



**Otieno v Kenya Petroleum Refineries Limited (Cause E078 of 2022)
[2023] KEELRC 1264 (KLR) (18 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1264 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E078 OF 2022**

**M MBARÚ, J
MAY 18, 2023**

BETWEEN

NICHOLAS ODHIAMBO OTIENO CLAIMANT

AND

KENYA PETROLIUM REFINERIES LIMITED RESPONDENT

JUDGMENT

1. The background of the judgment herein is that on 6th October, 2022 the claimant filed his Memorandum of Claim and served the respondent who entered appearance on 7th October, 2022. No response was filed.
2. On 14th March, 2023 parties attended court for pre-trial directions and the respondent was allowed 14 days to file responses and serve upon which the claimant would have 7 days right of reply and the court further allowed parties to close pleadings within 30 days and a hearing date allocated for 24th April, 2023.
3. On the hearing date, the respondent had not complied. The claimant was heard on his case.

claim

4. The claimant was employed by the respondent in July 2016 as a human resource administrative assistant on a contract of one year. On 26th January, 2017 he was issued with a new contract for 3 years and on 14th June, 2017 he was seconded to Kenya Pipeline Company (KPC) based on a lease agreement between KPC and the respondent. The secondment was further extended through letter dated 1st July, 2021.
5. On 1st December, 2021 the employment terms were changed from fixed term contract to permanent and pensionable terms and the claimant's work performance was positively reviewed over the years.



6. The claim is that on 16th December, 2021 the respondent issued the claimant with notice to show cause why disciplinary action should not be taken and directed to respond by 24th December, 2021. The respondent was to furnish the claimant with documents used during the audit review at the canteen for the financial period 2018 to 2021. The claimant made effort to access the documents so as to respond to the notice issued without success as the audit department declined to provide the same on the grounds that the office was closed for December holidays. The documents required were spread within 3 years and were enormous and it was not possible to go through all of them within 7 days and the response given was limited to the Draft Canteen Operations Audit Review Report for the financial year 2020-2021 dated 30th October, 2021 and which had been attached to the Notice to show cause.
7. On 23rd December, 2021 the claimant replied as required and confirmed that the canteen finances had not been mismanaged as alleged. This was in line with the Draft Audit Report shared by the auditor.
8. On 28th January, 2022 the claimant received a letter from the respondent informing him that a Disciplinary Committee had been appointed and mandated to review the matter in detail. The committee mandate included conducting interviews.
9. In a Canteen report dated 6th December, 2021, services were suspended and no money was lost. The claimant was therefore shocked to receive notice dated 28th January, 2021 purporting to conduct investigations on the issue. On 3 occasions he was invited for interviews with regard to his role at the canteen operations and how it could be improved. Other employees were also interviewed and in its report dated 28th March, 2022 the committee noted that the audit report of 12th December, 2021 on canteen management should be considered and the show cause notice issued to the claimant should be considered but despite these recommendations, on 13th June, 2022 the respondent issued the claimant with notice terminating his employment.
10. The claim is that the claimant was not given a chance to respond to the investigations report by the Disciplinary Committee and the audit reports he had requested for had not been issued.
11. On 23rd June, 2022 the respondent issued the claimant with the Disciplinary Committee Report and on 7th July, 2022 he filed his appeal which was dismissed without a hearing or being given the reasons.
12. The claim is that the claimant's employment was terminated unfairly, there was no procedural or substantive fairness and purely based on witch-hunt and the claimant is seeking the following;
 - a. A declaration that employment terminated unfairly and unlawfully;
 - b. An order of reinstatement back to employment without loss of position and benefits
In the alternative;
 - c. One-month notice pay;
 - d. Unpaid salaries for 13 days worked in June;
 - e. Unpaid leave allowances;
 - f. Certificate of service; and
 - g. Costs.
13. The claimant testified in support of his case that he worked diligently for the respondent and his performance was reviewed with good results but following an audit for the period of 2020-2021 on 16th December, 2021 he was issued with a notice to show cause on alleged anomalies as per canteen



management audit review for the financial period of 2018-2021. He tried to get records from the audit department without success and within the time allocated for his response, the huge volumes of records required to address, his responses submitted on 23rd December, 2021 were purely based on the Audit report dated 30th October, 2021.

14. The claimant testified that in the audit report, he was surprised to find the auditor had flagged receipts as questionable despite the auditor granting him permission to retrieve them from suppliers since the canteen copies had been misplaced. Some receipts had also been lost due to shortage of space to store them and those placed on the floor got damaged from leaking water. The audit report hence noted a variance of Kshs. 23,859.
15. The claimant was then issued with letter of the respondent appointing a Disciplinary Committees to investigate the matter and he was called for interviews and the final report related to recommendations that canteen operations be reviewed. Other employees were invited for the interviews without the knowledge of the claimant and he was surprised to receive letter of summary dismissal on 13th June, 2022 on the grounds that he had submitted fake receipts amounting to Ksh. 121,945 without confirmation of the authenticity of the receipts from the suppliers who had issued them. The claimant had offered to call the suppliers to support his case with the auditors and this resulted in unfair termination of employment and the orders sought should be allowed.

Response

16. As noted above, the respondent did not respond to the claim. An application dated 8th May, 2023 was filed to re-open the case for hearing and directions given.
17. At the close of the hearing, the claimant filed written submissions that following his responses to the notice to show cause dated 16th December, 2021 a Disciplinary Committee was appointed and to conduct interviews and where he attended on 3 occasions. Other employees were called but he was not called to hear their interviews and in the final report of the Disciplinary committee, only recommendations were given with regard to improving canteen operations. There were therefore no reasons to justify termination of employment as held in *Pamela Nelima Lutta v Mumias Sugar Co. Ltd.* The reasons that the claimant had submitted fake receipts amounting to Ksh. 121,945 and that such amounts were unaccounted for had no basis since the auditor was aware of the circumstances of his office and that some receipts had been lost or damaged. In his response to the notice to show cause on 23rd December, 2021 the claimant had explained the variance and account to ksh. 118,457 and the balance of Ksh. 3,488 was well explained and arose out of supermarket receipts which were faded and ineligible.
18. The claimant submitted that in the case of *David Wanjau Muboro v Ol Pejeta Ranching Limited* [2014] eKLR the court held that where an employee has performed his duties diligently as expected of his position, he should not be blamed. The claimant was required to undertake purchases on recurring basis from small-scale suppliers who had no formal receipts and upon audit questions the same suppliers agreed to issue new receipts and the details were provided to the respondent. the summary dismissal was therefore not justified and did not meet the requirements of Section 41 of the *Employment Act*, 2007 (the Act) and an order of reinstatement should be allowed.

Determination

19. On 16th December, 2021 the respondent issued the claimant with a notice to show cause on 4 main issues that there were;
 1. Unaccounted variance of Ksh. 121,945 for the period of audit, 2018-21;



2. Receipts produced on account of differences at (No.1) above amounted to Ksh. 195,007 well over the Ksh. 121,945 initially reported in the audit and this was found questionable;
 3. Whereas Ksh. 118,457 of the variances could be traced to the purchase book, the balance of Ksh. 76,550 could not;
 4. Most of the newly submitted receipts given on account of Ksh. 121,945 variances were on photocopy paper, not serialised and even the serialised ones were not dated chronologically raising questions of Authenticity. Some receipts were dated many weeks ahead of the date of submission by the claimant.
20. On the first issue, the claimant explained that the variances arose out of supermarket receipts where some were faded and ineligible and some items were purchased once and hence not recorded on receiving books.
 21. With regard to providing excess receipts, the claimant responded that he had planned on being away from Mombasa and when the auditor called him to provide receipts he picked an envelope with reissued receipts and some of them were wrong and replacements had been reissued.
 22. On the third issue, the claimant responded that some receipts had wrong amounts or dates amounting to ksh. 76,550.
 23. On the fourth issue, the claimant responded that there were local purchases without formal receipts and some were purchased way back in the year 2014 before he was employed.
 24. The claimant testified that he was employed at the human resource administrative assistant with duties to oversee canteen operations. So, all canteen operations were under his supervision and was required to take accounts for all purchases.
 25. On 28th January, 2022 the respondent responded to the claimant with regard to his response and noted they were unsatisfactory as the basic questions pertaining to submission of questionable receipts to account for cash loss had not been addressed adequately. A disciplinary committee was therefore appointed with mandate to review the matter.
 26. The claimant testified that he was invited before the disciplinary committee on 3 occasions and following which he was issued with notice dated 13th June, 2022 being summary dismissal from employment on the grounds that following investigations into the conduct of submitting fake receipts totalling to Ksh.121,945 to account for company purchases on diverse dates between the year 2018 and 2021 has completed its work and proved that based on their interviews, enquires and evidence presented you committed a serious offence against and to the substantial detriment of the company which constitutes Gross Misconduct under the *Employment Act* ... 44(4)(g).
 27. Even though there is no response to the claim, one of the key elements that an employee who is alleging there is unfair termination of employment must prove is that there was unfair termination in terms of Section 47(5) of the Act. The standard of proof is addressed in the case of *Josephine M. Ndungu & others v Plan International Inc* [2019] eKLR, the court held that;
 28. Under section 47(5) of the *Employment Act*, the burden of proving unfair termination lies with the employee. The said burden is discharged once he establishes a prima facie case that, the termination did not fall within the four corners of the legal threshold set out by section 45 of the Act.
 29. The threshold being that before termination of employment, an employer will be deemed to have a substantive justification for terminating employment if the employer genuinely believed that the



- matters that informed the decision to terminate employment existed at the time the decision was taken. There must exist a substantive ground/reason leading to termination of employment as held in *Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike* [2017] eKLR.
30. Also, the employer must have a reason that is just and equitable in the circumstances of the case the reason given must be valid and fair. The Court of Appeal in *National Bank of Kenya v Samuel Nguru Mutonya* [2019] eKLR in determining whether a decision by the employer to terminate employment is just and equitable, the court held that the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to dismiss the employee.
 31. Once the employee has discharged his burden of proof, Section 45 of the Act requires the employer to prove that the employment was terminated in accordance with fair procedure. It is therefore not sufficient for purposes of determining the lawfulness of termination of employment for the employer to only show that he/she had valid reasons to support the decision but must demonstrate that there was compliance with the procedural strictures set out under section 41 of the Act.
 32. In this case, the claimant was issued with a notice to show cause over various matters about his work. He did not deny that there were unaccounted variances of Ksh. 121,945 for the period of audit, 2018-21 save to note that such arose from supermarket receipts where some were faded and that some items had been purchased once and hence not recorded on the receiving books.
 33. The claimant as the accounting officer in the canteen operations, the officer trusted by the respondent to undertake his duties diligently failed to account to Ksh. 121,945 due to alleged faded receipts and failure to record received goods. In the case of *Violet Kadala v Post Bank Limited* [2020] eKLR, the court held that there are certain positions once held, they call for a higher duty and degree of accountability and trust. The employee holding funds for and on behalf of an organisation must be trusted to do his job well. It is not sufficient that goods are purchased in the open market, a diligent officer in operations of finance must go out and do all what it takes to account for monies received from the employer while buying such items in the open market. It is not a good defence when called to account that the goods were purchased from small-scale suppliers. That does not assist especially where the subject employee is under investigations for failing to account for monies of up to ksh. 121,945.
 34. On the second issue, the claimant once called to account went ahead and produced excess receipts. This effectively led to another variance from Ksh. 195,007 well over the Ksh. 121,945 initially reported in the audit and this was found questionable. The explanation that the claimant had travelled from Mombasa and had kept these receipts in an envelope and he submitted the wrong receipts to the auditor leads to one question, why was the claimant keeping these receipts with him? why would he have excess receipts with him in an envelope instead of the subject file? Did he balance his books?
 35. In addressing a situation such as what the claimant faced, the court in the case of *Agnes Murugi Mwangi v Barclays Bank of Kenya Limited* [2013] eKLR held that in handling people's money and in order to maintain customer confidence, they must demonstrate a high degree of integrity and financial probity. For the claimant, he failed to give a proper account for monies given to him for canteen purchases. He cannot blame the employer for the action taken against him, termination of employment.
 36. Being in operations and accounting for the canteen funds, the response that some receipts had wrong amounts or dates amounting to Ksh. 76,550 and that he made local purchases without formal receipts and could not explain some expenses going back to the year 2014 whereas the claimant had held his office for over 6 years, his position did not allow for such lapses. He carried a higher responsibility as the accounting officer. He cannot fault the auditor in the findings.



37. The Claimant's conduct fell below this standard and I find that the Respondent had a valid reason for terminating his employment.
38. The claimant testified that he was employed as the human resource administrative assistant with duties to oversee canteen operations. So, all canteen operations were under his supervision and was required to account for all purchases and monies received from the respondent as part of his core duties. Ordinary performance reviews over the years may not have established these lapses since they are administrative until the financial audit was conducted. Figures speak for themselves.
39. With regard to due process, on 28th January, 2022 the respondent advised the claimant that a Disciplinary Committee had been constituted and would interview him. The claimant testified that on 3 occasions he invited to attend before the disciplinary committee and the outcome were recommendations to the respondent to consider the audit report and to consider the responses given by the claimant to the show cause notice and as outlined above, with sufficient grounds, employment was terminated by summary dismissal.
40. Without any evidence being called as to why such decision of summary dismissal was taken instead of any other less punitive sanction, notice pay is due.
41. The claimant was last earning Ksh. 96,088 which is due in notice pay.
42. The primary remedy sought by the claimant is that of reinstatement. As outlined above, the claimant was dealing with finances and out of which various monies were unaccounted for, different amounts were submitted with excess receipts, and some receipts had wrong amounts or dates. To return the claimant to the same position without loss of benefits would result in a great injustice. Reasons leading to termination of employment are found fair and justified, the order of reinstatement is not available.
43. In the alternative, notice pay is claimed and is already addressed as due.
44. The claim for 13 days' pay in June, 2022 is not challenged and hence due in terms of Section 18(5) of the Act where the employee has offered his labours to the employer, for days worked, whatever the reason leading to termination of employment, the wages are due is Ksh. 41,638.20.
45. On the claim for leave allowances, the claimant had just been issued with a new contract on permanent and pensionable terms. He was entitled to leave days but not allowances.
46. Certificate of service is due pursuant to Section 51 of the Act. such should issue upon clearance with the employer.
47. Accordingly, judgment is hereby entered for the claimant against the respondent in the following terms;
 - a. Notice pay Ksh. 96,088;
 - b. Pay for 13 days in June, 2022 Ksh. 41,638.20;
 - c. Certificate of service shall be issued; and
 - d. 50% Costs of the suit.

DELIVERED IN OPEN COURT AT MOMBASA THIS 18TH DAY OF MAY, 2023.

M. MBARŪ

JUDGE

In the presence of:



Court Assistant: Japhet Muthaine

..... **and**

