



REPUBLIC OF KENYA



KENYA LAW
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**Ochwang'u v Leafde Limited (Cause E072 of 2022)
[2023] KEELRC 1728 (KLR) (29 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1728 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E072 OF 2022**

M MBARŪ, J

JUNE 29, 2023

BETWEEN

ANDREW OPIYO OCHWANG'U CLAIMANT

AND

LEAFDE LIMITED RESPONDENT

JUDGMENT

1. On April 1, 2021 the respondent employed the claimant as head of finance and accounting at a gross salary of Ksh 107,350 per month. In October 2021 the respondent issued the claimant with notice of intention to terminate his employment with effect from October 31, 2021. The claim is that there was no hearing on the allegations made against him leading to unfair termination of his employment.
2. The claim is that the respondent subjected the claimant to harassment by using the police to arrest him and then refused to pay his terminal dues;
 - a. Pay until the last day worked Ksh 107,350;
 - b. 13 leave days Ksh 46,518;
 - c. 12 months compensation Ksh 1,288,200.
3. The claimant testified that upon employment by the respondent he was promoted and his salary increased but through letter dated July 17, 2021 he was issued with notice that his employment would be terminated without being given a hearing which was unfair and should have been paid for the full month, his due leave days paid for together with compensation and costs of the suit.
4. In response, the respondent's case is that the claimant was employed as head of office finance until July 17, 2021 when it was discovered that he had high irregularities with the finance department. Following audits and investigations, the respondent realised that there were extreme irregularities especially with pricing of items, solicitation from suppliers and casual workers and payment of invoices.



Further investigations revealed that the claimant was part of the gross atrocities conducted against the respondent leading to losses.

5. The matter was reported to Lungalunga Police Station and as a result the claimant was issued with notice of dismissal and paid all his terminal dues and the claims made should be dismissed with costs.
6. In evidence, the respondent called Irene Nyanchama Bogonko the manager who testified that the claimant was a former employee of the respondent and was tasked with administrative duties but he used his position to commit acts of commissions which led to losses. The respondent conducted an audit through Aason Solution that revealed that there were questionable transaction which included misapprehension of funds, over billing, price fixing, kickbacks or rigged valuations. The matter was reported to the police and the claimant charged at Msambweni Law Court.
7. The respondent also called Saema Salim Mohamed a managing partners with Aasan Solutions, an audit firm contracted to investigate and audit the finances following noted irregularities by the claimant. The firm investigated and covered bank transactions, cash transactions, fraudulent supplier invoices and bill together with payroll and projects and made findings that the claimant he committed financial malpractices by intentionally misrepresenting financial facts, there as fraud committed for personal needs, there was manipulation of payroll records with ghost payments some made through Mpesa and through fabrication. It was also established that the claimant had directed the store keeper to change records. To save the company from more losses, the auditors recommended a new accounting system be put in place together with a different payroll system to cut on manipulations. Internal controls were found weak hence the claimant was able to commit acts of fraud.
8. At the close of the hearing, both parties filed written submissions which are analysed and the issues which emerge for determination are whether there was unfair termination of employment and whether the remedies sought should issue.
9. The claimant does not contest that he was issued with notice terminating his employment on October 31, 2021 on the grounds that he had committed acts of gross misconduct through irregularities of financial impropriety and following an audit he was found culpable and was reported to Lungalunga police station and has since been charged with stealing by servant contrary to Section 281 of the [Penal Code](#) at Msambweni Law Courts in Criminal Case.
10. The claim is that following notice to terminate his employment, there was no hearing and this led to unfair termination of employment.
11. The undated letter that terminated the claimant's employment noted that your last working day shall be the 31st day of October 2021. the claimant would be paid for two months in lieu of notice less statutory deductions.
12. The claim is for payment of a full month salary which is paid based on the letter and notice that terminated his employment. There was provision for two months pay in lieu of notice. The claimant was only entitled to one month pay in lieu of notice based on his letter of employment.
13. Leave pay is due where the employee has not enjoyed his right in terms of Section 28 of the [Employment Act](#), 2007. As the employer, the respondent was required to keep work records where the claimant enjoyed such right or was paid *in lieu* therefore. Letter of employment provided for 1.75 days each month and the claim for 13 days pay for the period of employment is reasonable save it should be based on the basic pay and the claim for 46,518 is found justified.
14. With regard to the claim of unfair termination of employment, Section 44(3) and (4) of the [Employment Act](#), 2007 allow an employer to summarily dismiss an employee for breach of contract and



for gross misconduct. However, the employer must give the employee notice and allow the employee to give his response in terms of Section 41(2) of the Act which requires that;

- (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.
15. Hearing of the employer forms the mandatory procedures of the law. Even where the employer finds the employee to have committed serious matters of financial impropriety, due regard and due process directs that the employee be given a hearing even on short notice.
16. The minimum standard to the right to a hearing is also to ensure that the employee is allowed to have another employer of his choice present during such a hearing. In *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR, the court held that there is a mandatory and elaborate process set up under section 41 of the Act requiring notification and hearing before termination of employment. This is given emphasis in the case of *Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited* [2014] eKLR that part of the due process standards is to ensure the employee is given a hearing at the shop floor before employment is terminated.
17. In this case, the claimant was not given a hearing at the shop floor despite the respondent undertaking a comprehensive audit and reporting to the police at Lungalunga and the claimant being charged with a criminal case of stealing by servant at Msambweni law Court. There is nothing demonstrated as to why the respondent failed to adhere to this crucial step and legal requirements. This resulted in procedural unfairness.
18. In deciding what compensation is to be paid, the court is directed to look at the conduct and culpability of the employer in terms of Section 45(5)(b) of the *Employment Act, 2007*. the conduct of the claimant is of the nature that he has since been arrested for theft by servant. he does not contest that he has a criminal case ongoing at Msambweni Law Court. The offence relates to misappropriation of respondent's funds put under his stewardship. To award compensation would be to reward his gross misconduct and on the finding that there was procedural unfairness, an award of zero (0) compensation is hereby found appropriate.
19. Accordingly, judgment is hereby entered for the claimant against the respondent for payment of annual leave pay for 13 days at Ksh 46,518 less statutory deductions. Each party to bear own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 29 DAY OF JUNE, 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

