



**Kamanga v Bata Shoe Company (K) Limited (Cause 1183 of 2018)
[2023] KEELRC 2339 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2339 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1183 OF 2018
M MBARÚ, J
SEPTEMBER 28, 2023**

BETWEEN

JOHN MBURU KAMANGA CLAIMANT

AND

BATA SHOE COMPANY (K) LIMITED RESPONDENT

JUDGMENT

1. The respondent employed the claimant on 15 February 1990 as a stores manager in accounts department in Bata Franchise stores.
2. The clam is that on 11 November 1991 the claimant was transferred from accounts department to the merchandising department as a merchandising officer and then to the retail department as district sales manager from 2 July 2001. In August 2003 the claimant was promoted to central distribution centre as distribution centre manager.
3. On 20 November 2017 the claimant was issued with a warning letter from Mr Alberto Errico, President Bata Africa citing housekeeping problems in distribution centre and the claimant responded on 25 January 2018. In early December 2017, the entire receiving section at distribution centre was instructed by Errico to report directly to him and not the claimant.
4. On 29 January 2018 the claimant received letter of transfer from central distribution centre to production department with no job description which department was different from his field of competence. He asked for clarification about the transfer through memo dated 31st January 2018 without any feedback from the respondent.
5. On 16 February 2018 the claimant received verbal and written instructions from Errico to hand over to the new distribution centre manager at the distribution centre and to report to the production department on 19 February 2018. The claimant complied and then applied for leave which was approved by Errico



6. While the claimant was on leave, the respondent did stock taking in week 8 and 9 which showed stock differences. The claimant was recalled from leave to participate in week 9 stock taking but he was reluctant on the basis that there was a lot of stock movement in and out of the distribution centre after he had left the department. He also noted that many experienced staff had been moved from the department and could not guarantee credible outcome and the disparity between average difference stock prices of the two counts demonstrated the concerns noted by the claimant.
7. The claimant resumed work on 9 April 2018 and was issued with letter to appear before the disciplinary committee on 12 April 2018 to respond to various allegations. He asked for more time to be able to respond by 19 April 2018 but was allowed only two days.
8. On 10 April 2018, two months after the claimant had been transferred he was issued with a job description from the production manager on his new role as production foreman and reporting to plastics factory manager who in turn was reporting to production manager which meant, there was a demotion. He asked for a clarification on his demotion but the respondent denied such matter and that he should maintain his position.
9. On 9 April 2018 the claimant was issued with a notice to show cause and required to respond by close of day on 10 April 2018. He wrote to the human resource manager and explained that the show cause notice had been overtaken by events as he had already been summoned to attend before the disciplinary hearing and hence requested to respond by 20 April 2018.
10. The claim is that on 16 April 2018 the claimant attended before the disciplinary committee but was treated unfairly and on 19 April 2018 he was issued with notice of summary dismissal in terms of Section 44(4) (c) of the [Employment Act](#) on the basis that he had neglected to perform his duties properly.
11. The claimant's case is that there was unlawful, wrongful and unfair termination of employment and he is seeking for an order of reinstatement in a manager's position and in the alternative an order for compensation for unfair termination of employment and payment of salary for the remainder of his employment period, 28 years' service pay, leave days accrued all at Kshs. 28,498,202.72.
12. The claimant testified in support of his case.
13. In response and counter-claim, the respondent's case is that the claimant was the warehouse and distribution manager and was required to manage, supervise and keep accurate records of stocks which were stored at the warehouse and distribution centre. The claimant was dismissed from his employment on 19 April 2018 following a physical count of footwear carried out from 3 to 4 March 2018 which revealed a stock shortage of Kshs. 46,898 pairs of shoes. The stock value unaccounted for was valued at Kshs. 33,285,305 while the retail value is Kshs. 55,285,305. The respondent had evidence that the claimant was aware of the stock loss but failed to disclose to the same.
14. The claimant was taken through the due process during the disciplinary hearing, he was allowed to respond to allegations made against him, he was given the audit report and allowed to cross-examine the witnesses who had been instructed by the claimant to conceal the stock losses. Termination of employment was justified and the claims made should be dismissed with costs.
15. The respondent incurred huge losses as a result of the claimant's negligence and seek compensation for the same.
16. The response is also that the respondent employed the claimant on 15 February 1990 and had a contract issued. He had a job description for all positions held and while serving in the role of warehouse and distribution centre manager, he was required to take care and control all stocks and other assets of



- the company, ensure receipts in respect of shoes produced by Bata and shoes supplied to the company were all accounted for, ensure footwear dispatches were properly accounted for through approved invoices and transfer vouchers, ensure accurate preparation and execution of monthly stock inventory and to keep records of warehouse transactions by safeguarding the property of the respondent.
17. The warehouse is divided into three departments;
 - One is receiving department;
 - Second is dispatching department; and
 - Third is management.
 18. As warehouse and distribution manager, the claimant was responsible for all the 3 sections and the claim that a part of the same was not under his supervisor in December 2017 is wrong.
 19. In a letter dated 29 January 2018 the respondent transferred the claimant from warehouse and distribution to production department which was normal practice and he did handover and this was not a demotion as alleged.
 20. The claimant was issued with a warning on 20 November 2017 following concerns on how footwear in the distribution centre were being stored. The respondent had noted that there were disorganised heaps which led to deterioration of shoes and it was the duty of the claimant to ensure proper storage.
 21. On 16 February 2018 the claimant handed over his duties in the warehouse and distribution centre and indicated stock of about 2,981,947 pairs of shoes valued at Kshs. 887,713,395.33 alleged to be from the electronic system. There was no physical count. When this was subjected to an audit and physical count, it emerged the records by the claimant were not correct, a second and third count were conducted and there was a disparity. First physical count after the claimant transfer on 24 February 2018 realised a shortage of 91,420 pairs of shoes valued at Kshs. 38,235,465.
 22. An internal audit was carried out and the claimant recalled to attend on 2 March 2018 and a second count was done on 5 March 2018 but he declined to attend and gave his reasons as being that he had handed over his duties in that department, that there were staff changes in that department and the this should have been done before his transfer. The reasons given for failure to attend a stock count were unjustified and taking note of the huge disparity of missing shoes and the value, the respondent proceeded with the second count in his absence. A shortage of 46,898 pairs of shoes was noted valued at Ksh.33, 285,305.
 23. When the claimant resumed duty from leave on 9 April 2018 he was issued with a notice to attend disciplinary hearing for failure to report actual stock in December 2017. A show cause notice also issued to respond as to why disciplinary action should not be taken. The hearing was scheduled for 12 April 2018 but the claimant asked for more time and hearing rescheduled to 16 April 2018 and he chose not to bring a representative as advised.
 24. The claimant was found culpable of causing the respondent a loss of unaccounted for shoes valued at Kshs. 33,285,305 and retail price value at Kshs. 55,285,305 leading to summary dismissal on 19 April 2018. At the time of summary dismissal, the claimant was paid his final dues of Kshs. 204,638.40 being;
 - a. Salary earned by 19 April 2018 Kshs. 112,286.20;
 - b. 25 leave days pro-rated Kshs. 147,745;
 - c. 4 days' overtime Kshs. 23,639.20;Less tax Kshs. 79,032



Due pay Kshs. 204,638.40

Counter-claim

25. In counterclaim, the respondent's claim against the claimant is that he was in breach of his employment contract where he failed to exercise skill and care in his duties which led to damage and exposed the respondent to loss of property. The claimant failed to keep accurate records in his role and when he handed over upon transfer, he failed to give a proper account of stocks which was negligent and leading to a loss of Kshs. 55,285,305.
26. The claim is for the claimant to pay the respondent;
 - a. Kshs. 55,285,305 being value to 46,898 pairs of shoes;
 - b. General damages
 - c. Punitive and aggravated damages
 - d. Interests on the dues and
 - e. Costs of the suit.
27. John Ngoru the human resource manager testified in support of the respondent that when the claimant handed over his duties as warehouse and distribution manager on 16 February 2018, he signed a handover form and indicated there was approximately 2,981,947 pairs of shoes valued at Kshs. 887,713,395.33 but a physical count noted a shortage of 91,420 pairs of shoes valued at Kshs. 38,235,465.
28. Due to the alarming disparity, a second count was taken and the claimant asked to attend but he declined giving reasons that he had already handed over, staff in that department had been transferred and that such count had already been done at the time of his transfer. He hence refused to attend as required and upon count, the respondent did an audit which revealed a shortage of 46,898 pairs of shoes valued at Kshs. 33,285,305.
29. The claimant was invited to a disciplinary hearing with regard to the losses and his misleading reports on stock and unaccounted for stocks and he failed to give satisfactory responses leading to summary dismissal on 19 April 2018. The claimant has since been paid his terminal dues. The counterclaim is for the unaccounted stock due to the negligence of the claimant.
30. The respondent also called Kenneth Amdany the audit manager who testified that the respondent asked him to carry out an audit following handover and changes to the claimant's role in warehouse in January 2018. The audit found a loss of 91,000 pairs of shoes which was huge and so, the respondent asked for a physical stock taking on 3 and 4 March 2018 and the claimant was invite to attend but he refused and he gave reasons that this should have been done before his transfer and his staff had also been moved. The claimant wrote a memo to this effect but his refusal to attend and participate in stock taking was not justified.
31. The first count was done 5 days after the claimant's transfer. It would have benefited each party for the claimant to attend for a physical count and so, as the auditor, he conducted his audit report and noted the total loss of 46,000 pairs of shoes valued at over Ksh.33 million
32. The difference arose from the fact that the warehouse had a lot of stocks due to closure of Nakumatt shops and all gumboots had been put in gunny bags and counts were manual with omissions in the value hence the variances.



33. Mr Amdany testified that he had to involve external auditors in the process to ensure accuracy. This revealed loss of 46,000 pairs of shoes valued at over ksh.33 million and retail price of Ksh.55 million which is counterclaimed by the respondent.
34. Mr Amdany testified that the respondent called several witnesses during the disciplinary hearing. Darius testified while the claimant was absent but he cross-examined him. The claimant remained absent during the second stock taking and a huge difference from his handing over report was noted. The difference of 5 days was too short and no significant movement of stock could have happened within that time and the respondent is justified to counterclaim for the total loss of stock.
35. The claimant was invited to the disciplinary hearing and interrogated the audit report.
36. At the close of the hearing, both parties filed written submissions.

Determination

37. On 19 April 2018, the respondent dismissed the claimant from his employment on the grounds that, following an internal audit in the central warehouse while he was in charge as manager, he committed gross misconduct leading to loss of property by loss of merchandise valued at Kshs. 33,285,305 contrary to Section 44(4) (c) of the Employment Act, 2007 (the Act). The respondent has also counter-claimed for this loss from the claimant.
38. As submitted by the claimant, an employer who alleges that the employee is of gross misconduct must take the employee through the due process outlined under Section 41(2) of the Act as held in *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR. There must be valid reasons that touch on the conduct of the employee who must be given notice and allowed time to attend and make his representations.
39. The context of Section 41(2) is that;
 - 2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

And the elements to be gone into are defined in the case of *Oyombe v Eco Bank Limited* (Civil Appeal 185 of 2017) [2022] KECA 540 (KLR) (13 May 2022) (Judgment) to include the following steps;

... four elements must thus be satisfied for summary dismissal procedure to be said to be fair, being: -

 - a. An explanation of the grounds of termination in a language understood by the employee;
 - b. The reason for which the employer is considering termination;
 - c. Entitlement of an employee to have a representative of his choice when the explanation of grounds of terminations is being made;
 - d. Hearing and considering any representation made by the employee and the representative chosen by the employee.
40. In this regard, on 9 April, 2019 the claimant was issued with a show cause notice to respond to matters arising out of the audit report. He was allowed to make his responses to the allegations made against him arising from the stock audit.



41. The claimant protested that the production manager one Shahid directed him to make his responses while at home and not during working hours and that the manager was already biased against him but he made a full account of events and submitted his response before the disciplinary hearing on 16 April 2018.
42. The claimant also noted that the stock variances were discovered after he had handed over and taken his annual leave and according to him, this was meant to allow a biased report against him. Had this been necessary, the audit should have been carried out before he was transferred and key staff in this department allowed to assist but they were all moved.
43. To support the allegations made, the respondent heavily relied on the audit report, the claimant's handing over report and the evidence of the internal auditor, Mr Amdany. The audit report is an extract of a report. The handover report is a pager of various functions and responsible officer indicating that the stock handing over at 2,981,947 valued at Kshs. 887,713,395.33 with new padlocks for access from outside with Antonio as the responsible officer.
44. The claimant signed this report and handing over to Antonio Tanui the incoming officer and approved by Alberto Errico.
45. The Audit report is more on point. That is;
 - The handover report shows that the stock position was an 'approximate', meaning a physical count had not been performed to verify its accuracy.
 - That a physical count as performed 5 days later, from 24th to 26th February 2018. The stock count was supervised independently by a team from Internal Audit section. This stock take revealed a shortage of 91,420 pairs valued at Kshs. 38,235,465. This count was done in the absence of the former DC manager who had proceeded on leave. ...
 - That taking into account results of the repeat count, the net stock position was a shortage of 46,898 pairs valued at Kshs. 33,285,305. The modus operandi in which this significant shortage was perpetrated is still being investigated in liaison with security section.
 - It is from the foregoing that the Finance Director requested internal audit to review the significant shortage, existing controls and provide an objective conclusion to management. ...
46. Two issues then arose; the claimant had submitted handing over stock based on approximations. He proceeded on leave and while away, 5 days later, a variance was noted and according to the audit, it became a security concern that was supposed to be investigated. Secondly, the finance director requested for an internal audit to review existing controls and to provide an objective conclusion.
47. These gaps were not filled by the respondent.
48. What came out clearly from the evidence of Mr Amdany the internal auditor was that, during this period, the respondent was receiving huge stocks from Nakumatt shops that had just closed. Most of these stocks remained in gunny bags. The claimant also testified that during this period, stocks were being moved in and out of the company in hundreds.
49. As a company with various departments as noted in the internal audit, finance and accounts and the claimant was previously in the warehouse is divided into three departments - receiving department, dispatching department, and management. I take it, through these departments, the respondent had internal and external controls. The claimant was just but one of the managers in the system and network of other managers in charge of each department.



50. A loss of stock was noted as requiring the intervention of security department and finance department.
51. The claimant did not transfer himself from warehouse department to production department. The respondent as the employer retained control at all material times. Where it was found necessary for the claimant to hand over his duties, all controls ought and should have converged to ensure that he handed over a clean bill. To allow the claimant to proceed on transfer, then proceed on leave, the gap of 5 days is large enough to note changes in stocks if the evidence by the internal auditor Mr Amdany is correct, that at this point the respondent was receiving large stocks from shops after the closure of Nakumatt. To place blame on the claimant, seek to counter-claim the entire loss and shortage of 46,898 pairs of shoes, is ambitious. Account must be given to all the controls and accounting systems of the respondent.
52. In meeting the threshold of Section 41(2) of the Act, the responses of the claimant put into account, the respondent seized of all matters at its departments, had an objective process been undertaken, it would have revealed that the alleged losses of 46,898 pairs of shoes did lie in an intricate web of its own creation calling for multiple processes proposed by the auditor in the audit extract filed in court that both security and finance departments held the true answers.
53. One key person was key to the entire disciplinary hearing, Darious Amakadia, the foreman alleged to have been directed by the claimant to conceal shortages. This person was called before the disciplinary hearing in the absence of the claimant. This much, Mr Amdany confirmed.
54. The motions of a disciplinary hearing are to have all matters facing the employee addressed at the shop floor. This is not a criminal hearing. It is a space within which the employee ought to have had a fair chance to urge his representations and availed all the necessary evidence and witnesses to arrive at a just finding. Removing a key witness from the claimant denied him a crucial chance to interrogate him and exonerate himself.
55. The respondent has well submitted and relied on the case of David Githini Kibue v New Kenya Co-operative Creameries Ltd (KCC) [2019] eKLR that under Section 45(2) of the Act, termination of employment is fair if the employer proves there was a valid and fair reasons relating to the conduct of the employee. In the case of CFC Stanbic Bank Limited v Danson Mwashako Mwakuwona [2015] eKLR in adjudicating on the reasonableness of the employee's conduct, a wider inquiry must be undertaken to determine whether a reasonable employer could have decided to dismiss the employee on the given grounds.
56. Indeed, had the respondent taken into account the responses given by the claimant upon the show cause notice, allowed for a security and finance accounts to be rendered, the decision of summary dismissal ought not to have issued. This was premature given the facts availed as of 19 April 2018. This is more apparent from the Finance Directors email of 18 December 2017 on the situation of stocks within the respondent. This was not from the claimant. Mr Goel Mayank was not a manager under the claimant. The finance director was in a separate and distinct department from the claimant. Was his report as of 18 December 2017 interrogated and found with shortfalls? Was he disciplined for his reports?
57. The claimant is equally not blameless. The major lapse was his failure to attend and address the physical stock taking directed by his employer on 3 and 4 March 2018 and through his letter of 2 March 2018 the claimant declined on the grounds that;

... I came to see you [Finance Director] as requested but you weren't in. I have been told that you want me to avail myself for stock-take in Distribution Centre (DC) coming weekend and I wish to make a number of comments as hereunder: -



1. I was transferred out and told to hand over management of DC on 16 Feb 2018, signed off and hurriedly released from the department.
2. The physical stock- count should have been done when I was still in DC Manager but that was not allowed.
3. Since that time there have been a lot of transactions and personnel movements.

I am therefore reluctant given that DC operations, since aforementioned date, have not been under my watch.

On 2 March 2018 the claimant added that;

... after I left, I have learnt that several supervisors have been moved and casual workers introduced while some knowledgeable ones have been replaced with new casuals – a situation not reliable for a good count.

Just for record, receiving section of DC had been technically removed and upper wing told not to report to me. ...

58. Here, the claimant was called to assist in stock taking and to arrive at proper counts. As an employee of the respondent, whether on leave, off day, upon reasonable notice and request, duty demanded he should attend and address as required. Refusal to take proper and reasonable directions from an employer is a fundamental breach of the employment relationship and summary dismissal is allowed.
59. This is aptly captured by the Court of Appeal in the case of Paul Wanyagah v Market Development Trust t/a Kenya Markers Trust Civil Appeal No. 356 of 2017 that an employee who is invited to attend any matter at the workplace and refuses to oblige commits gross misconduct and is insubordinate. Refusal to attend as directed by the employer is tantamount to abdication of duty unless the employee can demonstrate that the summon was unlawful or related to illegal activities which is not the case here. The respondent simply wanted the claimant to attend under his previous department to assist with stock-take which matters resulted in his disciplinary hearing and summary dismissal. The claimant could have well averted such sanction by offering himself unconditionally. See Standard Group Limited v Jenny Luesby [2018] eKLR.
60. The above addressed, the sanction of summary dismissal was harsh and not justified. The failure to attend and address stock-take was in a series of triggers which led to the disciplinary hearing and all put into account, the respondent's lapse in due process and the conduct of the claimant refusal to abide lawful directions, a termination of employment should have applied.
61. The claimant is seeking reinstatement. Taking note of the relations between the parties leading to notice dated 19 April 2019, such remedy is far removed. With time lost, the remedy is not available. Notice pay is due at the last gross salary all at Kshs. 252,203.
62. Terminal dues paid to the claimant included;
 - a. Salary earned by 19 April 2018 Kshs. 112,286.20;
 - b. 25 leave days pro-rated Kshs. 147,745;
 - c. 4 days' overtime Kshs. 23,639.20;
63. The employer is the custodian of work records in terms of Section 10(6) and (7) of the Act. The tabulation of the claimant of his owed dues ought and should have been with the approval of the employer which is not the case here.



64. Accordingly, the claimant is hereby awarded notice pay at Kshs. 252,203.
65. On the counter-claim, the analysis above, the lapse in the respondent giving a foundation as to the total loss and its attribution to a single employee from a chain of various employees is lost. The audit report being the main reasons leading to the charges levelled against the claimant, the acknowledgement therefrom that security and finance departments should have undertaken investigations, to assign losses of 46,000 pairs of shoes to the claimant is unjustified. The police report on 4 May 2018 is not a conviction for such loss.
66. The counter-claim is found without basis and is hereby dismissed.
67. Accordingly, judgment is hereby entered in the following terms;
1. The claimant is awarded Kshs. 252,203 in notice pay only;
 2. The counter-claim is hereby dismissed in its entirety; and
 3. Each party to bear own costs.

The file shall be returned to ELRC Nairobi Registry.

DELIVERED IN OPEN COURT AT MOMBASA THIS 28TH DAY OF SEPTEMBER 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

