



**Vundi v Mombasa Parents Club & 3 others (Cause 16 of 2020)
[2023] KEELRC 2299 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2299 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 16 OF 2020
M MBARŪ, J
SEPTEMBER 21, 2023**

BETWEEN

JOHN MUTINDA VUNDI CLAIMANT

AND

MOMBASA PARENTS CLUB 1ST RESPONDENT

**BENJAMIN GITONGA MUTUNGI (BEING SUED AS CLUB
CHAIRMAN) 2ND RESPONDENT**

**MICHAEL SIMINYU WANGAMATI (BEING SUED AS CLUB
TREASURER) 3RD RESPONDENT**

**PAUL MUTUA MUNYAO (BEING SUED AS CLUB
SECRETARY) 4TH RESPONDENT**

JUDGMENT

1. The claimant is an adult male. The 1st respondent is a club association running the Nyali School, formerly Nyali Primary School. The 2nd, 3rd and 4th respondents are the officials of the 1st respondent serving as chairman, treasurer and secretary respectively.
2. The 1st respondent employed the claimant on 2 January 1998 as an accountant at a wage of kshs. 17,450 per month where he served until 19 September 2019 when he was sent on compulsory leave for 45 days to allow the respondents undertake investigations and audit in respect of the operations of his office. The respondent also issued the claimant with a notice to show cause on five allegations to which he gave his responses but on 6 November 2019 the respondent issued summary dismissal notice.
3. The claim is that the summary dismissal was unfair on the grounds that prior to the notice, the respondents directed the claimant to record statement at the Dog Section Police Station on leakages of club information to the public. The police confiscated the claimant's phone and this was meant to



- intimidate him into not attending the hearing on his case. By issuing both letters for compulsory leave and show cause notice on the same day, the respondent demonstrate bias and keenness to dismiss the claimant from his employment. there were no investigations conducted with respect to the claimant's office or any audit in respect to the operations of the accounts office.
4. The claim is also that the respondent failed to follow the due process in the summary dismissal on the grounds that the claimant was not notified of the intention to take disciplinary action or given the opportunity to defend himself. By inviting the police to investigate the claimant, the respondent demonstrated intention to terminate employment.
 5. At the time of the summary dismissal, the claimant was earning kshs. 179,908 and following the unfair termination of employment, the respond should pay gratuity that the claimant should have earned at retirement age.
 6. The claimant is seeking the following dues;
 - a. 6 days worked in November 2019 kshs. 41,517;
 - b. Leave pay for 2019 kshs. 179,908;
 - c. Leave travelling allowance kshs. 20,000;
 - d. Notice pay kshs. 179,908;
 - e. Gratuity at 18 days for 22 years kshs. 2,740,137;
 - f. 12 months' compensation kshs. 2,155,896.
 7. The claimant is also seeking payment of general damages arising from publication of his photo and name in the newspapers of 29 November 2019, to be issued with a certificate of service and costs of the suit.
 8. The claimant testified that following long service with the 1st respondent as the accountant, he became the administrator of non-teaching staff and human resource and the custodian of the school funds. The claim is for payment of 6 days worked in November 2019, leave days not taken in the year 2019 and notice pay following unfair termination of employment through summary dismissal. The claimant also testified that he is entitled to payment of gratuity which per the policy of the 1st respondent was payable at 18 days for each year worked in the event of termination of employment due to illness, redundancy and retirement at 65 years but he was not allowed to serve until the retirement age following termination of employment at 62 years.
 9. The claimant testified that on 19 September 2019 he was issued with two notices both dated 18 September 2019. One was with regard to compulsory leave for 45 days and the other, a show cause notice over 5 allegations of gross misconduct. he could not comprehensively respond to the allegations because he was on compulsory leave and required access to various records in the custody of the respondents. He was given until 30 September 2019 to respond and to meet the respondents for a board disciplinary hearing at Voyager Hotel.
 10. The claimant testified that the notice to show cause issued to him by the respondents was unfair because it was both required him to respond to the allegations and also had a disciplinary hearing date for 30 September 2019. The respondent also reported the allegations to the police for investigations who summoned him and took his phone.
 11. Before the disciplinary hearing, the principal of the school reported the claimant to the DCI that he was sending incitement messages to the media. There were bad publication/messages of the respondent



- in the social media and the claimant was accused of posting and sharing internal information of the school which was not true.
12. The claimant responded to the notice to show cause through email and to give emphasis to his concerns he made bold and underlined responses because he felt wounded after serving the school for over 22 years and was being accused of baseless allegations a few years to retirement.
 13. The claimant was accused of failing to attend an executive meeting on 18 September 2019 which meeting had been called in relation to the purchase of a school bus with an inflated LPO which he challenged. Instead, he was reported to the police over alleged cybercrime and that he had published internally matters of the school to the social media and his phone was held by the police.
 14. In his response, the claimant told the respondents that he was ready to be sacked if by telling the truth was not good for them and in response the respondent issued him with notice of summary dismissal and accused of refusing to attend disciplinary hearing on 30 September 2019 when the executive committee of the board was to hear his disciplinary case but he could not attend because he had issues with 4 of its members, the chairman, the treasurer and the principal. They were all involved in the purchase of the school bus at an inflated costs. These were the same persons who had accused the claimant and were to hear his case and hence, he knew he would not receive justice.
 15. The other allegations were that the claimant had failed to account for kshs. 10,875 used to hire music festival costumes but he had submitted the required documentation to the chairman who was satisfied with the same.
 16. Upon cross-examination, the claimant testified that in his role, he was reporting directly to the full board and to the trustees and not to the principal. The 1st respondent had a staff policy and all grievances from employees were to be processed through the ranks and his next in line was the principal but he was allowed direct access to the board and trustees.
 17. The claimant testified that he was not on talking terms with the principal when he was summoned to attend a meeting at his office, he opted to only meet with the chairman. During the meeting held on 18 September 2019 at the principal's office, present were the chairman, treasurer and the principal and he declined to attend because he felt victimised and would be humiliated because, when he was employed, he was only accountable to the full board and to the trustees. He had differed with the same persons with regard to their inflated LPO for the purchase of the school bus and he did not expect any justice from them and therefore could not attend the scheduled disciplinary hearing on 30 September 2019 and after which he was issued with notice of summary dismissal.
 18. In reply, the respondents' case is that the claimant was employed as an accountant and on numerous occasions was found to have carried out his duties negligently and carelessly leading to unaccounted and loss of funds entrusted to him. the 1st respondent noted the claimant to have fundamentally been in breach of his employment contract as an accountant and to facilitate investigations, through letter dated 18 September 2019 he has sent on compulsory leave. He was also issued with a show cause notice requiring him to respond and attend hearing on 30 September 2019 to respond to allegations that;
 - a. On 4 September 2019 the claimant was called by the 2nd respondent as the chairman of the school to attend a meeting at the principal's office but he declined which was insubordination and gross misconduct;
 - b. Despite the 1st respondent instructing the claimant to effect changes to access passwords of the 1st respondent's KRA and NTSA account to be held by the 1st respondent, the claimant declined;



- c. The claimant failed to account for kshs. 205,365 being monies entrusted to him for payment of meals, entrance fees for grade two and three at Sun n Sands Hotel and Haller Park.
 - d. Failing to obey instructions from the treasurer the 3rd respondent with regard to submission of monthly management accounts to the board.
 - e. Contravening the 1st respondent's board directive allocating duties and roles to the claimant as the accountant and bursar.
19. The claimant responded to the allegations made against him with mere denials and instead focused on the 1st respondent, the board and other officers and demonstrated his unwillingness to obey lawful commands and instructions from his supervisors.
 20. Despite being invited to a disciplinary hearing on 30 September 2019 the claimant declined to attend giving the 1st respondent no option but to dismiss him from employment and the claims made are without merit and should be dismissed with costs. The claimant took all his leave days and terminal dues were paid based on the last day worked. the claimant had several warning letters in the course of his employment and cannot justify his claim for compensation.
 21. In evidence, the respondent called Michael Simuyu Wangamati a member of the board and treasurer who testified that the claimant was the school accountant and answerable to the school principal as the Chief executive office and functionally the accounting officer to the board.
 22. Mr Wangamati testified that on 18 September 2019 the executive board given mandate to address various matters of the 1st respondent held a meeting at Voyager hotel and asked the claimant to attend but he declined. There were various matters the executive board members required to address with the claimant and upon his refusal to attend and address, he was given compulsory leave and notice to show cause dated 18 September 2019 and also a hearing date on 30 September 2019 at Voyager Hotel. The claimant respondent, the board members met on 30 September 2019 but he refused to attend. When asked for clarifications, the claimant declined to address. On the allegations that there was bad blood between the claimant and several board members, this is not correct since the board called him to address any concerns that he may have had and he declined to attend. He refused to respond to any directions and instructions given by the school principal leaving the respondents with no choice but to issue summary dismissal for gross misconduct.
 23. Mr Wangamati also testified that on 4 September 2019 the claimant as called for a meeting by the principal and he failed to attend. The meeting could not proceed since the claimant refused to submit monthly financial reports.
 24. The claimant failed to account for monies entrusted to him amounting to kshs. 205,000 and this was to be addressed at the board level but he refused to attend.
 25. The claimant held KRA and NTSA accounts in his personal names and when directed to revert these to the 1st respondent he refused.
 26. For these reasons, the claimant was of gross misconduct and his failure to attend disciplinary hearing as directed justified the summary dismissal. The claims made for payment of gratuity is not available since the 1st respondent had a policy with conditions of when to pay such benefit and upon summary dismissal this was not available to the claimant. The 1st respondent had also long changed the payment of gratuity to pension in the year 2005.
 27. John Kombo the principal of the 1st respondent and testified that he has since left the school and he worked with the claimant who was on 18 September 2019 sent on compulsory leave to allow the



respondents conduct investigations into his conduct. They had had a cordial relationship with the claimant until when he refused to take instructions from him as the principal and when he was called to a meeting by the chairman, he declined to attend leading to the compulsory leave and notice to show cause and an invitation to attend disciplinary hearing on 30 September 2019. the claimant replied to the show cause notice but refused to attend the disciplinary hearing without any good cause. The board was left with no option but to dismiss him and notice issued and he was paid his terminal dues to the last day of service. the claim for gratuity is not due since the claimant left employment under summary dismissal for gross misconduct. Under the respondent's policy, from the year 2005 the payment of gratuity ended upon the respondents taking up a pension scheme and all staff were covered therein.

28. From the written submissions and evidence before court, these analysed, the twin issues which emerge for determination can be summarised as whether there was unfair termination of employment and whether the remedies sought should issue.
29. Through notice dated 6 November 2019, the 1st respondent issued the claimant with notice of summary dismissal on the grounds that upon the show cause notice dated 18 September 2019 the claimant was directed to show cause how his employment should not be terminated over five allegations outlined in the notice and to also attend an oral disciplinary hearing on 30 September 2019 which he declined to attend.
30. The claimant does not deny that he received the notice to show cause and that in the notice, he responded to all the allegations made against him but declined to attend the disciplinary hearing on 30 September 2019. The claimant gave his reasons for non-attendance at the disciplinary hearing as being that the five allegations made against him were ambiguous and without clarity and hence he was unable to adequately respond. That there were four board members he had differed with following an inflated PO over the purchase of a school bus and they were intent on terminating his employment. the claimant also gave his reasons for non-attendance at the disciplinary hearing to be that, parallel to his compulsory leave and requirement to show cause, the respondents caused him to be summoned by the DCI to answer to cybercrime allegations following bad publicity of the 1st in the social media.
31. An employer is allowed to suspend the employee and to remove him from the shop floor to allow for investigations. Such is a prerogative allowed of the employer for good cause.
32. Together with suspension or administrative leave or compulsory leave, the employee may be required to respond to various matters of his conduct to assist with the investigations. Where the employee is unable to respond due to lack of necessary records, the practice is to seek the same from the employer.
33. In this case, on 18 September 2019 the claimant was sent on compulsory leave to allow for investigations. He was also directed to respond to five allegations.
34. On the allegations that he refused to attend a meeting called by the respondents in the principal's office on 4 September 2019, the claimant responded and stated that he was not on taking terms with the principal and that I cannot take myself into those fighting me territory!!!
35. With regard to the allegations that he failed to obey instructions from the board to access KRA and NTSA passwords, the claimant replied and stated that no instructions had been issued to him and that the 1st respondent had no mobile phone at the time and hence he used his phone number for such purposes and used his persona email since that of the school was down.
36. On alleged failure to account for kshs. 205,365 for a school trip the claimant responded that when he went on leave on 24 July 2019 he found his drawer open and the receipts missing and that such an



allegation was meant to fix him because he had challenged the LPO for the bus and there was bad blood between him and the school leaders.

37. With regard to failing to submit monthly management accounts, the claimant responded that he had done as required but the treasurer said the reports were scanty and auditors were called in leading to the matter being reported to the police where the claimant was summoned and directed to surrender his phone.
38. With regard to the allegations that the claimant had contravened directions from the board and he failed to attend a board meeting on 18 September 2019 the claimant responded and stated that those who were in attendance were;

[the] treasurer, the principal and the chairman. Among who inflated the LPO price of the new buss and now want to be judges thus the meeting was made to humiliate me with all this false allegations ... a way to victimise me and to push me out ... in any case, I cannot get a fair hearing when majority of the executive members are fighting me. ... so even the one of today 30th September 2019 I won't attend and am ready to be sacked if that it is what it takes for the club/school to be liberated from those bend [bent] to fleece it!!!

39. For the disciplinary hearing, as the claimant indicated, on the scheduled date, 30 September 2019, he did not attend. On 6 November 2019 he was served with notice of summary dismissal.
40. An employee faced with a disciplinary matter, once invited by the employer to attend and address, should oblige. Such is to give the employee the best chance to defend himself and address his concerns however aggrieved the employee may be. This is the primary forum to urge his case and safeguard his employment.
41. Failure to attend as directed by the employer is tantamount to frustrating own employment. it is also defined as gross misconduct and subject to summary dismissal in terms of Section 44(4) (e) of the *Employment Act, 2007* that;
- (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;
42. The claimant felt he was not accountable to the principal but to the full board and the trustees since upon his employment, he had direct access to these structures. He therefore refused to attend before the board executive since he felt they were not the full board. When summoned to address various matters with regard to his office, he declined to attend on the grounds that he could only attend before a full board.
43. Essentially, the claimant could not budge or attend any meeting where the principal, chairman and treasurer were in attendance. However, these were the very persons and officers appointed and elected by members to oversee the 1st respondent's operations by the Club members. Despite being given the opportunity to attend and address his case on 4, 18 and 30 September 2019, the claimant declined.
44. An employee who fails to attend before his employer to defend himself cannot blame anybody else but himself. In the case of *Jennifer Osodo v Teachers Service Commission* [2013] eKLR the court held as follows;

...an employee facing disciplinary action cannot be allowed to hold their employer to ransom by taking the position that they will only attend disciplinary proceedings at their convenience. I have examined the facts and circumstances of this case and I am satisfied that



the respondent afforded adequate opportunity to the claimant to defend herself but she threw away the opportunity. She stretched her luck to the wire prompting the respondent to dismiss her for desertion of duty. I find both the respondent's action and the attendant procedure justifiable. The claimant's claim for unfair termination of employment therefore fails.

45. The Court of Appeal in the case of *Paul Wanyangah v Market Development Trust t/a Kenya Markets Trust* [2023] eKLR held that in deciding whether it was just and equitable for an employer to terminate the employment of an employee, the court must look at the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision. In a case where the employee is invited to attend his disciplinary case and refuses to do so, such an employee squanders that moment to his detriment and cannot claim unfair termination of his employment.
46. In this case, the claimant dared the respondent to terminate his employment by summary dismissal. Upon such invitation, taking note that the claimant had consistently refused any efforts to hear his case on the merits on 4, 18 and 30 September 2019, the sanction issued on 6 November 2019 of summary dismissal is hereby found justified.
47. The claimant cannot seek notice pay, compensation of payment of damages where he frustrated his own employment and for good cause, the sanction of summary dismissal issued.
48. On the claim for pay for 6 days worked, employment ended on 6 November 2019 when such notice issued in terms of Section 18(4) of the *Employment Act, 2007*;
 - (4) Where an employee is summarily dismissed for lawful cause, the employee shall, on dismissal be paid all moneys, allowances and benefits due to him up to the date of his dismissal
49. The claimant is entitled to his salary up and until the last day of his employment with the respondents. On the last salary of ksh. 179,908, for 6 days, the claimant is entitled to ksh. 35,982.
50. On the claim for leave for 2019, through notice dated 18 September 2019 the claimant was allowed 45 leave days. From such date, he did not resume his employment. he cannot claim outside such allocation.
51. On the claim for leave travelling allowance, this is not a term of the employment contract.
52. On the claim for gratuity, this is equally not a term of the contract and no private treaty or agreement is submitted to justify this claim. Even where such was due, which is not the case here, the respondent being the employer is the custodian of all work records. The evidence of Mr Kombo was that since the year 2005 the payment of gratuity ceased upon a transition to a pension scheme. Such covers that respondents in terms of Section 35 (6) of the *Employment Act, 2007*. Indeed, the payment statement for January 2019 issued in terms of Section 20 of the *Employment Act, 2007* demonstrate that the respondent remitted the sum of kshs. 31,433.60 for the benefit of the claimant in pension. The sum of kshs. 32,481.60 is remitted in February 2019 and up and until October 2019.
53. Through a Claim Discharge Voucher dated 20 August 2021, Kenindia Assurance Limited processed the claimant's pension contributions.
54. A claim in gratuity based on the evidence above amounts to a dishonest claim.
55. Accordingly, the claim herein is found without merit and is hereby dismissed save for the award of pay for 6 days in November 2019 all at kshs. 35,982. Each party to bear own costs.



DELIVERED IN OPEN COURT AT MOMBASA THIS 21ST DAY OF SEPTEMBER 2023.

M. MBARŪ

JUDGE

