



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Nzuki v Matungulu Kangundo Water & Sewerage Co Limited (Cause
54 of 2018) [2023] KEELRC 2191 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2191 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 54 OF 2018
AN MWAURE, J
SEPTEMBER 22, 2023**

BETWEEN

DAVID MUSAU NZUKI CLAIMANT

AND

**MATUNGULU KANGUNDO WATER & SEWERAGE CO
LIMITED RESPONDENT**

JUDGMENT

Introduction

1. The Claimant filed a Memorandum of Claim dated 22nd January 2018.

Claimant's Case

2. The Claimant was employed by the Respondent on 1st July 2013 as a managing director.
3. The Claimant avers that on 3rd July 2014 the Respondent served him with a letter of notice to show cause why he should not be summarily dismissed on grounds that:-
 - a. Failure to implement and execute company obligations and decisions.
 - b. Conducting himself in an unbecoming behaviour before an officer from Tanathi Water Services.
 - c. Carrying away board of directors' minutes file when going on leave together with the company's flash disk.
 - d. Going on leave on 25th August 2014 without prior arrangement or permission from the board of directors.



- e. Sending several phone messages without the knowledge of the board of directors to Machakos county, MCA, MPs, Senator and Governor threatening to expose the directors.
 - f. Behaving in an emotional and uncouth manner in front of the board of directors.
4. The Claimant avers that he provided a written response vide a letter dated 15th December 2014 in which he responded to each accusation and explained the notice to show cause was unfounded and made in bad faith.
 5. The Claimant avers that he was called to an alleged disciplinary hearing on 19th January 2015 however he was neither given an opportunity to defend himself nor called a representative of his own during the hearing as required under section 41 of the *Employment Act*.
 6. The Claimant avers that the hearing was attended by Gerald Mwaka- Chairman; Phoebe Muindi- Director; Mary Kisuke- Director; Samuel Mutua- Director; Agnes Muteti- Ag. MD; Brenda Kiberenge- Legal Officer, Tanathi Water Services Board and Richard Muindi- Machakos County Government representative.
 7. The Claimant avers that the Respondent contravened tenet 27 of the code of ethics for board of directors of the Respondent by failing to report the Claimant's alleged misconduct to the CEO, Tanathi Water Services as he is the authorised person to issue appropriate sanction and penalty as he may deem fit.
 8. The Claimant avers that on 31st January 2015, the Respondent's chairman issued him a letter in which he was summarily dismissed on grounds that the board of directors resolved to do so in view of the serious allegations of misconduct levelled against him.
 9. The Claimant avers that the termination letter and the reasons therein were unfair, unjust and in breach of the *Employment Act*, the Respondent's Code of Ethics or Board of Directors and his letter of appointment.

Respondent's Case

10. The Respondent aver that since the Claimant's employment he has acted contrary to the regulations and guidelines in accordance with his letter of appointment dated 3rd July 2015 and was implementing his own decisions.
11. The Respondent aver that the Claimant was given several written and oral warnings which he defied including side lining the managing director in his decisions, recruiting new employees without the board's consent, making abrupt decisions singlehandedly, conspiring with cartels to defraud the company, disregard of work ethics expected of him as can be seen in the Respondent's documents attached.
12. The Respondent's aver that it conducted a disciplinary panel by following correct procedures required in law by serving the Claimant a notice to show cause first and have the panel sitting on 19th January 2018 in which the Claimant was found to have violated his mandate, incompetent to serve as a managing director and the Claimant was paid his dues and summarily dismissed.

Evidence in court

13. This court took note and ordered that the court records affirm that the Claimant served the Respondent's advocate and the Respondent in person Affidavits of service dated 21st February 2023



and 7th March 2023 respectively were filed as proof of service but Respondent and/or his advocate were absent during the hearing therefore the court ordered the case to proceed *ex parte*.

14. The Claimant adopted his witness statement dated 23rd January 2018 together with the memorandum of claim as his evidence in chief and list of documents dated 22nd January 2018 as his exhibit.
15. The Claimant testified that he was dismissed by the Respondent on 31st January 2015 and that the Respondent neither issued him with a notice of the disciplinary hearing nor notified him that he could take a witness to the board meeting he attended where he was informed it was a disciplinary hearing.
16. The Claimant further testified that the alleged minutes of the disciplinary hearing did not contain his response.
17. The Claimant further testified that the 1st Respondent cancelled his paternity leave and that he was dismissed while on leave which was made indefinite.
18. The Claimant testified that the summary dismissal was unfair as he was denied a fair hearing.

Submissions

19. The Claimant submitted that in as much as he responded to the notice to show cause, the Claimant was not accorded a fair hearing as he was not notified that he had a right to have an independent representative during the proceedings as required under section 41 of the *Employment Act*.
20. The Claimant submitted that the disciplinary panel failed to consider the Claimant's explanations and he testified that whatever he communicated during the said meeting was not put in writing, verbatim in the said minutes.
21. The Claimant submitted that the summary dismissal from employment was malicious, unfair and unlawful as the allegations were never proven nor substantiated and the procedure was wrong and unlawful.
22. The Claimant further submitted that the Respondent did not rebut the Claimant's testimony with any evidence hence the reliefs sought in his memorandum of claim together with costs and interests for reason that his termination was unfair and unlawful as the Respondent contravened Article 41 and 27 of the *Constitution* and sections 19, 36, 41, 43, 44 and 45 of the *Employment Act*.

Analysis and Determination

23. The first issue is that the Respondent did not rebut the Claimant's testimony with any evidence. The court is guided by the case of *Billiah Matiangi v Kisii Bottlers Limited & another* [2021] eKLR where the court held: -

“ 11. Where a plaintiff gives evidence in support of her case but the defendant fails to call any witness in support of its allegations then the plaintiff's evidence is uncontroverted and the statement of defence remains mere allegations. In *Janet Kaphiphe Ouma & Another v Marie Stopes International (Kenya)* Kisumu HCCC No. 68 of 2007 Ali-Aroni, J. citing the decision in *Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter* Civil Appeal No. 23 of 1997 held that:

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions



made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence”.

The fact that a defence is held as mere allegations in no way lessens the burden on the plaintiff to prove her case. The court in the case of *Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & Another* [2016] eKLR the court stated:

“I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not.

The appellant despite the absence of evidence from the respondent was obligated to prove its case on a balance of probabilities. Although there was no evidence from the respondents, the appellant did not present any evidence to prove that she was the owner of motor vehicle KAK 194E and this was very crucial for the success of her case.”

24. In view of the foregoing, although the Respondent herein did not produce any evidence in this court in support of its case, the Claimant must prove that he was indeed wrongfully and summarily dismissed.
25. The law clearly provides that for an employer to lawfully terminate an employee, it must prove that it has a substantive justification to terminate the employment and that procedural fairness under Section 41 of the *Employment Act* was adhered to. In *Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR, the court held that:-
 - “29. My understanding of these provisions of law is that they seek to substantially regulate termination of contracts of service particularly by an employer. First, an employer may not terminate an employee except for good cause. Some of the grounds that constitute good cause under section 41 of the *Act* are: poor performance; physical incapacity; and gross misconduct. Section 40 of the *Act* provides redundancy as the other substantive ground for termination but which is unrelated to those set out under section 41.
 30. But even where there exists substantive ground(s) to justify a termination, the law obligates the employer to observe certain procedural strictures to ensure the upholding of the broad principles of natural justice in processing the separation between him/her and the affected employee. The employer has to: provide the employee with details of the accusations against the employee; allow the employee an opportunity to respond to the charges; allow the employee to be accompanied by a shop steward or co-employee of his choice during the process; and finally provide the employee with a decision either terminating or saving the contract of service.
 31. Where the employer fails to do the foregoing, the resultant termination is deemed unlawful. And in law, the burden of justifying the lawfulness of



the termination both in terms of whether there was a substantive ground to terminate and whether procedure for release of the employee was adhered to lies with the employer.

32. Section 47(5) of the *Employment Act* sometimes presents a challenge regarding how to navigate the aspect of the burden of proof in addressing disputes arising from terminations. It does suggest two burdens: the employee has the burden of proving the unlawfulness of the termination; and the employer has the burden of justifying the termination.”
26. The *Employment Act* fully embodies what are legal requirements to lawfully summarily dismiss an employee from employment as seen in the below quoted sections.
27. Section 41 of the Act provides as follows: -
- “(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 a shop floor union representative of his choice present during this 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 the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.”
28. Section 43 provides as follows:
- “(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.”
29. Section 45 of the Act provides in part as follows: -
- “(1) No employer shall terminate the employment of an employee unfairly.
- (2) A termination of employment by an employer 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:
- Related to the employees conduct, capacity or compatibility; or
 - Based on the operational requirements of the employer; and



-That the employment was terminated in accordance with fair procedure.”

30. Section 47(5) of the Act stipulates as follows: -

“For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

31. And section 44 (4) (c), (d) and (e) of the Act stipulates as follows:

“Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:-

- (c) an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;
- (d) an employee uses abusive or insulting language, or behaves in a manner insulting to his employer or to a person placed in authority over him by his employer
- (e) an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer.”

32. The Respondent vide his statement of response produced the notice to show cause letter dated 3rd December 2014 which was also produced by the Claimant as his exhibit no.4 and minutes of the board of directors held on 19th January 2015 which detailed the allegations against the Claimant which constituted justifiable or lawful grounds for the dismissal under section 44 of the Employment Act. There was however no concrete evidence to support the allegations as provided in the employment laws.

33. Further more the Respondent failed to meet the procedural fairness set out in Section 41 (1) of the Employment Act as no evidence was adduced before this court that the Claimant was notified earlier of the disciplinary hearing and the allegations levelled against him before the alleged disciplinary hearing to enable him prepare a proper defence.

34. In reference to the disciplinary hearing minutes, it stated: - “the show cause letter was read to him and after consideration it was found out he had omitted some accusations which he was given a chance to defend himself.”

35. Section 41 of the Employment Act provides:-

“(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 a shop floor union representative of his choice present during this explanation.

36. In the case of *Galgalo Illo vs Agricultural Finance Corporation* 2021 eKLR *supra* the court held that even where substantive grounds exist to justify termination certain procedural structures must be observed by the employer to uphold the broad principles of natural justice.
37. The court finds the respondent did not pass the fairness test of justifying the termination of the claimant and also failed to observe procedural fairness. The court finds the claimant was unlawfully terminated and judgment is entered in his favour.
38. The court holds that since claimant was unlawfully terminated he is entitled to certain reliefs as listed hereunder.
 - i. Compensation for unlawful termination under section 49 of *employment act* pegged at 3 months considering the period he worked for the respondent kshs 273,000/-
 - ii. One-month salary in lieu of notice 91,000/-.
 - iii. Accrued leave days between July 2014 to January 2015, 45,000/-
Total 409,000
 - iv. Costs are awarded to the claimant as well
 - v. Interest is also awarded from date of judgment till full payment.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 22ND DAY OF SEPTEMBER 2023.

ANNA NGIBUINI MWAURE

JUDGE

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 has 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.

ANNA NGIBUINI MWAURE

JUDGE

