



**Muleyi v Kenya Airports Authority (Cause 1086 of 2017)
[2023] KEELRC 2020 (KLR) (31 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2020 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1086 OF 2017
SC RUTTO, J
JULY 31, 2023**

BETWEEN

CALEB MULEYI CLAIMANT

AND

KENYA AIRPORTS AUTHORITY RESPONDENT

JUDGMENT

1. Through a Statement of Claim, dated 13th June, 2017, the Claimant avers that he was employed by the Respondent as an Accounts Clerk starting 1st December, 2011. He further avers that he was terminated on or about 7th September, 2015, on account of failure to bank revenue on time. Terming his termination as unfair and unlawful, the Claimant seeks against the Respondent the sum of Kshs 851,409.00 being one month's salary in lieu of notice and compensatory damages. This is in addition to a prayer for a declaration that his termination was unlawful, unfair and illegal. He further seeks an order for issuance of a Certificate of Service.
2. Opposing the Claim, the Respondent contends that the Claimant was dismissed on account of gross misconduct hence is not entitled to compensation for unfair termination as there were valid reasons for his termination and he was given a chance to be heard.
3. The matter proceeded for part hearing on 2nd May, 2022 and subsequently on 21st March, 2023 when the defence side closed its case, thus marking the end of the trial.

Claimant's Case

4. The Claimant testified in support of his case. At the outset, he sought to adopt his witness statement and the documents filed together with his Claim, to constitute his evidence in chief.



5. It was the Claimant's testimony that his duties included but not limited to verifying the accuracy of invoices and other accounting documents or records, update and maintain ledgers and other records detailing financial business transactions among others.
6. Recounting the events leading upto his termination from employment, the Claimant stated that he was interdicted on 4th May, 2015 on account of delaying to remit a client's money into the Respondent's account. The monies had been issued to him by the client while he was off duty and as such, he could not remit the same in time until when he resumed duty. He later went to the office and handed over the money.
7. It was his evidence that the Respondent having interdicted him, purported to conduct disciplinary proceedings on 30th April 2015, 29th July 2015 and 10th August 2015 in which proceedings, representatives from his union were locked out. As such, he was not afforded a fair hearing and neither was he given an opportunity to defend himself in the said proceedings.
8. He further averred that he wrote a letter dated 15th September, 2015 to the Respondent raising complaints against one Peter Wafula, the Airport Manager, Eldoret International Airport touching on victimization, abuse of office and misuse of power which gave rise to his interdiction. However, the Respondent neglected and/or refused to investigate the allegations.
9. He subsequently sought independent legal advice and engaged the firm of Masika & Koros Advocates who issued the Respondent with a demand letter dated 24th April, 2017 but the same did not elicit any response.
10. He was advised by his advocates which advise he verily believe to be true that the procedure adopted by the Respondent in reaching the decision to terminate him was unfair as he was not granted a fair hearing and neither of his union representatives were allowed in the proceedings.
11. It was the Claimant's further evidence that no notice of termination of his service was issued except for the letter dated 7th September, 2015 purporting to have terminated his services on 11th August, 2015 without an option of appealing against the said termination.
12. Closing his testimony in chief, the Claimant asked the Court to order compensation for his unfair termination from employment.

Respondent's case

13. The Respondent called oral evidence through Ms. Jacinta Wafubwa who testified as RW1. She identified herself as the Manager, Employee Relations, of the Respondent. She started by adopting her witness statement to constitute her evidence in chief. She proceeded to produce the documents filed on behalf of the Respondent as exhibits before Court.
14. According to RW1, her testimony was based on personal knowledge of the Respondent's policies, practices, operations and documentation in the Claimant's personnel file.
15. It was RW1's evidence that on 14th May, 2014, the Respondent received a complaint from one of its customers stating that he had paid the Claimant Kshs. 9,000/= but the same was never receipted. The Claimant responded to this complaint by admitting that he had not followed the laid down Standard Operating Protocols (SOP's) by failure to issue the receipt in time. The Respondent convened a disciplinary hearing to discuss the Claimant's breach of protocol and he again admitted to the breach and sought forgiveness. He was issued with a warning letter and informed him that future contravention of policy would attract severe disciplinary action.



16. RW1 further stated that on 17th April, 2015, the Respondent received a complaint from its customer by the name Amir Roses stating that it paid the Claimant Kshs 27,000/= but was not issued with a receipt. The Respondent's Airport Accountant issued a show cause memo to the Claimant seeking an explanation on why the client's money had not been receipted.
17. The Claimant responded in writing and admitted violating the Respondent's Finance SOP by retaining the complainant customer's payment.
18. The Respondent convened a preliminary meeting on 30th April, 2015 in the Claimant's presence to ascertain the facts of the complaint. The panel determined that the Claimant was culpable for violation of its policies and that he had been warned before of a similar breach hence resolved to interdict him.
19. The Claimant was interdicted on 4th May, 2015 pending further investigations. He was called to a disciplinary hearing on 29th July, 2015 where he was accorded an opportunity to defend himself. The disciplinary committee met on 10th August, 2015 and resolved to terminate the Claimant's employment with the Respondent immediately.
20. The Claimant who was summarily dismissed on account of gross misconduct on 7th September, 2015, appealed his termination and after deliberation, the appeals committee resolved to uphold his termination.
21. RW1 contended that there were valid reasons for the Claimant's termination and that due process was followed to the letter.
22. It was her further evidence that the Claimant was paid all his terminal dues.

Submissions

23. It was submitted on behalf of the Claimant that the reason for which he was terminated was not valid as the termination letter read that he was summarily dismissed "on grounds of gross misconduct". It was further submitted that the Claimant was not found guilty of any of the actions listed under the provisions of Section 44 (4) of the *Employment Act* and that nothing would have been easier than for the Respondent to supply a contract, manual or policy indicating that the allegations against him warranted summary dismissal.
24. In further submission, it was stated that the Respondent's customers had a habit of paying for services and walking away without receipts. That this was a culture and a custom entertained and condoned by the Respondent otherwise there is no logical explanation as to why the Respondent's customers would pay such large sums of money and leave comfortably at the teller/clerk without receipts only to come days later and lodge a complaint. That this custom became weaponised to the Claimant's detriment.
25. It was further submitted that the Claimant's termination from employment did not follow due procedure as he was ambushed with disciplinary hearings and the Respondent did not file a copy of a single show cause notice as evidence.
26. It was further contended that the Claimant was not represented by a union member or an employee of his choice in the disciplinary hearing that purported to terminate his contract. In support of the Claimant's submission, reference was made to the case of Cooperative Bank of Kenya Limited vs Banking Insurance & Finance Union (K) (2017) eKLR.
27. On its part, the Respondent submitted that the Claimant by his own admission breached the fundamental terms of contract as provided for under Section 44(1)(3) of the *Employment Act*. That by retaining monies owed to it, the Respondent had a reasonable apprehension that the Claimant had



intended to defraud it which was a criminal offence. The Respondent further maintained that the Claimant breached its policies either wilfully or negligently therefore the reasons for his termination were valid as required under Section 45(2)(a) of the Employment Act.

Analysis and determination

28. I have considered the pleadings on record, the evidence, as well as the rival submissions and isolated the following issues for determination:
- i. Whether the Respondent has proved that there was a justifiable reason to terminate the employment of the Claimant;
 - ii. Was the Claimant accorded procedural fairness prior to being terminated from employment?
 - iii. Is the Claimant entitled to the reliefs sought?

Justifiable reason?

29. Sections 43(1) and 45 (2) (a) and (b) of the Employment Act (Act) are significant in resolving this question. First, an employer is required to prove the reasons for an employee's termination and failure to do so, such termination is deemed to be unfair. That is not all. In terms of Section 45 (2) (a) and (b) of the Act, an employee's termination from employment is unfair if the employer fails to prove-
- a. that the reason for the termination is valid;
 - b. that the reason for the termination is a fair reason-
 - i. related to the employees conduct, capacity or compatibility; or
 - ii. based on the operational requirements of the employer; ...
30. The foregoing is what is essentially referred to as substantive justification.
31. It is also worth noting that the question of fairness and validity is quite subjective and can only be determined on a case by case basis. Indeed, in terms of Section 43 (2) of the Act, the reasons resulting in an employee's termination must be matters the employer genuinely believed to exist at the time of termination.
32. Turning to the instant case, the Claimant was terminated from employment on grounds of gross misconduct. From the record, it is apparent that the Claimant's termination stemmed from a complaint by one of the Respondent's clients by the name Amir Roses Ltd. This was following an allegation that the said client gave the Claimant Kshs 27,000.00 on 2nd April, 2015 as part payment of an outstanding amount of Kshs 126,000.00 owed to the Respondent.
33. In support of its case, the Respondent exhibited a copy of the written complaint from the customer dated 17th April, 2015. The said complaint reads as follows:
- “We paid Kshs 27,000/= to KAA as part payment fee and we have not been issued with a receipt payment to Caleb Muleyi in cash on 2/4/15.”
34. The complaint record further indicates under the “investigation part” that:
- “The money paid of Kshs 27,000/= has not been received via KAA SAP system and even the Manual systems Amir paid Kshs 18,000/= to KAA on 2/4/15 at 3:55 pm. Caleb claims it is the only money paid to him. This is the complaint from the client of the officer.”



35. What is notable is that the Claimant did not deny receiving the money from the Respondent's client. Through his written explanation dated 21st April, 2015, the Claimant further admitted violating the Respondent's Finance SOP by retaining the money paid by the client for the duration he did. His written explanation reads in part:

“RE: Customer Complaint -amir Roses

The client gave me shs 27,000 as part payment of shs 126,000 to clear the full payment of two trucks. I remained with shs 9,000 of which I have surrendered to be deposited in authorities(sic) account. I remained with the amount so that I would deposit the following week on his payment of shs 27,000 as it had been agreed upon for weekly payment, which I violated the Finance SOP having remained with the client's cash period for that period.

I do hereby ask for forgiveness for having gone against the organization's stipulated Finance SOP. I humbly say sorry because I did not have negative intention against the client's and organization's cash paid..”

36. The Claimant's explanation for retaining the money was that he received the same from the client while on off duty and that he had the intention of banking the same. The Claimant's explanation notwithstanding, it is noteworthy that he received the money from the Respondent's client on 2nd April, 2017 and as at 17th April, 2017, when the client lodged the complaint, he was yet to bank the same. The intervening period was close to two weeks. One wonders why he retained the money for that long? In addition, the Claimant admitted that he banked Kshs 18,000.00 and retained Kshs 9,000/= . Again, one wonders why he would bank part of the money received from the client and retain the balance? Why did he not bank the entire amount?
37. Indeed, the Claimants' admission in itself through his written explanation was a damning indictment on his conduct. This is taking into account that he admitted violating the Respondent's Finance SOP thus further confirming that he was aware of the same.
38. Further, this was not the Claimant's first incident as the record bears that he had been caught up in a similar incident in 2014.
39. It is not in doubt that the allegations leading to the dismissal of the Claimant from employment bordered on dishonesty and lack of trust in the employment relationship. By the very nature of the Claimant's duties, trust and honesty were a very essential ingredient in the employment relationship as his work entailed receiving money from the Respondent's clients.
40. It was therefore expected that he would always render an accurate account of every coin collected on the Respondent's behalf. It thus follows that by the Claimant retaining the Respondent's client's money for a considerably long period of time without receipting and not accounting for the same until prompted, fundamentally dented the trust the Respondent had bestowed on him.
41. As was held in the case of *McKinley vs BC Tel.* (2001) 2 S.C.R. 161:

“Whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More Specifically the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship,



or is fundamentally or directly inconsistent with the employee's obligations to his or her employer.”

42. Applying the above determination to the case herein, I am persuaded that the level of trust the Respondent had in the Claimant dwindled significantly following the incident, and moving forward, the Respondent would have found it difficult to trust him with collection of its revenue. In turn, this would have affected the Claimant's performance of duty in a fundamental way.
43. As stated herein, Section 43(2) of the Act, provides that the reason or reasons for termination of an employee are matters that the employer at the time of termination, genuinely believed to exist, and which caused the employer to terminate the services of the employee.
44. Given the circumstances presenting herein, it is evident that by his own admission, the Claimant gave the Respondent a reason to genuinely believe that he was being dishonest in the manner in which he was handling its revenue.
45. From the way I see it, a reasonable employer in the Respondent's shoes would have let go of the Claimant if faced with similar circumstances. The trust it had bestowed on him had been significantly eroded and seemingly, termination of the Claimant was the most reasonable decision it could make, as an employer confronted with the circumstances at hand.
46. On this issue, my thinking aligns with the determination in the case of *British Leyland UK Ltd. vs Swift* [1981] IRLR 91 where it was held that:

“The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which an employer might reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him.”

47. In total sum, I am of the considered view that the Respondent has proved that the reasons for the Claimant's dismissal were valid, fair and related to his conduct thus warranting his summary dismissal. The Respondent thus had a justifiable cause to terminate the Claimant's employment.

Procedural fairness?

48. The requirement for fair procedure is generally provided for under Section 45 (2) (c) of the Act. Further, Section 41 (1) of the Act makes specific requirements in regards to the process to be complied with by an employer. It entails notifying the employee of the allegations levelled against him or her and granting him or her the opportunity to make representations in response to the said allegations in the presence of a fellow employee or a shop floor union representative of own choice.
49. In the instant case, it is evident from the record that the Claimant was asked to give his written explanation on 20th April, 2015. He responded on 21st April, 2015, and on 30th April, 2015, he appeared before a disciplinary panel where he was given an opportunity to state his side of the story. It was after this hearing that he was interdicted from employment. He was further heard in person by a disciplinary panel convened on 29th July, 2015.



50. The Claimant's contention is that in all the three instances, he was heard by the Respondent's disciplinary panels, he was not allowed representation by his Union.
51. In my view, the Claimant was given adequate opportunity to defend himself and absence of a union representative at the disciplinary hearing did not diminish the quality of the process.
52. I must add that what is important from the provisions of Section 41 of the Act, is that the Claimant was notified of the allegations against him in a language he understood, given opportunity to respond and appear in person before the Respondent's disciplinary committee.
53. In the circumstances, I am satisfied that the Respondent complied with the spirit of Section 41 of the Act hence the disciplinary process was procedurally fair.
54. In total sum, I find that the Claimant's dismissal was not unfair and unlawful.
55. It is also notable that the Claimant has also attributed the disciplinary action against him to one of his supervisors, by the name Peter Wafula, who he had lodged a complaint against. From the record, it is evident he only raised this issue on 15th September, 2015, after his dismissal. As it is, he never raised the same during the hearing and in his written explanation. Besides, he made an express admission of the allegations levelled against him in his written explanation dated 21st April, 2016. Therefore, his complaint against his supervisor seem like an afterthought.

Reliefs?

56. As the Court has found that the Claimant's dismissal was not unfair and unlawful, the claim for notice pay and compensatory damages, fall.

Orders

57. In the final analysis, I find that the Claimant is not entitled to the prayers sought hence I dismiss the Claim in its entirety with an order that each party bears its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JULY, 2023.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Okunga

For the Respondent Mr. Masese

Court Assistant Abdimalik Hussein

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 March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of



Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

