



**Okeyo v Bbox Capital Kenya Limited (Cause E045 of 2021)
[2023] KEELRC 1493 (KLR) (22 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1493 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E045 OF 2021
CN BAARI, J
JUNE 22, 2023**

BETWEEN

BENARD BERRY OKEYO CLAIMANT

AND

BBOX CAPITAL KENYA LIMITED RESPONDENT

JUDGMENT

Introduction

1. Before Court is the Claimant's Memorandum of Claim dated June 16, 2021, and filed on June 18, 2021. The Claimant seeks a declaration that his termination by the Respondent was unlawful and he be reinstated to his employment immediately without loss of any payments/benefits, unpaid salary for the days worked up to September 30, 2020, salary underpayment, accrued leave, holiday pay, damages for unlawful/wrongful termination, costs of the suit and interest.
2. The Respondent entered appearance and filed a Response to the Claimant's Memorandum of claim on August 10, 2021.
3. The Claimant's case was heard on March 8, 2022, followed by the Respondent's on May 31, 2022. The Claimant together with a Mr Ochuro and a Mr Otieno Fredrick, testified in support of his case. They adopted their witness statements, and produced documents filed in the matter as exhibits in the case.
4. The Respondent presented a Mr Munyao Kimathi, Vincent Chege and George Musamali to testify in its defence, and who similarly adopted their witness statements and produced documents filed in the matter in support of the Respondent's case.
5. Both parties filed submissions in the matter.



The Claimant's Case

6. The Claimant was engaged by the Respondent as a Retail Area Manager (Nyanza Province), in a contract of employment dated November 7, 2016, on a gross monthly salary of Kshs113,658.00.
7. It is the Claimant's case that he executed his duties and responsibilities with distinguished dedication, total commitment and industriousness. His duties he states included, ensuring all the Respondent's shops met their sales targets, installations and repossessions, developing a work plan and sharing the same with the retail managers, implementing marketing and sales strategies using the Retail supervisor, reporting on the performance of each shop to the retail manager and suggesting changes to the implementation plans.
8. The Claimant states that he did not have the obligation and duty to authorize replacement and swapping of the equipment for clients, and that these functions were the preserve of the Installation Officers, Shop Managers, Logistics Managers and Sales Agents.
9. It is his further case that due to the Respondent's mode of operations, he had no ability to know any equipment replacements done for the clients, and that he entirely relied on numerical data sent to him by the Shop Managers and which data had no specific details.
10. The Claimant states that during his term of service, he met and worked with several employees of the Respondent. It is his further case that sometime in the year, 2016, the Respondent made product disposal to its employees and staff members at discounted prices, and that a Mr Chrisant Ochuro, the Respondent's then logistics Manager, purchased thirteen BB 17 batteries, three 15 watts solar panels, more than 30 bulbs and a television set.
11. The Claimant states that Mr Chrisant Ochuro sold the items listed above to him at a total of Kshs10,000, and that he paid for the items in both cash and Mpesa. The Claimant further states that in March, 2020, he was gifted 3 bulbs by a Mr Kennedy Odhiambo, a Sales Agent, and that he had been awarded a complete solar system by the Respondent for being the best Sales Agent.
12. It is the Claimant's case that he installed this equipment at his adoptive mother's home, one Mrs. Pacifica Dero Kobe, sometime in the year 2017. The Claimant lists the specific equipment installed as 2 BB 17 Batteries manufactured in the year 2015, 2 15 Wats Solar Panels and 10 bulbs.
13. The Claimant states that in the year 2019, a Mr Fredrick Odongo, an Installation Officer with the Respondent, proceeded to the home of Mrs. Pacifica Dero Kobe and analyze the solar equipment and replaced the parts that were not functioning.
14. The Claimant states that he did not authorize the swap nor was he aware that the same had been done. He further states that Mr Fredrick Odongo specifically replaced and installed 2 Bbox Home Batteries manufactured in the year 2016 and a 250 Watts Solar Panel.
15. It is the Claimant's case that he did not purchase the equipment and was a total stranger to them. It is his further case that on August 22, 2020, queries were raised about the equipment described at paragraph 14, and that the Claimant, Mr Fredrick Odongo, Mr Chrisantus Ochuro and Mr Elijah Odhiambo were called upon to explain the same at a police station at Pap-Onditi.
16. It is his case that on or about September 30, 2020, the Respondent by a letter of even date, purported to terminate the employment of the Claimant and that by the same letter, the Claimant was advised that the termination was due to fraud and that he had fraudulently instructed Mr Fredrick Odongo, an installation Officer, to swap and replace equipment.



17. It is the Claimant's position that the Respondent's conduct did not follow due process, demonstrated bad faith, and that the investigations were not based on any material evidence and was not objective. The Claimant further states that Respondent's action, decision to interdict him was loop sided, skewed and biased as the Respondent deliberately chose to ignore the Claimants response to the allegations.
18. The Claimant states that the Respondent's actions complained of herein, have caused him tremendous hardship, embarrassment, anguish and humiliation, and he claims full compensation and/or damages as a result.

The Respondent's Case.

19. The Respondent states that it employed the Claimant on November 7, 2016, as a Retail Supervisor earning a monthly salary of Kshs44,389. It is its further case that in the year 2018, it promoted the Claimant to Retail Area Manager on a basic salary of Kshs113, 658.
20. The Respondent avers that the Claimant, as a Retail Area Manager (RAM), was responsible for sales metrics across a defined network of shops under his Job Description, being all retail shops in Nyanza Province.
21. The Respondent further states that the Claimant was responsible for technician's performance and was obliged to monitor technicians' performance against the objectives of the Respondent, and to take necessary actions.
22. The Respondent's investigation team proceeded to Karabondi Village in Homa Bay to carry out an investigation after they were tipped off by an informer that the Respondent's products had been illegally installed in a certain home in the village.
23. The Respondent states that the informer and the investigation team went to the home which turned out to be Ms. Pacifica Adero's, wherein, the team found two (2) control units serial No. CU0112-079862 and CU0112-048601-1, two (2) solar panels, thirteen (13) bulbs and thirteen (13) switches.
24. It is the Respondent's case that the products mentioned in paragraph 23, were being used by Ms. Adero, yet none of the items had been paid for or captured in the Respondent's products tracking system.
25. The Respondent states that when the Claimant became aware of the recovery of the Respondent's products at the home, and that he was the prime suspect, he attempted to compromise the Respondent's investigators by requesting them to stop the investigation since he was at risk of losing his job.
26. The Respondent states that its investigation team proceeded to investigate the matter nonetheless, and found that the Claimant had engaged in a fraudulent activity to the detriment of the Respondent by installing the Respondent's products at Ms. Adero's home without authorization. It is the Respondent's further case that Ms. Adero did not produce any documents to show that she had bought the Respondent's products that were recovered from her home.
27. The Respondent states that during the disciplinary hearing, the Claimant failed to explain why he had installed the Claimant's products at Ms. Adero's home and why the products were not recorded on the Respondent's system.
28. It is the Respondent's position that Ms. Adero, the Claimant, and Mr Fredrick Odongo, knew each other outside the "Customer-Seller" relationship.



29. The Respondent subsequently issued a Show Cause letter dated 6 August, 2020 to the Claimant to give reasons why disciplinary proceedings should not be instituted against him for installing the Respondent's products at Ms. Adero's home without authorization.
30. The Respondent states the Claimant responded to the show cause letter, wherein, he stated that Ms. Adero was his adopted mother and that he had installed the Respondent's products at Ms. Adero's home after purchasing them from a former employee of the Respondent.
31. The Respondent states that it was not satisfied with the Claimant's reply to the Show Cause letter because the Claimant did not produce any documentation of the alleged purchase of the Respondent's products that he had installed at Ms. Adero's home.
32. The Respondent states that it invited the Claimant for a disciplinary hearing on September 14, 2020, vide a letter dated September 11, 2020, and that the invitation letter informed the Claimant of the time and venue of the meeting and his right to be accompanied by a representative of his choice.
33. It is the Respondent's case that on September 14, 2020, the Claimant appeared before the Respondent's Disciplinary hearing committee with no representative, but nonetheless, the allegations stipulated in the show cause letter dated August 6, 2020, and outcome of the investigation were read out to him.
34. The Respondent states that the Claimant confirmed that he did the installation of the products on the Ms. Adero's premises but that he was unaware of the repossessed products found in the custody of the Ms. Adero.
35. It is the Respondent's case that due to the Claimant's unclear responses regarding how the Respondent's products got to Ms. Adero's home, his relationship with Ms. Adero, Fredrick Odongo, how he acquired the Respondent's products, and why he was attempting to compromise the investigation process, the Respondent invited the Claimant for a second disciplinary hearing on September 29, 2020, vide a letter dated September 25, 2020.
36. The Respondent states that on September 29, 2020, the Claimant appeared for the second disciplinary hearing and failed to satisfactorily respond to the Respondent's findings concerning his involvement in defrauding the Respondent. The Respondent further states that it is convinced that the Claimant used his position as a Retail Area Manager (RAM) to fraudulently instruct one of the Respondent's technicians named Fredrick Odongo to illegally and unprocedural install the Respondent's products at Ms. Adero's home.
37. The Respondent states that it issued the Claimant a summary dismissal letter on September 30, 2020, following the outcome of the disciplinary hearings held on August 6, 2020, and September 29, 2020, which letter expressly stated that he was dismissed for his involvement in defrauding the Respondent.
38. The Respondent further states that the summary dismissal letter issued to the Claimant indicated that the Respondent would pay all accrued and outstanding entitlements up to and including his last day of employment being September 30, 2020, leave days earned but not utilized, all welfare dues and further issue him with a certificate of service conditional on his clearance with the company.
39. The Respondent states that the Claimant appealed against its decision to summarily dismiss him and that it responded vide its letter dated November 4, 2020, upholding its decision and stating its reasons for doing so.



40. The Respondent avers that the Claimant has up to date wilfully neglected and failed to undertake the clearance procedure with the Respondent, hence making it difficult for the Respondent to assess the dues owed to him, if any, and to issue a Certificate of Service.

The Claimant's Submissions

41. The Claimant submits that his termination was substantively unfair because the Respondent lacked bona fide triable evidence of his participation in fraud as maliciously alleged to warrant his termination.
42. It is the Claimant's plea that this Honourable Court looks into the validity and justifiability of the reasons for termination by the Respondent. It is his further submission that the dismissal was not based on evidence of wrong doing but purely malice and bad faith. The Claimant sought to rely in *Muthaiga Country Club v Kudheiba Workers* [2017] eKLR, to support this position.
43. It is the Claimant's humble submission that this Honourable Court makes a finding that there was in fact no justification for his termination and that the actions of the Respondent display a case of unlawful termination.
44. It is the Claimant's prayer that this Honourable Court awards this claim as prayed for.

The Respondent's Submissions.

45. The Respondent submits that there was a sufficient reason for the Respondent to suspect that the Claimant had instructed/authorized Fredrick Odongo, an installation officer to replace the faulty products in the home of their aunt. The Respondent had reliance in *Thomas Sila Nzivo v Bamburi Cement Limited* [2014] eKLR, to buttress this position.
46. It is submitted for the Respondent that in the circumstances of this case, the question before this Court ought to be whether it was reasonable for the Respondent to dismiss the Claimant. The Respondent placed reliance in the case of John Jaoko Othino v Intrahealth International [2022] eKLR where the Court relied on the test of reasonableness as set out by Lord Denning in the case of *British Leyland UK Ltd v Swift* (1981).
47. It is submitted that the Respondent had a fair and valid reason for terminating the Claimant's employment since he was adversely linked to the fraudulent activities committed against the Respondent.
48. It is further submitted that the Respondent's grounds for dismissing the Claimant pass the reasonable test, as any reasonable employer would dismiss the Claimant based on the evidence provided linking him to the fraud.
49. The Respondent submits that there was indeed a valid reason for termination under Section 44(4) (g) of the *Employment Act*, as the Respondent dismissed the Claimant from employment on the basis of the employer's investigations and findings, which were adequate in the circumstances to amount to a reasonable and sufficient ground to conclude that the employee had committed fraud against the employer.
50. The Respondent submits that the Claimant was issued with a notice to show cause with details of the accusations that were being levelled against him, he was invited to respond to the letter, he was invited to attend a disciplinary hearing, he was accorded an opportunity to exercise his statutory right to accompaniment and the panel considered his representations before making the decision to summarily dismiss him.



51. It is the Respondent's further submission that the termination of the Claimant's employment adhered to the provisions of Section 41 of the *Employment Act*.
52. The Respondent submits that an order for reinstatement is a discretionary remedy that ought to be withheld unless on very exceptional circumstances being shown by the employee. It sought to rely in the case of *Kenya Plantation and Agricultural Workers Union v Unilever Tea Kenya Limited* (Cause E009 of 2021) [2022] KEELRC 1321 (KLR) (27 July, 2022) (Judgment) to support this position.
53. It is the Respondent's further submission that no evidence was led by the Claimant to show that reinstatement is an appropriate remedy in the circumstances of this and as per the considerations listed under Section 49(4) of the *Employment Act*.
54. The Respondent submits that the Claimant having been terminated on ground of fraud, there is little to no chance that he could be reunited with the Respondent and rebuild an employment relationship based on mutual trust, confidence and respect taking into account the circumstances of the Claimant's termination, and the amount of time that has since passed. The Respondent had reliance in *O. K. M. N. v Presbyterian Foundation & another* [2014] eKLR where a prayer for reinstatement was declined for this reason.
55. It is finally submitted that the Respondent has satisfactorily proven that the reason for terminating the Claimant's employment was both fair and valid, and that the Respondent has demonstrated that it followed due process when terminating the Claimant's employment.

Analysis and Determination

56. I have considered the pleadings herein, the witnesses' oral testimonies and the rival submissions. The issues for determination are:
 - i. Whether the Claimant was unfairly dismissed.
 - ii. Whether the Claimant is entitled to the reliefs sought.

Whether the Claimant was unfairly dismissed

57. The Claimant's contention is that he was unfairly dismissed from the service of the Respondent. The Respondent on its part, argues that it had a fair and valid reason for terminating the Claimant since he was adversely linked to the fraudulent activities committed against the Respondent.
58. Termination/dismissal from service under *the Constitution* and the *Employment Act*, 2007, requires that an employer meets a just cause standard by prioritizing fair treatment of an employee it considers dismissing for an act of misconduct. To achieve this, an employer must adhere to the provisions of Sections 41, 43, and 47(5) of the *Employment Act*, 2007, on procedural fairness and substantive justification for the termination/dismissal.
59. Section 41 of the *Employment Act* states thus on procedural fairness: "41(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."
60. To determine whether the Respondent adhered to fair procedure in dismissing the Claimant, the Court will analyze the process adopted vis-a-vis the requirements of Section 41 of the *Act*.



61. The Respondent's position is that it issued the Claimant with a show cause letter detailing the charge against him and requiring him to respond to the letter. The Claimant told the Court on cross-examination, that he was indeed issued with a show cause letter and which he responded to. The Claimant further confirmed being invited to appear before a disciplinary committee and that he was informed of his right to be accompanied by a representative of his choice.
62. The Claimant again confirmed having been suspended on full pay to allow for investigations to be conducted. It is his further testimony that he appealed against the Respondent's decision to dismiss him from service. In *Hosea Akunga Ombwori v Bidco Oil Refineries Limited* (2017) eKLR the Court expounded on the provisions of Section 41 thus:
- “To satisfy the requirements of Section 41 of the *Employment Act*, 2007, an employer issues what is called in ordinary parlance a show cause notice/letter. Such a letter or notice should outline the allegations or charges against the employee and also request him to respond within a reasonable time.
27. The notice also ought to inform the employee that disciplinary action which might lead to termination of employment is under consideration. In other words, the notice should be set out in clear terms”.
63. Further in *Philip Kimosop v Kingdom Bank Limited* (2022) eKLR, the Court held that the Respondent's action of serving a show cause letter to the Claimant, inviting the Claimant to an oral hearing, giving the Claimant the right to call witnesses, produce documents and also be represented by another employee at the hearing constituted fair procedure.
64. From the foregoing, it is evident that the Respondent meticulously adhered to the tenets of fair process in arriving at the decision to summarily dismiss the Claimant.
65. I thus find and hold that the Claimants dismissal is procedurally fair.
66. On whether the Respondent had valid reasons to dismiss the Claimant, the Respondent's told the Court that it dismissed the Claimant premised on an investigation that revealed that its products were found in possession of one Pacifica Adero Kobe, a relative of the Claimant, and which products had neither been paid for nor captured in the Respondent's tracking system.
67. In *John Jaoko Othino v Intrabealth International* [2022] eKLR, the Court while relying on the test of reasonableness set out by Lord Denning in the case of *British Leyland UK Ltd v Swift* (1981), held that the test of reasonableness would be to answer the question, was it reasonable for the employer to dismiss the employee? And proceeded to state that if no reasonable employer would have dismissed the employee, the dismissal would be unfair, but if a reasonable employer might reasonably dismiss him, then the dismissal would be fair.
68. It is now for this Court to evaluate the circumstances and/or reasons under which the Claimant was dismissed, and reach a finding of whether the Respondent reasonably arrived at the decision to dismiss the Claimant.
69. Section 45 of the *Employment Act*, provides that a termination is unfair if the employer fails to prove that the reasons for termination are valid and fair. Further, the ILO Convention 158 of 1982, provides that an employee shall not have his contract terminated unless there is a valid reason.



70. In determining validity of reasons for termination, an employer must believe at the time of termination that an employee is guilty of the allegations against him; that he has reasonable grounds to sustain the believe, and that he carried out investigation in respect of the charges.
71. The Claimant told this Court that he was responsible for performance and retail supervision of the Respondent's business in the larger Nyanza region. He also confirmed that Mrs. Pacifica is his adopted mother. It is his position that although he was gifted some items by Fredrick, he had no documents to prove that Fredrick was given the bulbs. He further confirmed that the installation he alleges to have made at his adoptive mother's house was not recorded in the Respondent's tracking system
72. In Nyeri Civil Appeal No. 79 of 2016 *Kenya Power and Lighting Company Limited v Agrey Lukorito Wasike*, the Court in underscoring the proviso to Section 43 held that: -

“In the present case, it seems quite clear from the evidence on record that KPLC believed, and had ample and reasonable basis for so believing, that Wasike had attempted to steal cable wire from KPLC stores which he was in charge of. That being the case, we think the learned Judge plainly erred in entering into a detailed examination of whether or not the 300 metres of cable wire were part of the 1,100 metres that were being legitimately removed from the store, as well as an examination of whether or not there was sufficient documentation in proof of the discrepancy, and the like.

“It was enough, we think, that the gateman found cables that were concealed and should not have been getting out of the stores.

Wasike was unable to explain that anomaly to the satisfaction of his superiors or the disciplinary committee. That provided KPLC with a reasonable basis to act as it did and it is improper for a court to expect that an employer would have to undertake a near forensic examination of the facts and seek proof beyond reasonable doubt as in a criminal trial before he can take appropriate action subject to the requirements of procedural fairness that are statutorily required. The learned Judge was wrong to find that the termination was unfair for want of valid reasons”

73. In the same breath, the Respondent's products were found in possession of the Claimant's relative who did not have prove of purchase. The Claimant told the Court that he had installed the Respondent's products at Pacifica Adero's home after purchasing them from a former employee of the Respondent, but did not produce any documentation as evidence of purchase of the Respondent's products that he had installed.
74. The items said to have earlier been bought by the Claimant were not listed in the Respondent's tracking system. Further the Claimant told the Court that Mr Ochuro who is said to have sold the items and Fredrick Odongo who did the installation, all reported to him.
75. In my view, the Respondent had a reasonable basis to believe that the Claimant acted fraudulently and hence a valid, fair and justified reason to dismiss.
76. Consequently, I find and hold that the Claimant's dismissal is procedurally and substantively fair.
77. The Claimant confirmed that he cleared with the Respondent and was paid a total of Kshs 60,000.

Whether the Claimant is entitled to the reliefs sought

78. The Claimant's prayers to this court is a declaration that his termination by the Respondent was unlawful and he be reinstated to his employment immediately without loss of benefits; unpaid salary



for the days worked up to September 30, 2020; salary underpayment; accrued leave; holiday pay; damages for unlawful/wrongful termination, costs of the suit and interest.

79. Having reached a conclusion that the Claimant's dismissal was fair, the prayer for a declaration of unfair termination fails, and so does the prayer for reinstatement.
80. On the prayer for unpaid salaries up to September 30, 2020, although the Respondent's position is that the Claimant did not clear and hence non-payment of his dues, the Claimant at cross-examination told the Court that he actually cleared and was paid Kshs 60,000.00
81. It is however not clear what the pay of Kshs 60,000.00 was for, as neither party told the Court on what account the money was paid. This said, the Claimant was dismissed on 30th September, 2020. He was thus entitled to payment of salary for the month of September, 2020, and there being no prove that the money was paid, the claim for unpaid salary succeeds in respect of September, 2020.
82. The Claimant did not lead any evidence to show that he was under paid. The claim for underpayment thus fails and is dismissed.
83. Although the Claimant did not show that he did not utilize his leave, the Respondent being the party with the obligation to keep employee records, did not prove that the Claimant took his leave. The Claimant is awarded one-month salary on account of leave not taken.
84. The claim for holiday pay was equally not proved and is hereby dismissed.
85. In whole, I make orders as follows:
 - a. That the Respondent pays the Claimant salary for September, 2020, at Kshs113,658.00
 - b. That the Claimant be paid One-month salary on account of accrued leave at Kshs 113,658.00
 - c. That the total awarded herein, be made less Kshs 60,000.00 admittedly paid to the Claimant.
 - d. The Respondent unconditionally issues the Claimant with a certificate of service
 - e. The suit having partially succeeded, parties shall bear their own costs of the suit.
86. Judgment of the court.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 22ND DAY OF JUNE, 2023.

CHRISTINE N. BAARI

JUDGE

Appearance:

Ms. Onsongo present for the Claimant

Ms. Mugenyu present for the Respondent

Christine Omollo- C/A

