



**Ndirangu v Defence Canteen Organization (Cause 1820 of 2017)
[2023] KEELRC 1778 (KLR) (14 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1778 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1820 OF 2017**

SC RUTTO, J

JULY 14, 2023

BETWEEN

MICHAEL KAMOTHO NDIRANGU CLAIMANT

AND

DEFENCE CANTEEN ORGANIZATION RESPONDENT

JUDGMENT

1. The claimant avers that prior to his dismissal on March 30, 2017, he had served as an employee of the respondent since November, 1989, with his last posting being Manager. The claimant has termed his termination as malicious, unfair and illegal. His claim against the respondent is for the sum of Kshs 909,861.00 being terminal notice, annual leave pay, prorata leave for 5 months, compensation for wrongful dismissal and overtime pay.
2. The Claim was opposed through the respondent's Statement of Defence dated October 11, 2017. Putting the claimant to strict proof, the respondent avers that the claimant was summarily dismissed in accordance with paragraph 8 of his letter of appointment as read together with Section 44(4) (c) of the *Employment Act*. Consequently, the respondent has asked the Court to dismiss the suit with costs.
3. The matter proceeded for trial on October 13, 2022 and February 22, 2023 during which both sides called oral evidence.

Claimant's case

4. The claimant testified in support of his case and at the outset, sought to adopt his witness statement to constitute his evidence in chief. He further produced the documents filed together with his Claim as exhibits before Court.



5. It was his evidence that he was employed by the respondent in November, 1989 as a trainee store man. He completed his training after six months and he was confirmed as a store man. He rose through the ranks to the position of Manager.
6. He averred that on June 23, 2016, he received a call from the then acting Chief Field and Service Officer asking him to report to his office. He was informed that there was a case of theft at Establishment 019S, which had taken place before his tenure, during his tenure and after he had left the Establishment. He was asked whether he had shared his password with anybody and he stated that he could not remember any incidence.
7. At around 4:00pm, military officers went and asked him to accompany them to their offices. They asked him to state what he knew about the thefts. He was later taken to Pangani Police Station together with two other staff members. He spent the night there and was released the following day on bail. He was then informed at that time that his password had been used to steal goods worth Kshs 303,000.00 but the charge for theft was over Kshs 2,000,000.00.
8. It was the claimant's further evidence that after his release, the Chief Field Services and Services Officer asked him if he could agree to pay Kshs 303,000.00 so that they could drop the charges. He declined and continued reporting to Pangani Police Station.
9. In February, 2017, he was informed by the Personnel officer that they intended to withdraw the case at the police station as it was heading nowhere. He asked her to put it in writing and he replied in agreement. She further informed him that the case was to be heard departmentally. He appeared before the Board who informed him that they found nothing implicating with theft and he was to wait for the managing director approval. He was later called by the Personnel Officer who handed him his dismissal letter on March 30, 2017.

Respondent's case

10. The respondent called oral evidence through Ms. Jane Okumu who testified as RW1. She identified herself as the Chief Personnel and Admin Officer. She also adopted her witness statement to constitute his evidence in chief.
11. RW1 testified on June 21, 2016 subsequent to an internal auditing exercise a loss of Kshs 251,701.54 and Kshs 51,807.94 was detected at DEFCO Moi Airbase. The Kshs 251,701.54 loss linked to the claimant's fraudulent generation of supplier returns to Hot Point Ltd and Hass Petroleum. Further, Kshs 51,807.97 losses were linked to the claimant's generation of fraudulent inter organization transfer of assorted goods to purport that there were transfers between DEFCO shop Nos 019, 060 and 051c. That there were no transfers to that effect. It was her evidence that the claimant was the manager for DEFCO shop No 051c. That the Audit and military police investigations detected that the claimant's password and two others were used to occasion the fraudulent actions leading to the loss.
12. She further stated that the claimant was arrested and confined at Pangani Police station pending civilian police investigations. He was later released on police bond and on July 25, 2016 by application of DEFCO Terms and Conditions of Service, the claimant and other two accomplices were suspended from duty to pave way for further investigations.
13. In February, 2017 the claimant and DEFCO reached a consensus to have the matter solved internally and thus the complaint at Pangani police station was withdrawn paving way for internal resolution mechanism. The claimant communicated his consent to an internal resolution mechanism vide a letter dated February 21, 2017.



14. In accordance to DEFCO Terms and Conditions of Service, a Disciplinary Board was convened on March 24, 2017 and the claimant was charged with three counts relating to conduct to prejudice of good order and discipline as provided for in section 55 of the said DEFCO Terms and Conditions of Service.
15. At the end of the disciplinary process the claimant was found guilty of the offence charged. The Board recommended that part of the amount lost be recovered from his dues owed to DEFCO and that his service be terminated for gross misconduct subject to the managing director's approval.
16. On March 28, 2017, the managing director acted on the Board's findings whereby he directed that 10% of the loss amount be recovered from the claimant's owed dues and that his services be terminated under service no longer required whereby he was entitled to his benefits after deduction of all liabilities due to DEFCO.

Submissions

17. It was the claimant's submission that no material has been produced before this Court to convince it that the disciplinary procedure he was subjected to was free as alleged by the respondent. It was further submitted that it is also questionable as to why the respondent would refrain from producing the transcript of the board's decision, despite being served with a notice to produce.
18. In further submission, the claimant stated that the only items that could be used to prove the reasons for termination are the minutes of the meeting and decision of the Board. That by failing to produce the same, the Court cannot be convinced that in the circumstances herein, the termination of the claimant's employment was the reasonable approach to be taken by the respondent. According to the claimant, the respondent has therefore failed to discharge the burden of proof placed on it by Section 43 of the *Employment Act*.
19. On the part of the respondent, it was submitted that the burden of proof lies with whoever would want the Court to find in his/her favour in support of their claims. That the claimant did not adduce before the Court any evidence in support of his allegations of the respondent's unfair actions. Citing Section 107 of the *Evidence Act*, the respondent maintained that the rules of evidence are clear that he who alleges must prove.
20. It was the respondent's further submission that the claimant failed to indicate the particulars of unfairness of the actions of the respondent that led to the termination of his employment. That in the absence of such particulars and adequate evidence to support the claimant's assertions of unfairness or illegality of its actions, both substantive and procedural, the claim therefore fails.
21. It was further submitted by the respondent that in conformity to Article 47 and 50 of the *Constitution*, the claimant was granted a fair hearing before a Disciplinary Board which was constituted in line with Section 57(a)(vii) of the DEFCO terms and conditions of service.

Analysis and determination

22. Flowing from the pleadings, the evidentiary material before Court and the rival submissions, the issues isolated for determination are: -
 - a. Whether the respondent has proved that it had a valid and fair reason to terminate the claimant's employment;
 - b. Whether the respondent accorded the claimant procedural fairness prior to termination;



- c. Is the claimant entitled to the reliefs sought?

Fair and valid reason?

23. In terms of Section 43(1) of the *Employment Act* (Act) an employer is required to prove the reasons for termination of employment and failure to do so, such termination is deemed to be unfair. Further, Section 45 (2) (a) and (b) of the Act qualifies a termination of employment as unfair where the employer fails to prove that the reason for the termination is valid, fair and related to the employee's conduct, capacity or compatibility; or based on its operational requirements.
24. From the totality of the evidence before Court, it is apparent that the claimant was summarily dismissed from employment on grounds that his password was used to commit fraud against the respondent. In this regard, the claimant was accused of fraudulent generation of supplier returns.
25. From the claimant's own evidence, he was holding the position of Manager. In all respects, he was senior in rank and it follows that the level of responsibility expected of him was high. Notably, he did not deny that the respondent's goods which were under his watch, were stolen. His only defence was that he was unaware as to how the theft had occurred. As it turned out, his password had been used to commit the fraudulent acts against the respondent.
26. The claimant was the sole custodian of his password and being a confidential code, he was required to keep it secret. The fact that the same landed in the wrong hands and was used to commit fraudulent acts against the respondent, speaks volumes as to the manner in which he handled it. As was held by the Court of Appeal in the case of *Violet Kadala Shitsukane vs Kenya Post Savings Bank, Nairobi Civil Appeal No. 295 of 2016*: -
- ' A password, especially that which is used to access money is unique to the user. A password protects everything that is personal and sensitive. With the ever-growing threat from cyber criminals, passwords are guarded like princesses: Even a strong password is useless if it is exposed.'
27. And further, in the case of *Daniel Waweru Kinyua vs Nairobi City Water & Sewerage Company Limited [2016] eKLR*, it was held as follows: -
- ' To permit or suffer to be accessed ones password is a case of negligence. It matters not that the claimant subsequently benefited from the fraud or malfeasance committed. The mere act of letting one's password land in the wrong hands is enough. The respondent therefore had a good reason to dismiss the claimant.'
28. Therefore, given the circumstances of this case and applying the determinations in the aforementioned cases, I am led to conclude that the claimant was negligent in the way he handled his password, thus the respondent had a valid and fair reason to terminate his services as it did.

Procedural fairness?

29. Procedural fairness relates to the manner in which an employee's termination is effected. In this respect, Section 45(2) (c) of the Act provides that for termination to be fair, it ought to be in line with fair procedure. What constitutes fair procedure is provided for under Section 41(1) and can be aptly summarized in two words, notification and hearing. What this means is that an employer is to notify the employee of the reasons for which it is considering termination of the employment contract. This is then followed by a hearing in which case, the employee is given an opportunity to present his side of



the story and in so doing is entitled to be accompanied by a fellow employee or union representative of his or her own choice.

30. In the instant case, the claimant pointed out several gaps with regards to how his termination from employment was effected. He admitted attending the disciplinary hearing but stated that he was not given an opportunity to present any evidence.
31. The respondent on the other hand contends that the claimant was granted a fair hearing.
32. Given the opposing positions taken by both parties over the issue, it is apparent that the same could only be resolved by evidence with regard to the steps undertaken by the respondent before the hearing and during the hearing. Several questions come to the fore, for instance, was the claimant notified of the right to be accompanied and to adduce evidence in support of his defence? Was he given an opportunity to present his defence? The answers to these questions are definitely not on record as the respondent did not avail evidence of a notification and more importantly, the disciplinary proceedings. To this end, I am led to draw an adverse inference against the respondent noting that it is the party that bears the burden of proving that an employee was terminated in accordance with fair procedure. I must add that in absence of the disciplinary proceedings, the respondent failed to discount the claimant's assertions that he was not given an opportunity to present any evidence he may have had.
33. In the circumstances, I am led to conclude that the respondent has failed to discharge its burden by proving that the procedure it applied in terminating the claimant's employment was fair. Ultimately, the claimant's termination was not procedurally fair hence unlawful.

Reliefs

34. As the Court has found that the claimant's termination although substantively justified was procedurally unfair, he is awarded one (1) month's salary in lieu of notice and compensatory damages equivalent to four (4) months of his gross salary. This award takes into account the length of the employment relationship as well as the circumstances leading to the claimant's termination.
35. The claimant is further awarded leave pay as the respondent did not exhibit his leave records in line with its obligation under Section 74(1) (f) of the Act.
36. The claim for overtime is declined as the claimant failed to specifically plead and prove the same despite being a specific claim in nature. For instance, which are the dates he worked in excess of the legal maximum? Indeed, he did not justify the global figure claimed in overtime, showing specifically how it was arrived at. For this reason, the claim is not sustainable.

Orders

37. It is against this background that I enter Judgment in favour of the claimant against the respondent and he is awarded: -
 - a. One (1) month's salary in lieu of notice being the sum of Kshs 44,832.00.
 - b. Compensatory damages in the sum of Kshs 179,328.00 being equivalent to four (4) months of his gross salary.
 - c. Unpaid leave being Kshs 31,382.40.
 - d. The total award is Kshs 255,542.40.
 - e. Interest on the amount in (d) at court rates from the date of Judgment until payment in full.



f. The claimant shall also have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF JULY, 2023.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Muchai

For the Respondent Ms. Mungata

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

