



**Wangui v Unaitas Sacco Limited (Cause 1716 of 2017)
[2023] KEELRC 2022 (KLR) (31 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2022 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1716 OF 2017**

**SC RUTTO, J
JULY 31, 2023**

BETWEEN

DANIEL THEURI WANGUI CLAIMANT

AND

UNAITAS SACCO LIMITED RESPONDENT

JUDGMENT

1. The instant suit was commenced by way of a Memorandum of Claim filed on 30th August, 2017 through which the Claimant avers that he was employed by the Respondent on 4th June, 2012 as a Graduate Trainee. He further states that after successful completion of his Graduate Trainee Programme, he was appointed as a Credit Officer on 16th May, 2013 and posted to Kanyenyaini Branch where he served until 30th July, 2014. He was later transferred to the Respondent's Ongata Rongai Branch where he reported on 1st August, 2014 as a Credit Controller. He has attributed this to his dedicated service at the Respondent's Kanyenyaini Branch. The Claimant further states that in late December, 2015, he received a letter of appointment to the position of Credit Administrator in charge of the Branch's Credit Department. As it would be, the Claimant's growth momentum at the Respondent organisation was interrupted as he was issued with a suspension letter dated 15th July, 2016. The letter of suspension made reference to an audit report which according to the Respondent, cast doubt on the Claimant's integrity and compliance to lending procedures. This was to mark the beginning of the end of his employment relationship with the Respondent as he was subsequently terminated from employment through a letter dated 24th November, 2016.
2. It is against this background that the Claimant seeks from the Respondent, the sum of Kshs 2,014,652.00 being compensatory damages, unpaid salary during the period of his suspension, notice pay, pay in lieu of untaken leave days, gratuity for 3 years and service pay. In addition, he seeks a declaration that his dismissal from the Respondent's employment was unprocedural, unfair and



unlawful. He further seeks general and aggravated damages as well as an order for the issuance of Certificate of Service.

3. In response to the Claim, the Respondent avers that the Claimant was dismissed for losses it incurred through his negligence in refinancing of defaulted loans, splitting loans to the disadvantage of the lender, negligence in providing unsecured loans and compromising on member due diligence. The Respondent further contends that the Claimant was accorded a fair hearing subject to the law and its Human Resource Policy. The Respondent has further termed the Claimant's Claim as grossly exaggerated only designed to abuse the process of the court.
4. The matter proceeded for hearing on 14th March, 2023, during which the Claimant testified in support of his case while the Respondent elected not to call oral evidence.

Claimant's Case

5. At the outset, the Claimant adopted his witness statement to constitute his evidence in chief. He further produced the documents filed together with his Claim as exhibits before Court.
6. It was the Claimant's evidence that he was the first employee to serve in the position of Credit Administrator at the Respondent's Ongata Rongai Branch. Being the pioneer employee in the said position, presented new challenges including the issue of developing a working system that put into consideration the new form of administration of the credit department at the said Branch as well as becoming a supervisor to his colleagues, the credit officers, who had known him as a Credit Officer since August, 2014.
7. The Claimant further testified that as a Credit Administrator, he was to supervise 4 credit officers while also assisting the Branch Manager in coordinating and managing the credit department at Ongata Rongai Branch.
8. He averred that his staff Balanced Score Card (BSC) appraisal reports for Quarter one 2016 and Quarter two 2016 as signed by his supervisor, confirms that he was doing quite well in his new role and did not have any issue to call for disciplinary action.
9. He continued performing his duties and responsibilities until he was issued with a suspension letter on 15th July, 2016, through the Respondent's Human Resource office which cited an Audit Report of Rongai Branch and in most specific, cited non compliance to lending procedures.
10. According to the Claimant it was very unfair and humiliating when as a dedicated employee of the Respondent, he was suspended from employment for almost 5 months with no pay and without being informed specifically what wrong he had done so that he could formally respond to any of the specific allegations.
11. It was the Claimant's further testimony that he was called by the Respondent's receptionist on Friday, 28th October, 2016 informing him that a meeting was to be held on Tuesday, 1st November, 2016 at 12.30 p.m. According to the Claimant, he was not given any detail of what was the purpose of the meeting and he did not know that the said meeting would turn out to be a disciplinary hearing. His expectation for a fairly representative disciplinary committee panel would have comprised of at least a staff member from the audit team since the Audit Report in question came from that department, the Human Resource team and Head office Credit team.
12. From his observation during the hearing, it seemed that everything had long been concluded and it looked like it was just a matter of fulfilling the required procedure as his fate had been long decided.
13. He later received a letter of termination dated 16th November, 2016.



14. The Claimant further contends that he was not issued with a show cause letter despite the Respondent's Human Resource policy which states clearly that a formal disciplinary procedure should start with a show cause letter.

Respondent's Case

15. As stated herein, the Respondent elected not to call oral evidence hence its case remained as per its Response filed on 6th March, 2016.

Submissions

16. It was the Claimant's submission that the Respondent did not at all prove or attempt to prove that the reason for terminating him was valid and fair as required in Section 43 of the *Employment Act*. He further argued that a verdict against him was made in the most unfair manner having been denied the requisite information which would have enabled him respond to the allegations.
17. The Claimant stated in further submission that that the Respondent entirely charged him arising from the findings of a report which they kept a secret right from the day he was suspended up to termination. He regarded this as patently unfair. He contends that the only conclusion that can be drawn is that the allegations in the suspension letter and the termination letter were trumped up charges geared towards ensuring that he was kicked out by all means. In support of this position, the Claimant placed reliance on the cases of *Lawrence Lien Shoono vs East Africa Portland Cement Company Limited* [2018] eKLR and *James Andako vs National Industrial Training Authority* [2021] eKLR.
18. On the question of procedure, the Claimant submitted that the circumstances of this case show that the Respondent followed a process unknown in law which was contrary to fair labour practices. He termed the process as calibrated whose final outcome was known to the Respondent no matter how he belaboured to address the allegations against him. In his view, the process was meant to terminate one of its best performing employees whose career trajectory was upwards in the company. To this end, he submitted that the Respondent disregarded its own Human Resource Manual to blindly terminate him by all means while also disregarding the provisions of Section 41 of the *Employment Act*. On this score, he sought to rely on the case of *Charles Muthusi Mutua vs Katbi No Kakoka Services Limited* [2022] eKLR.
19. He further contended that he was put on suspension and was never issued with a Notice to Show Cause informing him of an impending termination of his employment. That the suspension letter did not make any reference to conclusive findings that he had performed those allegations as it pointed out to further investigations meaning that the Respondent had not clearly established his culpability. He further argued that the suspension letter did not also require him to respond to the allegations explaining his role or conduct in the allegations and whether those allegations were true or not.
20. It was his further submission that he was not properly invited to a disciplinary hearing and informed of his right to be accompanied by another employee of his choice or his shop floor trade union representative. That the purported invitation for him to a meeting that he did not know its nature cannot therefore suffice as a hearing within the confines of Section 41 of the *Employment Act* 2007. According to the Claimant, the hearing was merely seeking to sanitize a decision that had long been made. To buttress this position, the Claimant made reference to the cases of *Sabina Mutua vs Amedo Centre Kenya Limited* [2017] eKLR, *Andrew K. Tanui vs Postal Corporation of Kenya* (2014) eKLR and *Ken Aluoch vs Postal Corporation of Kenya* (2016) eKLR.



21. On its part, the Respondent submitted that it had all reasons to terminate the services of the Claimant. Placing reliance on the case of *Kenya Revenue Authority vs Reuwel Waithaka Gitahi & 2 others* [2019] eKLR, it reiterated that it had all the reasons to subject the Claimant to disciplinary hearing and eventual termination, having failed to follow policies and procedures of the organization through non-compliance and portraying a high level of gross negligence.
22. Citing the case of *Jacob Juma Makokha vs Radar Security (K) Limited* [2018] eKLR, the Respondent termed the Claimant's actions as constituting gross misconduct warranting summary dismissal as contemplated under section 44(4) of the *Employment Act*.
23. With regards to the issue of procedure, the Respondent submitted that it followed the proper administrative procedure in termination. It was its submission that the Claimant was suspended on 15th July, 2016 pending investigation and further action after failing to give a justified explanation for the reasons of termination. That in the circumstances, it was necessary to suspend Claimant as a preventative measure against any further actions to the detriment of the employer.
24. Still on the same issue, the Respondent argued that the Claimant was invited for the disciplinary hearing and was aware of the allegations against him. That as such, the fact that a show cause letter was not served upon him did not invalidate the disciplinary process. The Respondent further contended that the suspension letter served upon the Claimant indicated the charges facing him, the reason it was considering his termination hence conformed to the intent of Section 41 of the *Employment Act*. In support of its arguments, the Respondent invited the Court to consider the determination in the case *Charles Muema Munuve & another vs Safaricom PLC* (2021) eKLR.

Analysis and determination

25. I have considered the pleadings on record, the evidentiary material before Court as well as the rival submissions and to my mind, the issues falling for determination are: -
 - i. Whether there was justifiable cause to terminate the services of the Claimant;
 - ii. Whether the Claimant was accorded procedural fairness; and
 - iii. Is the Claimant entitled to the reliefs sought?

Justifiable cause?

26. Pursuant to Section 43(1) of the *Employment Act* (Act), an employer is required to prove the reasons for termination of an employee's contract of service and failure to do so, such termination is deemed to be unfair. In addition, Section 45 (2) of the Act provides that a termination of 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; and
 - c. that the employee was terminated in accordance with fair procedure.
27. What this essentially means is that, beyond proving existence of reasons to justify termination of an employee's services, an employer is required to prove that the said reasons were valid, fair and related to the employee's conduct, capacity or compatibility; or its operational requirements.



28. Back to the case at hand, it is evident that the reasons leading to the Claimant's termination from the Respondent's employment was gross negligence and infringement of its regulations, policies and procedures through non compliance. The Claimant was specifically cited for refinancing of defaulted loans, splitting of loans to the disadvantage of the lender, advancing unsecured loans and compromising on members due diligence.
29. In this regard, the Respondent made reference to a report dated 2nd November, 2016. Notably, the said Report was not availed before Court. As it is, this was the Respondent's smoking gun against the Claimant as it contained the substance of the allegations against him. The net effect of this lapse on the part of the Respondent was that no evidence was adduced before Court to justify the Claimant's termination from employment. Ultimately, the Respondent's allegations against the Claimant remained bare and were not backed by any evidence in whatever form or manner.
30. Coupled with the foregoing, the allegations against the Claimant were quite general and did not contain better particulars. For instance, which are these defaulted loans the Claimant refinanced and split? What are the particulars of the unsecured loans he advanced?
31. The Court of Appeal in the case of *Ol Pejeta Ranching Limited vs David Wanjau Muboro* [2017] eKLR, found that the allegations against the employee, were too general hence termed his termination as unfair. I fully subscribe to this position.
32. Suffice to say, the allegations against the Claimant were not proved and substantiated.
33. In light of the foregoing, I cannot help but conclude that the Respondent has failed to prove that it had a valid and fair reason to justify the Claimant's termination from employment. As a consequence, the Respondent has not satisfied the element of substantive justification.
34. In the end, the Claimant's termination was unfair having failed to satisfy the requirements set out under Section 43(1) as read together with Section 45(2) (a) and (b) of the Act.

Procedural fairness?

35. Section 45(2) (c) of the Act provides that for termination to be fair, it ought to be in line with fair procedure. In this regard, Section 41(1) of the Act provides in an extensive manner, the specific requirements an employer must comply with in order to meet the test of procedural fairness. This procedure entails notifying the employee of the allegations he or she is required to respond to and thereafter granting him or her the opportunity to make representations in response to the said allegations.
36. It is common ground that the disciplinary process against the Claimant was commenced by way of a letter of suspension dated 15th July, 2016, through which he was informed of his suspension to pave way for investigations. According to the Claimant, he was called by the Respondent's receptionist on Friday, 28th October, 2016 and asked to attend a meeting on Tuesday, 1st November, 2016. He avers that he was not informed of the purpose of the meeting and it was only upon his attendance that he was surprised to find that it was a disciplinary hearing.
37. The Respondent disagreed with this position and maintained that the Claimant was informed of the meeting of 1st November, 2016, where it was abundantly clear that the purpose of the session was a notice to show cause.
38. Despite the Respondent's assertions, there was no evidence to prove as much. I say so because there was no evidence in the form of a letter notifying the Claimant of the allegations against him and requiring



- him to attend the disciplinary hearing on the said date to make his representations. As required under Section 41 of the Act, such information would ordinarily have been accompanied by the notification that the Claimant was entitled to be accompanied by a fellow employee or a union representative.
39. In absence of such evidence, I am led to draw an adverse inference against the Respondent being the party with the burden of proving that the Claimant's termination as procedurally fair.
40. Indeed, without the evidence, it is not possible to tell whether the Claimant was well aware of what lay ahead of him as he appeared for the disciplinary hearing. This leads me to question whether he had sufficient time to prepare for his defence prior to appearing for the disciplinary hearing. This is coupled with the fact that the suspension letter had notified the Claimant that investigations were ongoing. It would thus mean that at the time, the allegations against him had not fully crystallized hence it cannot be said that he was asked to show cause through the letter of suspension.
41. As was rightly held by the Court of Appeal in the case of *Nebert Mandala Ombajo vs Institute of Certified Public Accountants of Kenya (ICPAK)*, Nakuru Civil Appeal No. 62 of 2018, disciplinary proceedings are a grave matter for an employee as the consequences may be catastrophic to the employee's life.
42. Therefore, it is only fair that an employee is notified beforehand of the nature of the disciplinary hearing to not only allow him prepare for his defence sufficiently, but to also prepare psychologically noting that such a process has the possibility of depriving him the source of his livelihood.
43. Without proof from the Respondent's end that the Claimant was notified of the allegations against him and advised of the nature of the meeting of 1st November, 2016, I am led to conclude that the process it applied in effecting the Claimant's termination was not in compliance with the process contemplated under Section 41 of the Act. In the end, the process was procedurally unfair against the Claimant.
44. To this end, I cannot help but conclude that the process applied by the Respondent in terminating the Claimant's employment was procedurally unfair hence unlawful.

Reliefs

45. As the Court has found that the termination of the Claimant was not substantively and procedurally fair hence unfair and unlawful, the Court awards him one month's salary in lieu of notice and compensatory damages equivalent to seven months of his gross salary. In making this award, the Court has also taken into account the length of the employment relationship as well as the circumstances attendant to the Claimant's termination from employment.
46. The Claimant is further awarded salary during the period he was on suspension. Here is why. It is common ground that the Claimant was suspended from duty with effect from 15th July, 2016. It is notable that during the period the Claimant was on suspension, he was out of work involuntarily and not on his own volition. Further, it is noteworthy that the Claimant's letter of suspension did not state that the suspension was without pay. In the event the Respondent intended the Claimant's suspension to be without pay, then nothing stopped it from putting the same in writing or providing for the same in its Human Resource Manual or such other policy, which in any event was not produced in evidence.
47. The Claimant is also entitled to leave pay as the Respondent did not produce his leave records in accordance with its obligations under Section 74(1) (f) of the *Act*.



48. The claim for service pay is denied as the Claimant’s pay slips reveal that he was contributing to the National Social Security Fund hence he falls within the exclusions under Section 35(6) of the Act which provides as follows: -

(6) This section shall not apply where an employee is a member of—

.....

(d) the National Social Security Fund.

49. The claim for gratuity is similarly declined as the Claimant has not justified his entitlement to the same either contractually or on the strength of a Collective Bargaining Agreement the Respondent is party to.

50. The claim for punitive and aggravated damages is also refused as the purpose of compensation is to make good the employee’s loss and not to punish the employer. In this regard, I fully align with the position taken by the Court in the case of David Mwangi Gioko and 51 others vs Nairobi City Water & Sewerage Company Limited, [2013] eKLR, thus:

“This court has in the past held that there is need in resolving employment disputes to pay heed to the principle of a fair go all round. This principle requires the court to balance the interest of the employer and that of the employee.”

Orders

51. Against this background, Judgment is entered against the Respondent and the Court makes the following award in favour of the Claimant: -

- a. A declaration that that the Claimant’s dismissal was unfair and unlawful.
- b. One (1) month’s salary in lieu of notice being Kshs 99,000.00
- c. Compensatory damages in the sum of Kshs 693,000.00 being equivalent to seven (7) months of the Claimant’s gross salary.
- d. Unpaid salary during the Claimant’s suspension from 15th July, 2016 to 16th November, 2016 being Kshs 396,000.00.
- e. Unpaid leave pay being Kshs 5,520.00.
- f. The total award is Kshs 1,193,520.00.
- g. Interest on the amount in (f) at court rates from the date of Judgment until payment in full.
- h. The Claimant shall also have the costs of the suit.

52. The Claimant shall also be entitled to a Certificate of Service in line with Section 51(1) of the Act. This shall issue within 30 days from the date of this Judgment.

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

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STELLA RUTTO

JUDGE

Appearance:



For the Claimant Mr. Njomo

For the Respondent Ms. Muthoni

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

