



**Marakalu & another v Kenya Ports Authority (Cause E056 of 2023)
[2023] KEELRC 1937 (KLR) (4 August 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1937 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E056 OF 2023
M MBARŪ, J
AUGUST 4, 2023**

BETWEEN

SAM MOFFATT WALI MARAKALU 1ST CLAIMANT

RICHARD KIPKEMBOI ROTICH 2ND CLAIMANT

AND

KENYA PORTS AUTHORITY RESPONDENT

JUDGMENT

1. The claimants are adults and the respondent is a statutory corporation incorporated under the [Kenya Ports Authority Act](#).
2. In the year 1998 and 1997 the claimants were employed by the respondent as senior clerical assistant and a berth tally clerk respectively. Both positions were in the cargo operations departments.
3. On February 10, 2023 the respondent terminated the claimants' employment by summary dismissal.
4. The claim is that before the summary dismissal, the claimants were suspended on half salary with the 1st claimant earning Kshs 63,000 per month and the 2nd claimant was earning Kshs 85,386. Upon summary dismissal, the respondent withdrew payment of any salary, the medical cover and despite seeking for the minutes to be able to lodge an appeal, these were not provided.
5. The respondent issued the 1st claimant with a notice to vacate the staff quarters allocated to him.
6. Despite the respondent being aware that the dispute resolution process is not exhausted through the appeal process, prejudicial actions have been taken against them. the claimants are facing criminal charges before the Chief magistrate court in Criminal Case No E422 of 2022 following charges of loss of 6 Hot Rolled Coils (HRC) valued at Kshs 3,600,000.



7. The claim is that the claimants are aggrieved by the actions of the respondent in withdrawing their medical cover and benefits, half pay and failure to supply them with minutes of the disciplinary hearing which resulted in their summary dismissal. The 1st claimant is in lawful occupation of staff house, Block 228 Door 2 at Makupa Asian staff quarters pending the hearing and determination of his appeal filed before the respondent's Board.

The claimants are seeking for judgment against the respondent that;

- a. a mandatory injunction directed to the respondent to restore their medical benefits, half salary pay, pending the hearing and determination of their appeals lodged with the respondent on 17 and February 28, 2023.
- b. An order for the payments to the claimants their respective salary pending the hearing and determination of their appeals lodged with the respondent.
- c. An order directed to the respondent not to evict the 1st claimant from the staff house he is occupying at the Asian Quarters Block 228 Door No 2 pending the hearing and determination of his appeal.
- d. An order directed to the respondent to supply the claimants with the minutes of the disciplinary hearing and the ruling in their dismissal on the February 10, 2023.

Each claimant testified in support of the claim.

8. The 1st claimant testified that he has worked for the respondent for over 25 years but on May 20, 2022 he was suspended over allegations of gross misconduct when it was alleged that he had colluded with other employees to steal HRC valued at Kshs 3,600,000 and which led to being charged in Criminal Case No 422 of 2022 at Mombasa Magistrates Court and which matter is ongoing.
9. The claimant testified that on February 17, 2023 he was issued with letter of summary dismissal dated February 10, 2023 despite the respondent being aware that the criminal case is ongoing. He has lodged an appeal that is pending and in occupation of staff house but has been issued with notice to vacate before his appeal can be heard.
10. At the time of summary dismissal, he was earning gross salary of Kshs 127,366 but since, payments have stopped despite the pending appeal which he is unable to address as the respondent has refused to issue the disciplinary committee minutes.
11. The 2nd claimant testified that he has worked for the respondent for over 26 years until his summary dismissal on February 20, 2023 despite the fact that he has an ongoing criminal case No 422 of 2022, the respondent has not addressed his appeal and he is still waiting for the disciplinary committee minutes and ruling thereof to be able to prosecute his appeal. At the time his employment was terminated by the respondent, he was on half salary at Kshs 85,360.
12. In response, the respondent's case is that the claimants were employees until February 10, 2023 when employment was terminated through summary dismissal. Their appeals were declined and the summary dismissal upheld by the Board of Directors.
13. The summary dismissal was lawful upon the claimants' being charged administratively following their involvement in theft of goods from the respondent's premises. Each claimant was invited for a personal hearing where they were accompanied by union representatives of their choice. Having been found



culpable of committing offences justifying summary dismissal, notice issued terminating employment and the claim for salary and fringe benefits available to employees of the respondent is not justified.

14. The claimants were taken through the due process and given a hearing in the presence of their union representatives. The claimants were found culpable of the charges and summary dismissal was justified. The pendency of the criminal charges against the claimants is not a bar to the respondent in concluding administrative disciplinary proceedings that led to termination of employment. The claimants are not entitled to any benefits available to the employees of the respondent and any outstanding rent is debt due from the 1st claimant and the claims made should be dismissed with costs.
15. In evidence, the respondent called Sharon Orimba the human resource officer, discipline who testified that the claimants were both employees of the respondent but on April 1, 2022 were reported by the KPA head of security services that on March 11, 2022 at 2330hrs stole HRC valued at Kshs 3,600,000 the property of KPA. On March 31, 2022 the claimants were arrested and arraigned in court where they were charged with stealing goods from Customs Bonded Warehouse contrary to section 279 of the Penal Code as well as computer forgery contrary to section 25(1) of the Computer Misuse and Cybercrime Act.
16. Upon receipt of the reports, KPA commenced disciplinary proceedings against the claimants who were issued with letters dated May 20, 2022 suspending them from duty because the offences they were charged with amounted to gross misconduct justifying summary dismissal.
17. Ms Orimba testified that the claimants were issued with show cause notices and required to respond but they only indicated that they had been charged with criminal cases and the Dock Workers Union representing the claimants also sent a response to the show cause notices reiterating that the claimants had ongoing criminal cases. Following investigations, the respondent invited the claimant to attend disciplinary hearing and found the claimants culpable where they were found to have been amongst 6 persons who conspired and stole the coils from the Port of Mombasa and disposed of them at Kiambu County sharing the proceeds. It was established that the 1st respondent issued 2 gate passes unprocedurally on March 12, 2022 at 0115hrs using the wrong bill of lading and pick up order which were used to evacuate the 6 coils. When the loaded trucks exited the port, he deleted the records from the KPA Conventional Cargo Information Management System in a bid to conceal the offence.
18. The 2nd claimant was found to have issued instructions for loading of the 6 coils on trucks without proper documentation for evacuation and thereby enabling the theft. Both claimants were accorded the due process and the summary dismissal was justified. The claimants lodged appeals and the Board of Directors held a meeting on May 12, 2023 and these were dismissed and the summary dismissal confirmed.

At the close of the hearing, both parties filed written submissions.

19. The claimants submitted that they were dismissed by the respondent on February 10, 2023 and they lodged appeals and for this reason applied for the minutes and ruling of such decision to support their appeal and pending the hearing of the criminal case that is ongoing but such records have not been issued. For these reasons, the claimants' rights and benefits in employment to a half salary, medical cover and the 1st claimant's occupation of his allocated house should be maintained.
20. The claimants submitted that the right to information is secured under article 35 of the Constitution where every citizen has the right to access information. Under article 35(b), the claimants are entitled to the minutes and ruling requested for as held in the case of Rebecca Ann Maina & others v Jomo Kenyatta University of Agriculture & Technology Cause No 1789 of 2013.



21. The respondent submitted that the employer and employee relationship has stopped and the orders sought by the claimants cannot issue outside such a relationship. In the case of *Teachers Service Commission v Paul Olweny Ngowe* [2021] eKLR the court held that after dismissal, employment benefits stop. The Court of Appeal in the case of *David Ngugi Waweru v Attorney General* [2017] eKLR it was held that institution of criminal proceedings is not a bar to internal disciplinary proceedings. Employment of the claimants terminated for a lawful cause and they were taken through the due process and cannot be paid a salary or given medical benefits outside the employment relationship. The 1st claimant occupied the allocated house by virtue of his employment and should be ordered to vacate and the suit dismissed with costs.
22. The written submissions are analysed and the issues for determination summarised as follows;
23. Whether the respondent should be compelled to restore the medical cover, half salary and benefits due to the claimants;
24. Whether the respondents should be ordered not to evict the 1st claimant from his allocated housing; and
25. Whether the respondents should be directed to supply the claimants with minutes and ruling from the disciplinary committee; and

Who should pay costs.

26. It is common cause that the claimants were both dismissed from their employment with the respondent through notices dated February 10, 2023.
27. It is also not in dispute that the claimants have been charged before the Mombasa Magistrates Court in Criminal Case No E422 of 2022 with the offence of stealing goods in a custom bonded warehouse contrary to section 279 of the *Penal Code* and computer forgery contrary to section 25(1) of the *Computer Misuse and Cybercrime Act*.
28. The claimants were taken through the disciplinary process of the respondent and employment terminated through summary dismissal with effect from February 10, 2023. They lodged appeals against such the sanction and Ms Orimba testified that the Board of Directors during a meeting held on May 12, 2023 dismissed the appeals.
29. The claimants moved the court through the memorandum of claim filed on June 21, 2023.
30. At the time, the claimants were seeking to secure their right of appeal by provision of the minutes and ruling of the disciplinary committee so as to urge the appeal and in the interim, their employment benefits be preserved which includes half salary, medical benefits for self and family and that the 1st claimant be allowed to keep occupation of the allocated housing within the respondent's staff quarters.
31. The basis of the claimants' reliefs is that, upon being charged with criminal case No E422 of 2022, they were suspended and the criminal proceedings are ongoing and their employment rights and benefits should be preserved.
However, employment ceased on February 10, 2023.
32. With cessation of employment, the claimants are allowed right of appeal which they exercised and which has since concluded with the Board of Directors meeting on May 12, 2023 and whereby they confirmed the summary dismissal.



When then did the cause of action herein arise?

33. In employment and labour relations, upon the employer issuing the letter terminating employment, that action ends the employment relationship. The dispute resolution mechanisms available in terms of an appeal, conciliation or as the case may be for the purpose of alternative dispute resolution mechanisms, the cessation of employment ends all benefits accruing to the employees with his employment.
34. As submitted by the respondent in the case of *David Ngugi Waweru v Attorney General* [2017] eKLR, criminal proceedings are not a bar to administrative disciplinary action by the employer who has the right to apply internal disciplinary procedures with regard to addressing an employee's misconduct or gross misconduct.
35. In the case of *James Mugeru Igati v Public Service Commission of Kenya* [2014] eKLR the court gave emphasis to the matter and distinction between criminal and internal disciplinary proceedings undertaken against an employee and held that;
- ... there is nothing in the Public Service Commission Regulations which suggest that disciplinary process is tied to criminal process that may arise from the same facts. There is no provision in the Public Service Commission Regulations which make it necessary for employers to follow police investigations, or findings or indeed criminal court decisions in resolving employment disputes. The Public Service Commission Regulations do not merge disciplinary processes with criminal trials.
- ... in answer to the serious offences which he was charged with as he was never put on his defence. The criminal trial collapsed principally because the police did not call the investigating officer. The claimant had another opportunity to explain the allegations that he falsified documents, to the industrial court when this current dispute was heard.
36. The essence being that internal disciplinary processes and criminal processes are two independent processes and therefore can proceed side by side and none can bar the other from proceeding. In *Christopher Amasava v Kenya Revenue Authority & another* [2021] eKLR, the court, while addressing the same matter held that;
- ... criminal and disciplinary processes are distinct. The former is founded on criminal law while the latter is founded on the contract of employment between the parties concerned. In fact, none of the two binds the other and the standard of proof is different because while in criminal process the standard of proof is beyond reasonable doubt, in the disciplinary process, is balance of probability and for that reason I find clause 9 of the respondent's code of conduct to be in consonance with the said jurisprudence.
37. In this case, the position taken by the claimants that they could not respond to the show cause notices and supported by their union, Dock Workers Union through letter dated March 17, 2023 that they had pending criminal matter ongoing and so the disciplinary hearing was not justified, these responses have no legal foundation, the internal disciplinary hearing cannot be halted, stayed or suspended to allow a criminal hearing to conclude unless the employer find such matter necessary since both regimes of procedures are regulated differently and call for distinct standards of proof.
38. The claimants were invited to attend disciplinary hearing and their rights secured under the provisions of section 41 of the *Employment Act*, 2007. The conclusion was that the claimants were culpable for gross misconduct following theft of 6 HRC the property of the respondent and summary dismissal is justified.



39. Indeed, section 44(4) (f) and (g) of the *Employment Act*, 2007 it allows an employer to summarily dismiss an employee who is arrested for a cognisable offence and who commits a criminal offence against and to the substantial detriment of his employer or his employer's property.
- (f) in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognisable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or
 - (g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.
40. With cessation of employment for lawful and justified cause, the claimants cannot be maintained by the respondent post the employment relationship. The benefit to salary, the due medical cover for self and family is only available to employees.
41. The 1st claimant enjoyed housing under the respondent with his employment which has since ceased. This benefit cannot accrue as of February 10, 2023.
42. Whether the claimants filed appeals or not, with cessation of employment from February 10, 2023 the orders seeking to restore their medical benefits, half salary pay, pending the hearing and determination of their appeals lodged with the respondent on 17 and February 28, 2023 cannot issue.
43. For posterity, the respondent shall supply the claimants with the minutes of the disciplinary hearing and the ruling of the disciplinary committee leading to summary dismissal on the February 10, 2023.
44. The 1st claimant shall unconditionally vacate the allocated housing being Block 228 Door 2, Makupa Asian staff quarters and remit the rent due from February 10, 2023 until his handing over date. The continued occupation of the 1st claimant of the respondent's house upon end of his employment is loss and damage to the respondent and is due in terms of section 17(1)(b) of the *Employment Act*, 2007 which directs that;
- [an employer shall deduct] (b) a reasonable amount for any damage done to, or loss of, any property lawfully in the possession or custody of the employer occasioned by the wilful default of the employee;
45. For the rent due, the 1st claimant shall remit to the respondent to mitigate the loss of non-use of its house.
46. Accordingly, claims herein are found without merit and are hereby dismissed and the following orders hereby issued;
- a. The respondent shall supply the claimants with the minutes of the disciplinary committee and the ruling thereof leading to summary dismissal on the February 10, 2023;
 - b. The 1st claimant shall render vacant possession of Block 228 Door 2, Makupa Asian staff quarters and pay rents due from February 10, 2023 until the date of handing over;
 - c. The claimants shall meet the respondent's costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 4 DAY OF AUGUST 2023.

M. MBARŪ



JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

