



**Nyandoro v Flamingo Horticulture Kenya Limited (Cause 1401 of 2018)  
[2023] KEELRC 2242 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2242 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1401 OF 2018  
L NDOLO, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**HENRY ORINA NYANDORO ..... CLAIMANT**

**AND**

**FLAMINGO HORTICULTURE KENYA LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. By his Memorandum of Claim dated 24<sup>th</sup> September 2018 and filed in court on 25<sup>th</sup> September 2018, the Claimant sued the Respondent for compensation for unlawful termination of employment plus payment of terminal dues. The Respondent filed a Response on 16<sup>th</sup> November 2018.
2. At the trial, the Claimant testified on his own behalf and the Respondent called its Human Resource Manager, Mt. Kenya Region, Steve Ngugi. The parties further filed written submissions.

**The Claimant's Case**

3. The Claimant states that on 1<sup>st</sup> November 2005, the Respondent (then known as Homegrown (K) Limited) employed him as a Guard. He was confirmed in his appointment on 1<sup>st</sup> February 2006.
4. The Claimant rose through the ranks to the position of Regional Security Manager as at 5<sup>th</sup> May 2016.
5. On 12<sup>th</sup> July 2018, the Claimant was notified that he was required to attend a disciplinary meeting. He claims that he was not given a chance to question his accusers and that the meeting was stopped before the allegations were fully discussed.
6. On the same day, 12<sup>th</sup> July 2018, the Claimant was issued with a suspension letter and asked to report back on 14<sup>th</sup> July 2018. When he reported back, he was required to show cause why disciplinary action should not be taken against him. Thereafter, he was served with a letter of summary dismissal.



7. The Claimant accuses the Respondent of denying him a fair chance to be heard. He adds that the termination of his employment was without justification. He now claims the following:
  - a. Service pay (21 days for each completed year).....Kshs. 922,249
  - b. 12 months' salary in compensation.....1,216,152
  - c. 3 months' salary in lieu of notice.....304,038
  - d. Salary for 12 days worked in July 2018.....40,538
  - e. Pay in lieu of cumulative annual leave not taken.....50,538
  - f. Public holidays worked (6 days).....40,538
  - g. Certificate of Service
  - h. Costs plus interest

### **The Respondent's Case**

8. In its Response dated and filed in court on 16<sup>th</sup> November 2018, the Respondent admits having employed the Claimant as a Guard effective 1<sup>st</sup> November 2005.
9. The Respondent further admits that the Claimant's last position was Regional Security Manager as at the date of termination of his employment on 14<sup>th</sup> July 2018.
10. The Respondent states that the Claimant was implicated in an incident on 7<sup>th</sup> July 2018, whereby the Respondent's Vehicle Fleet Number S36 left the Company premises at Ibis Farm for personal use, without being inspected, in breach of procedure, despite the matter being escalated to the Claimant as the responsible Manager.
11. The Respondent adds that on 8<sup>th</sup> July 2018, the Claimant instructed a Guard to allow the same Vehicle Fleet Number S36 to leave the Company premises using a gate pass for the previous day, 7<sup>th</sup> July 2018 which was invalid.
12. The Respondent avers that the incidents complained of were brought to the Claimant's attention by the General Manager, Ibis Farm, in an email exchange on 10<sup>th</sup> July 2018 and 11<sup>th</sup> July 2018. The Claimant is said to have forwarded his statement via email.
13. According to the Respondent, a disciplinary hearing was held on 12<sup>th</sup> July 2018, where the Claimant was accompanied by an employee of his choice, one Evans Ayora and was afforded an opportunity to be heard. The Claimant was then placed on suspension effective 12<sup>th</sup> July 2018 and required to report back on 14<sup>th</sup> July 2018.
14. The Respondent states that investigations culminated in a report submitted to the General Manager, in which other staff implicated the Claimant in the incidents.
15. The Claimant was subsequently invited to show cause via a letter dated 14<sup>th</sup> July 2018 to which he responded on the same day but his explanation was found wanting and his services were therefore terminated, effective 15<sup>th</sup> July 2018.
16. The Respondent avers that the Claimant's terminal dues were applied towards offsetting his outstanding liabilities resulting in nil payment to him.



## Findings and Determination

17. There are two (2) issues for determination in this case;
  - a. Whether the termination of the Claimant's was lawful and fair;
  - b. Whether the Claimant is entitled to the remedies sought.

## The Termination

18. The termination of the Claimant's employment was communicated by letter dated 14<sup>th</sup> July 2018, stating as follows:

“Dear Henry,

Termination

Reference is made to the incident on 7<sup>th</sup> and 8<sup>th</sup> July, where it was reported that a company vehicle fleet number S36 left the company premises for personal use without being inspected as procedural despite the matter having been escalated to you, it was also established that you used an unauthorised seal to seal the truck. Further to it, on Sunday, 8<sup>th</sup> July 2018 you instructed a guard to allow the aforementioned vehicle to exit the premises using the previous day's gate pass.

Also refer to show cause letter dated 14<sup>th</sup> July 2018, your response to the same and the disciplinary hearing session held on 12<sup>th</sup> July 2018 attended by the General Manager, Human Resources Manager – Ibis Farm, Human Resources Officer, Senior Transport Foreman, two guards, employee of choice, Welfare Chairman – Ibis Farm, and yourself.

Following the disciplinary hearing, we have sufficient grounds to conclude that as the Regional Security Manager in charge, you allowed a company vehicle fleet number S36 to exit the company premises for personal use without being inspected as procedural despite the matter having been escalated to you, it was also established that you used an unauthorised seal to seal the truck. Further to it, on Sunday 8<sup>th</sup> July 2018 you instructed a guard to allow the aforementioned vehicle to exit the premises using the previous day's gate pass. You also left the workshop yard vulnerable by instructing the Assistant Security Supervisor in charge to re-deploy the security guard assigned there and yet you are aware of the sensitivity of the area.

Your actions amount to gross misconduct and are contrary to the Company Policy. Based on the above, the company has arrived at a decision of terminating you with effect from 15<sup>th</sup> July 2018.

Upon receipt of all company property in your possession, you will be paid your terminal dues as follows.

Basic Pay for 1<sup>st</sup> July 2018 to 14<sup>th</sup> July 2018. House Allowance for 1<sup>st</sup> July 2018 to 14<sup>th</sup> July 2018. Service Gratuity for each completed year of service. Three months' notice pay. One way leave travelling allowance. Any holiday worked.

Kindly note that terminal dues will be paid less any outstanding liabilities with the Company and relevant statutory deductions.



Please note that you have up to 18<sup>th</sup> July 2018 to appeal if you so wish. The appeal letter should be addressed to the Director – Legal, HR, Compliance, and Corporate Affairs. Please clear with your department and collect your dues from Accounts office at your earliest convenience. Yours faithfully, For: Flamingo Horticulture Kenya Ltd. Samir Wason General Manager – Ibis Farm”

19. This letter seeks to implicate the Claimant in an alleged incident in which the Respondent’s truck is said to have left the company premises for personal use without being inspected. The Claimant was specifically accused of using an unauthorised seal to seal the truck and instructing a security guard to allow the truck to exit by an already used gate pass.
20. In inquiring whether a termination of employment was lawful and fair, the Court is required to ask two related questions; first, whether the employer had a valid reason for the termination and second, whether in effecting the termination, due procedure was observed.
21. Regarding the first question, Section 43 of the Employment sets the following standard:
  43. Proof of reason for termination
    1. In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
    2. The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.
22. In inquiring whether an employer has discharged its obligation under Section 43 of the *Employment Act*, the Court does not ask what action it would have taken had it been in the shoes of the employer. Rather, the Court applies the ‘reasonable responses’ test as defined in *Halsbury’s Laws of England, 4<sup>th</sup> Edition*, Vol. 16(1B) para 642 which states:

“In adjudicating on the reasonableness of the employer’s conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee’s conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if it falls outside the band, it is unfair.”
23. The Claimant made a good attempt to exonerate himself from wrongdoing. He was however unable to account for the seal which he used to seal the truck in issue. All the Claimant stated is that he got the seal from the main store but he could not confirm its authorisation.



24. In his own words, the Claimant did not receive the impugned seal from the Security Clerk, Peninah Gakere, who was responsible for distributing seals. It is on record that Gakere had written a statement stating that the seal used by the Claimant was not duly issued.
25. For this reason, I find and hold that the Respondent had a valid reason for terminating the Claimant's employment as required by Section 43 of the *Employment Act*.
26. The next question is whether in effecting the termination, the Respondent observed the mandatory procedure set by Section 41 of the Act which provides:
  41. Notification and hearing before termination on grounds of misconduct
    1. Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or shop floor union representative of his choice present during the explanation.
    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 grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.
27. Prior to the termination, the Claimant had been suspended by letter dated 12<sup>th</sup> July 2018, pending investigations. The suspension letter required the Claimant to report to the Human Resource Office on 14<sup>th</sup> July 2018, on which date he was issued with a show cause letter requiring him to respond on the same day. On that very day, the Claimant's employment was terminated.
28. From the foregoing, it is evident that the Claimant was not afforded adequate time to prepare his defence. Further, according to the record availed by the Respondent, the Claimant appears to have been subjected to some form of a disciplinary hearing on 12<sup>th</sup> July 2018, before the suspension and show cause letter. This strange twist is not what is contemplated by the procedural fairness requirements of Section 41 of the *Employment Act*. Overall, I find and hold that the Respondent bungled the disciplinary process, rendering the termination procedurally unfair.

## Remedies

29. Flowing from the foregoing, I award the Claimant three (3) months' salary in compensation. In making this award, I have taken into account the Claimant's length of service tinkered with his contribution to the termination.
30. According to the termination letter dated 14<sup>th</sup> July 2018, the Claimant was to be paid his terminal dues; including salary for 14 days in July 2018, 3 months' salary in lieu of notice and service gratuity.
31. The Respondent's witness, Steve Ngugi told the Court that the Claimant's dues were applied towards liquidating his loan with Siraj Sacco. The Claimant himself admitted being a member of the Sacco which had a check-off arrangement with the Respondent. The Claimant did not deny being indebted



to the Sacco and the Court found no reason to fault the Respondent for applying his terminal dues to pay off his Sacco loan (see *Elkana Sweta Makokha v Bob Morgan Services Limited* [2014] eKLR).

32. Having been a contributing member of the National Social Security Fund (NSSF) the Claimant is not entitled to service pay.
33. In the end, I enter judgment in favour of the Claimant in the sum of Kshs. 339,459 being three (3) months' salary in compensation for unfair termination of employment.
34. This amount will attract interest at court rates from the date of judgment until payment in full.
35. The Claimant will have the costs of the case.
36. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2023**

**LINNET NDOLO**

**JUDGE**

Appearance:

Ms. Wanyonyi for the Claimant

Ms. Bonyo for the Respondent

