the termination, it was submitted that all tenets of fairness were thrown under the bus. The process was a sham and the irresistible conclusion is that there was a pre-determined outcome considering the manner in which the meetings were conducted and the fact the same person were the investigators, witnesses, prosecutor, the judge and even the appellate judge. Therefore, it was argued that the claimant was not accorded a fair hearing as the rules of a natural justice



were not observed. The case of *Msaagha v Chief Justice & 7 others* (2006) eKLR was cited to support the foregoing submission.

19. As regards the issue of discrimination, it was submitted that section 5 of the *Employment Act* puts an obligation on employers to eliminate all forms of discrimination in both its policies and practices. It was submitted that despite the claimant being the Accountant, he was treated as a ranch employee and retreat employee by the Management. He was treated and subjected to differential treatment on the issue of food and housing. He was assigned container houses while the managers had permanent houses. He was shifted four times in one year and in one such shifts he was made to leave the good container house to a junior staff simply because of his race.
20. As regards the food issue, it was submitted that the staff working under the tourism were given food but the claimant was denied at the discretion of the respondent's Ranch Manager something which had not happened to the other accountants before him.
21. It was further submitted that the claimant faced discrimination by being made to work for Zeitz Foundation, a business associated with the respondent, for no pay, yet the respondent's Finance and Administration Personnel who left in June 2017 was earning a monthly pay for doing work for the foundation. Further the foundation kept on hiring new staff for pay but the claimant was working for no pay.

In addition, in August 2019, the respondent's staff who were handling work for the foundation were given above normal salary increment but the claimant was not given and forcing to resign from working for the foundation.
22. Finally it was submitted that the claimant was discriminated in tips incentives structure which was meant to reward performance by staff working for tourism. It was submitted that the claimant was left out although he was heavily involved in tourism accounting. The court was urged to look at the schedule for tips in supplementary list of documents.
23. As regards the relief sought, the court was urged to find that the claimant is entitled to the same including damages for discrimination and follow the decision in the case of *Janine Buss v Gems Cambridge International School Limited* (2016) eKLR where the court awarded the claimant Kshs.8,000,000.00 for discrimination at the work place.
24. On the other hand, it was submitted for the respondent that, the procedure followed in terminating the claimant's employment was fair because he was served with a show cause letter detailing the allegations made against him and he responded. Thereafter he was accorded a hearing as required by Section 41 of the *Employment Act* where he was advised on his right to have another employee at the hearing but he chose to proceed on his own. He then made his representations as shown in the minutes of the proceedings at the disciplinary hearing produced as exhibits.
25. The claimant did not object to the fairness of the process or the composition of the committee according to the respondent, and as such the allegation of unfairness herein is an afterthought and not based on facts or evidence. Further that, the claimant was found guilty of gross misconduct but in order to make him go home with his benefits the respondent in its own discretion reduced the summary dismissal to normal termination and even advised him to appeal within 7 days of the decision but he never appealed.
26. It was further submitted that the claimant went through the process of clearance and he was issued with a certificate of service. His terminal dues were also computed and the computation emailed to him for confirmation and he approved the same via email. Thereafter the money was wired to his bank account. As such it was submitted that he procedure was fair and in accordance with the law.



27. As regards the issue of discrimination, it was appreciated that Article 27 of *the Constitution* prohibits discrimination and provides for equal protection to all from discrimination. However, it was submitted that no proof of discrimination has been tendered nor has the claimant pleaded any particulars of the alleged discrimination. It was submitted that the alleged discrimination on the account of race is baseless.
28. As regards the reliefs sought it was submitted that the claimant is not entitled to the same. It was submitted that the termination was fair and he was paid his rightful benefits including six months salary in lieu of notice and he confirmed the same as correct tabulation. Further, it was submitted that the claimant was not entitled to overtime as none was approved by the management as stipulated in clause 5 of his appointment letter.

Analysis and determination

29. I have considered the pleadings, evidence and submissions. There is no dispute that the claimant was employed by the respondent from 4th October, 2017 to 15th June 2021 when his services were terminated for gross misconduct. The issues for determination are:-
 - a. Whether the reasons for termination were valid and fair.
 - b. Whether procedure followed was fair.
 - c. Whether the respondent discriminated against the claimant during his employment.
 - d. Whether the reliefs sought are merited.

Reasons for termination

30. It is not easy to sift the reason for the dismissal from the three page dismissal letter. My view is that whenever an employer intends to dismiss an employee, he should communicate the reasons in clear and simple language setting out the particulars of the misconduct allegedly committed by the employee. This would help the employee to prepare an effective appeal and to guide the subsequent disciplinary hearing. Finally clear and simple language and well particularized reasons for termination would help in resolving any disputes that may arise from the separation process. I say so because in this case even the defence and the witness statements filed by the employer do not state the reasons for the termination of the claimant's employment. All what they allege are that the claimant committed gross misconduct warranting summary dismissal.
31. Having said that, the much that gleams from the termination letter is that the claimant acted negligently at times even applying different standards depending on his preference. For example in receiving of goods; failing to issue gate pass to buyer of 3 cows after being instructed by the Ranch manager to do so; failing to verify one of the three cows purchased; and failure to declare or report the income (grazing fees) handed in by the Ranch manager as per the norm, yet at the same time complaining that accounting procedures are being by-passed. Further the termination letter accused the claimant of violating company rules in the HR Manual by making malicious and false allegation in an email to the management and copied to junior staff that accounting procedures were being flouted.
32. The claimant has denied the alleged offences and has stuck to his position that there was no valid reason for his dismissal. He maintains that the issues raised at the disciplinary hearing were not substantiated. Therefore he contends that the termination was not justified.



33. I have carefully considered the evidence presented by the parties. It seems that all was fine until the claimant wrote the email dated 30th March, 2021. The said email has not been produced as exhibit for the court to see. However it is alleged that it was a strong statement from the claimant to both senior managers and the junior staff that he was not going to relent in his professional duty as an accountant. He further pointed out that there had been attempts to by-pass accounting procedures in the past.
34. There is evidence that indeed accounting procedures were being by-passed with approval of the management and also by the junior staff. Such incidences included releasing of three cows by the security to a purchaser on 1st March, 2021 before the claimant completed verification exercise and before the claimant could issue a gate pass.
35. Another incidence involved delivery of solar items on 22nd February, 2021. The procedure required that before paying for any delivered items, verification must be done by the user department, procurement department and the accounting department. Upon verification of the delivered items, the user department and/or the procurement department prepares Goods Received Note (GRN) so that the accounting department can pay the invoice.
36. In the case at hand, the Ranch Manager instructed the claimant to pay for delivered solar items without a GRN which confirms the actual delivery. When the claimant called his supervisor the chief finance officer, he was directed to ensure that a GRN for the delivered goods was generated.
37. He explained in his response to the show cause letter that even before the verification of the solar items was completed the Ranch Manager had already uploaded on the banking platform 30% balance for payment of the items. He further pointed out that there was a wrong precedent for selective receiving of goods without GRN especially on imported goods and he recommended that error to be rectified.
38. Another issue relating to accounting procedure raised by the claimant in his response to the show cause letter concerned grazing fees of Kshs.469,000.00. The claimant explained that the chief finance officer gave instructions via email on 28th April, 2021 that all the grazing fees be banked upon receipts but when the claimant explained to the Ranch Manager the said instructions on 29th April 2021, the Manager took away the said cash and kept it contending that the money would not be banked because there was cash flow problem due to Covid-19 pandemic.
39. The above examples of flouting of accounting procedures by the Ranch Manager, in my view, renders the complaint by the claimant genuine. As a professional accountant, he had an obligation to point out the persistent by-passing of accounting procedures by the Ranch Manager which seemed to be affecting other departments including security, procurement and user departments. Some of the breaches were historical and they need to be stopped. Hence the email dated 30th March 2021.
40. The conduct by the claimant could not amount to gross misconduct to any reasonable employer. If anything it amounted to a professional conduct or at least whistle blowing. Such conduct did not warrant a dismissal but reward. No reasonable employer in the circumstances of this case would have dismissed the claimant. The correct person to face disciplinary action is not the stickler to the rules and accounting procedures, but the one who is keen on breaching or by-passing the accounting procedures.
41. The security officers who released cows without verification and gate pass, the Ranch manager who demands for payment of goods before the delivery is verified and a person who keeps over Kshs.400,000.00 in his office for use as petty cash against clear direction from the finance officer that all revenue collected be banked first, ought to be the accused person while the claimant best suits the role of a witness.



42. Consequently and in the view of the matters discussed above, I am persuaded by the weight of the claimant's evidence that the reasons cited for his dismissal were not valid and fair. Accordingly the dismissal or termination meted by the respondent vide the letter dated 15th June, 2021 was not justified.

Procedure followed

43. Section 41 of the *Employment Act* provides that:-

“(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”

44. In this case, the claimant was summoned to a management meeting on 20th May, 2021 and was asked to explain matters raised in his email of 30th March 2021 but he sought for more time. During the meeting he was threatened with disciplinary process if he failed to answer the questions raised but he requested for more time because he felt ambushed to answer matters which were never notified to him via the email inviting him to the meeting.

45. The following day he was served with a show cause letter which he responded within the seven days given. After three days he was asked to share his grievances and he did so on 1st June 2021. The following day he received a letter inviting him to a disciplinary hearing on 3rd June 2021. The hearing was before the same managers who had threatened him with a disciplinary process during the management meeting of 20th May 2021. According to the claimant the committee had a pre-determined outcome and therefore the disciplinary hearing was just a sham.

46. The court may not help much in that situation because, in the work place the employer or persons appointed by the employer presides of disciplinary hearings. A stranger cannot decide HR matters on behalf of the employer. It follows that where the employee feels that his goose has been cooked, he/she has no otherwise especially in small private enterprises. He must present his case and if in the end no fairness is done, he can take the matter to court.

47. Having said so, I must hold that, the employer herein followed a fair procedure by serving a show cause letter, according the claimant a hearing before a committee, communicating the decisions, according him a right of appeal; issuing him with a certificate of service and paying him terminal dues including salary in lieu of notice as per his appointment letter. Section 41 of the *Employment Act*, supra, obliges an employer to inform his employee the reason upon which termination is contemplated and then accord him a fair chance to defend himself.



48. The Court of Appeal has clarified that the obligation to accord a fair hearing extends even to termination by notice or payment of salary in lieu of notice. In the case of Kenfreight (E.A) Ltd v Benson K.Nguti the Court held that:-

“ Apart from issuing proper notice according to the contract (or payment in lieu of notice as provided) an employer is duty bound to explain to the employee in the presence of another employee or a union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition the employee is entitled to be heard and his representations if any, considered by an employer before the decision to terminate his contract of service is taken.”

49. The respondent accorded the claimant a hearing and still paid him salary in lieu of notice. Consequently, I am satisfied that the procedure followed before dismissing the claimant was fair.

Discrimination

50. The claimant alleged that he was discriminated by being denied food at the work place like other tourism staff yet his work involved Tourism accounts. He also alleged that he was discriminated in salary increment at the same rate as other staff who did volunteer work at the Zeitz Foundation. Lastly he contended that he was made to leave a better container house he was using to a junior employee on account of race. The respondent has however denied the alleged discrimination.

51. I have carefully perused the documentary evidence tendered. The appointment letter for the claimant provided for a gross salary of Kshs.155,000.00 inclusive of housing. Consequently, I find and hold that any housing provided by the employer after paying the claimant the said gross salary, was just discretionary housing. An employee who receives housing allowance cannot demand for a house from the employer because that amounts to double benefits and unfair enrichments.

52. As regards the unequal treatment between the claimant and staff working in tourism sector, I must point out that the claimant and the tourism staff were indeed different cadre of staff. Discrimination only arises where same cadre of staff, like say, accountants are being accorded differential treatment. The claimant has therefore not proved the alleged discrimination by evidence.

Reliefs

53. Having found that the respondent has not proved valid and fair reason for terminating the claimant's employment, I make declaration that the termination was unfair, unjustified and unlawful within the meaning of section 45 of the *Employment Act*.

54. In view of the foregoing, the claimant is entitled to compensation for unfair termination by dint of section 49 (1) of the Act. He worked for over 3 years and he did not contribute to the termination through misconduct. Consequently, I award him 3 months' salary as compensation for the unfair termination of his employment. This works to Kshs. 184,140 x 3= Kshs.552,420.00.

55. The claim for General damages for discrimination, however fails because the said violation has not been established by evidence.

56. In conclusion, I enter judgment for the claimant declaring that his services were terminated unfairly and further condemning the respondent to pay him Kshs.552,420.00 as compensation for the unfair termination. The claimant is also awarded costs of the suit plus interest at court rates from the date hereof. The above damages will however be subject to statutory deductions.



DATED, SIGNED AND DELIVERED AT NYERI THIS 26TH DAY OF MAY, 2023.

ONESMUS N MAKAU

JUDGE

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 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE

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