



**Mugallo v Crown Motors Group Limited (Cause 1147 of 2018)
[2023] KEELRC 2695 (KLR) (31 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2695 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1147 OF 2018
JK GAKERI, J
OCTOBER 31, 2023**

BETWEEN

PATRICK MUGALLO CLAIMANT

AND

CROWN MOTORS GROUP LIMITED RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Memorandum of Claim filed on 6th July, 2018 alleging unfair termination of employment and non-payment of terminal benefits and performance variable pay.
2. It is the Claimant's case that he was employed by the Respondent on 31st October, 2014 as a Sales Marketing Manager at a consolidated salary of Kshs.325,000/= as at the date of dismissal from employment.
3. The Claimant avers that he is entitled to 1% commission of VAT Free Sales made by him directly and 0.20% for sales directly made by his team.
4. The Claimant further avers that he received a notice to show cause letter dated 30th April, 2018 from the Managing Director accusing him of having submitted a tender to the State Department of Agriculture for 61 vehicles on 14th March, 2018 without authorization by the Head Office as provided by the policy and responded by letter dated 7th May, 2018 by which the Claimant denied having submitted any tender on 14th March, 2018 to the State Department of Agriculture and had not seen the policy document on the more than 20 vehicles.
5. It is the Claimant's case that he was invited for a hearing on 16th May, 2016 scheduled for 22nd May, 2018 at 11.00 am and attended the same and was issued with a summary dismissal letter on the same day.
6. The Claimant avers that he was denied annual leave and his dismissal from employment was unlawful as no notice was given, no fair administrative action and the process was rushed.



7. The Claimant faults the summary dismissal on both substantive and procedural matters.
8. The Claimant prays for;
 - i. A declaration that termination of employment by the Respondent was unfair.
 - ii. Three months salary in lieu of notice Kshs.975,000.00.
 - iii. 12 months salary compensation Kshs.3,900,000.00.
 - iv. Annual leave pay Kshs.227,500.00.
 - v. Severance pay Kshs.650,000.00.
 - vi. Unpaid performance variable.
 - vii. Costs of this claim.
 - viii. Interest on the above at court rates.
 - ix. Any other relief that the court may deem fit to grant.

Respondent's case

9. By its response filed on 24th September, 2018, the Respondent generally denies the Claimant's allegations but admits having employed him at the salary alleged and his entitlement to commission itemised in paragraph 6 of the claim.
10. According to the Respondent, the Claimant was reminded about the submission of Tender approval via email dated 27th March, 2018.
11. That the Claimant took leave whenever he applied for it as he admits in his witness statement that he was reporting to work after a 3 weeks leave.
12. The Respondent avers that the disciplinary process was conducted fairly as the Claimant was given ample time to prepare for the hearing.
13. The Respondent further avers that the Claimant submitted a tender for 61 motor vehicle units to the State Department of Agriculture.
14. That the Claimant refused to comply with the Respondent's policy thereby jeopardizing the business of the Respondent.
15. That the Claimant had previously been requested to submit his commission schedule but had not.
16. The Respondent prayed for dismissal of the suit.

Claimant's evidence

17. In his written statement, the Claimant testified that the Managing Director, Mr. Jabulani had notified him that the board was unhappy that he did not submit the Tender Authorization Form for approval by Head Office and the Chair of the Board Mr. Timothy Jacques was aware.
18. It was his testimony that Mr. Jacques was unhappy that the Claimant was being paid a huge commission on a one off deal he had done and the deal ought to have been a house deal which did not attract a commission.



19. On cross-examination, the Claimant confirmed that he was contractually bound to obey orders and instructions given by the Respondent and disobedience or neglect was a ground for termination.
20. He admitted having received the email from Mr. Brent dated 12th October, 2017 and the need for approval of Tenders and did not respond to the email. He stated that he spoke to him.
21. That he was aware of the directives by the company.
22. The Claimant further acknowledged having received the email from Mr. Brent dated 24th March, 2017, a reminder on the need for approval of tenders and request for the Tender Approval document of the State Department of Agriculture. That he responded by a physical meeting but did not respond to the email.
23. According to the Claimant, no Tender was submitted to the State Department of Agriculture.
24. He admitted having been invited for a hearing and attended the same on 22nd May, 2018.
25. The witness confirmed that under the contract of employment, in the event of termination, the employee was entitled to salary and leave earned.
26. It was his testimony that leave for 2018 had not been paid and had no claim for salary arrears.
27. That the commission was payable without any formal application and he had not generated any document on the commission payable and awaited payment.
28. On re-examination, the witness testified that there was no tender at all and he had notified the Respondent as much.

Respondent's evidence

29. RWI, Mr. Ernest Kinuthia confirmed on cross-examination that the Claimant's employment was terminated for submitting a tender he was working on, without approval. The witness admitted that there was no record of the tender or form.
30. The witness further confirmed that from the letter dated 7th May, 2018 from the Claimant to the Respondent, the Claimant indicated that he did not submit any tender to the Department of Agriculture.
31. RW2 testified that as he did not attend the hearing, he could not tell what transpired including whether the Claimant was accorded the opportunity to be accompanied by a witness or whether he had one.
32. He confirmed that he had neither a copy of the disciplinary proceedings nor minutes and the Claimant had no previous warning letter or case of indiscipline.
33. On re-examination, the witness testified that the email on record had an attachment and the Claimant had not indicated that she did not receive it or deny that he had made admissions during the hearing.

Claimant's submissions

34. Counsel identified three issues for determination, namely;
 - i. Whether termination of the Claimant's employment was wrongful, unfair and unlawful.
 - ii. Whether the Claimant is entitled to the reliefs sought.



iii. Who bears the cost of this suit?

35. As to whether termination of the Claimant's employment was unfair, counsel relied on statutory provisions to urge that the Respondent had no valid reason to terminate the Claimant's employment.
36. Sentiments of the court in *Dairus Kiseu Mwamburi v Co-operative Bank of Kenya Ltd* [2021] eKLR and *Mckinley v BC Tel* were relied upon to buttress the submission.
37. Counsel further submitted that although the Respondent alleged that the Claimant's employment was terminated for submitting a tender to the Department of Agriculture without prior approval, no documentary evidence of the tender was provided including the tender number to confirm that there was a tender the Claimant worked on it.
38. Counsel urged that the Claimant testified that he did not work on any tender.
39. Similarly, the allegation that the Claimant admitted having breached the Respondent's policy was not backed by minutes of the disciplinary proceedings.
40. Reliance was made on the decision in *Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR and the sentiments of the Court of Appeal in *Muthaiga Country Club v Kudbeiba Workers* [2017] eKLR, on the interplay between Section 43 and Section 47(5) of the *Employment Act* to urge that the Respondent had failed to discharge the burden of proof under Section 45(2)(a) and (b) and 47(5) of the *Employment Act*.
41. On procedural fairness, counsel urged that the Respondent failed to uphold the Claimant's right to fair hearing and cited the decisions in *Walter Ogal Anuro V Teachers Service Commission* [2013] eKLR and *Kenfreight (E.A) Ltd v Benson K. Nguti* [2016] eKLR to reinforce the submission.
42. On the reliefs sought, counsel submitted that the terms of employment embodied in the letter of employment were not in dispute and were deemed proved.
43. Counsel urged that the Commissions Schedule for November 2015 – July 2018 submitted as evidence on 23rd November, 2022 demonstrated the amount owed by the Respondent.
44. The issue of cost was not addressed.

Respondent's submissions

45. According to the Respondent's counsel, the issues for determination are;
 - i. Whether termination of the Claimant's employment was fair.
 - ii. Whether a fair process was employed.
 - iii. Whether the Claimant is entitled to the reliefs sought.
46. As to whether the Respondent had a valid and fair reason to terminate the Claimant's employment, counsel submitted that the reason cited in the dismissal letter was serious as the Claimant's conduct amounted to misconduct under the terms of engagement and Section 44(4)(c) of the *Employment Act* and thus a fair reason in that a Mr. Brent, the Respondent's Business Manager had by an email dated 17th October, 2017 notified the Claimant about the requirement of approval before tenders or quotations for over 20 units were concerned.
47. That the Claimant, while aware of the policy submitted a tender for 61 units to the Department of Agriculture in March 2018 in defiance of the policy.



48. Counsel relied on the sentiments of the Court of Appeal in *Kenya Revenue Authority V Reuwel Waithaka Gitahi & 2 others* (2019) eKLR on the applicable test under Section 43(2) of the *Employment Act*, 2007.
49. As regards the procedure employed, counsel relied on the provisions of Section 41 of the *Employment Act* and the decision in *Naima Khamis V Oxford University Press (EA) Ltd* (2017) and *Kenya Revenue Authority V Reuwel Waithaka Gitahi & 2 others* (*Supra*) to submit that the Claimant was accorded a fair hearing as he received a notice to show cause dated 30th April, 2018 and responded by letter dated 7th May, 2018, denying the allegations, was invited for a disciplinary hearing held on 22nd May, 2018, attended and presented his defence.
50. Pages 5 and 6 of the Respondent’s submissions were missing.

Findings and determination

51. The issues that commend themselves for determination are;
- i. Whether termination of the Claimant’s employment by the Respondent was unfair.
 - ii. Whether the Claimant is entitled to the reliefs sought.
52. As to whether termination of the Claimant’s employment was unfair, counsels have adopted contrasting positions as is typical with the Claimant’s counsel urging that the Respondent had failed to discharge the evidential burden of proof while counsel for the Respondent maintained that Claimant was guilty of misconduct and the procedure was fair.
53. The provisions of Sections 35, 41, 43, 44, 45 and 47(5) of the *Employment Act*, 2007 set out the substantive and procedural precepts on termination of employment. These provisions are specific on notice, procedure to be complied with, reason(s) for termination, examples of what amounts to gross misconduct, validity and fairness of the reason and justification. (See *Pius Machafu Isindu v Livington Security Guards Ltd* [2017] eKLR).
54. The foregoing provisions lay it bare that for a termination of employment to pass muster, it must be established that the employer had a substantive justification for a termination and employed a fair procedure in conducting the termination.
55. The sentiments of Ndolo J. in *Walter Ogal Anuro v Teachers Service Commission* (*Supra*) cited by both parties are instructive.
56. The learned judge stated as follows;
- “ . . . For a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”
57. The Court of Appeal expressed similar sentiments in *Naima Khamis V Oxford University Press (EA) Ltd* (*Supra*).



Reason for termination

58. Section 45(2)(a) and (b) of the *Employment Act*, 2007 require the employer to prove that it had a valid and fair reason to terminate the employee's employment based on the employee's conduct, capacity, compatibility or operational requirements of the employer.
59. In the instant case, the allegations relate to the conduct of the employee.
60. The termination letter dated 22nd May, 2018 states that the reason for termination was that the Claimant contravened "the terms of your employment and policy by not submitting the tender quotes approval forms to seek approval prior to submitting the tender for 61 units to the State Department of Agriculture on 14th March, 2018."
61. The notice to show cause dated 30th April, 2018 made a similar allegation.
62. It is common ground that the Claimant was the Respondent's Sales and Marketing Manager from 31st October, 2014 to 22nd May, 2018.
63. It is also not in dispute that by an email dated 12th October, 2017, Mr. Brent Smith makes reference to a discussion with the Claimant and informs him to ensure that the Tender notification template was completed and submitted for approval prior to any submission or quotation for all deals over 20 units.
64. The tenor of the email is clear that it was a mere notification of a procedure the Respondent was implementing.
65. Similarly, a second email from Mr. Brent Smith dated 27th March, 2018 at 2.30 pm, copied to the Claimant reminded him of the requirement for tenders or direct orders of over 20 units.
66. However, the email makes reference to a Ministry of Agriculture's tender the Claimant was working on.
67. Surprisingly, the Claimant did not respond to any of the emails and when questioned by counsel for the Respondent, his response was that he spoke to the sender in both cases but acknowledged having received the emails. He however denied that the Tender Notification Template document was enclosed.
68. Similarly, the Claimant admitted that he was aware of the Respondent's directive on tenders or quotations of 20 units or more.
69. Equally, the Claimant admitted on cross-examination that he was contractually obligated to obey all orders and instructions lawfully given by those in authority over him as ordained by Clause 12 of the Letter of Appointment. He further confirmed that disobeying, neglect or refusal to perform or comply with any lawful directions given by the Respondent was a ground for termination of employment under Clause 21(a) of the Letter of Appointment.
70. The Claimant was accused of having disobeyed the Respondent's policy and terms of employment on the premise that he had submitted a tender for 61 units to the State Department of Agriculture.
71. In his response to the notice to show cause dated 7th May, 2018, the Claimant was categorical that he did not submit any tender to the State Department of Agriculture on 28th March, 2018 as alleged in the notice to show cause.
72. The Claimant provided a similar answer to the question by counsel for the Respondent during cross-examination.
73. Puzzlingly, the Respondent provided no scintilla of evidence to demonstrate the fact that the Claimant was working on the particular tender and submitted the same to the State Department of Agriculture.



74. No doubt this was a huge tender, with immense financial implications and according to the Respondent, the Claimant appears to have been working on it alone and there was no communication on it until 27th March, 2018 when the email from Brent Smith makes reference to it.
75. Guided by the principle that who alleges must prove the allegations made, it was incumbent upon the Respondent to demonstrate that there was indeed a tender and the Claimant was working it either alone or in collaboration with others and submitted the same in defiance of the instructions given by Mr. Brent Smith.
76. Tenders involve substantial documentation from the advertisement, securing of the tender documents, the documents themselves, completion of the documents and eventual submissions among other stages. All tenders have a tender unique number.
77. The Respondent availed not a single document on the alleged tender for 61 units or the alleged submission to the State Department of Agriculture on 28th March, 2018.
78. Instructively, Mr. Brent Smith's email dated 27th March, 2018 makes no reference to the submission date of the tender or other material facts such as the duration the Claimant had been working on it or progress made.
79. These, in the court's view are facts the Respondent could have effortlessly established by documentation but failed to do so, a failure fatal to foundation of its defence against the Claimant's case.
80. Although Section 43(2) of the *Employment Act*, 2007 requires the employer to demonstrate that it genuinely believed that the matter relied upon as reason for termination existed, it must also demonstrate that it had reasonable and sufficient grounds for the genuine belief as held in *Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others* (Supra).
81. The Respondent's core business is the sale of motor vehicles and it cannot be heard to argue that the Claimant worked on and submitted a tender for 61 units to the State Department of Agriculture without reference to any other person and left no verifiable evidence of his input.
82. For the foregoing reasons, it is the finding of the court that the Respondent has failed to prove on a balance of probabilities that it had a valid and fair reason to terminate the Claimant's employment.

Procedure

83. It requires no belabouring that Section 41 of the *Employment Act*, 2007 prescribes the procedural tenets an employer must abide by for a termination of employment to pass muster. On their part, courts have variously isolated the essentials of Section 41 of the *Act*.
84. In *Postal Corporation of Kenya v Andrew K. Tanui*, the Court of Appeal stated as follows;
“ Four elements must thus be discernible for the procedure to pass muster:-
 - i. an explanation of the grounds of termination in a language understood by the employee;
 - ii. the reason for which the employer is considering termination;
 - iii. entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination are made;



iv. hearing and considering any representations made by the employee and the person chosen by the employee.”

85. While the Claimant’s counsel submitted that termination of the Claimant’s employment was procedurally flawed, the Respondent’s counsel urged that it was conducted as by law required as all steps were complied with.
86. It is not in contest that the Respondent invited the Claimant for a disciplinary hearing by letter dated 16th May, 2018 and the Claimant attended the same.
87. However, it is unclear as to what transpired at the hearing as the Respondent, for unknown reason neither availed a copy of the proceedings nor the recommendations of the committee.
88. Although the termination letter makes reference to the hearing, evidence and admission by the Claimant, the same are unverifiable by the Claimant’s counsel or the court.
89. More significantly, it is unclear to the court whether indeed the provisions of Section 41 of the [Employment Act](#), 2007 were complied with.
90. First, the invitation letter dated 16th May, 2018 makes no reference to the Claimant’s entitlement to be accompanied by an employee of his choice. Did the Claimant attend alone or was accompanied by another employee? This is a critical element of the right to fair hearing.
91. Secondly, the Respondent adduced no evidence to prove that the charges were explained to the Claimant in a language he understood.
92. Third, the Respondent tendered no evidence of the Claimant’s responses and/or defense or the findings of the committee and its recommendations.
93. Fourth, it is unclear as to whether the alleged hearing was indeed a hearing as the Respondent adduced no evidence of the attendance register.
94. Intriguingly, RW2 confirmed on cross-examination that he did not have a copy of the proceedings or minutes, which is credible evidence that neither the proceedings nor the minutes existed.
95. In sum, the Respondent has not demonstrated that it complied with the provisions of Section 41 of the [Employment Act](#), 2007.
96. Needless to emphasize and as held by the Court of Appeal in *Pius Machafu Isindu v Lavington Security Guards Ltd (Supra)*, the elaborate procedural elements prescribed by Section 41 of the [Employment Act](#) are mandatory.
97. The foregoing is fortified by the sentiments of the Court of Appeal in [Postal Corporation of Kenya v Andrew K. Tanui \(Supra\)](#) as follows;
- “ . . . It said nothing about the Respondent appearing with another employee of his choice. The retort that an employer has no obligation to ask the employee to be accompanied does not avail the appellant because the law requires that such other person be present to hear the grounds of termination and if so inclined, make representations thereon. A hearing not so conducted is irregular. At the board meeting, there is no evidence that an explanation of the grounds of termination was made to the Respondent, and if so, in what language . . . ”
98. The foregoing sentiments apply on all fours to the circumstances of the instant suit.



99. Flowing from the foregoing, the court is in agreement with the Claimant's counsel that termination of the Claimant's employment was procedurally flawed.
100. In a nutshell, it is the finding of this court that the Respondent failed to adduce sufficient evidence to show that it had a substantive justification to terminate the Claimant's employment and conducted the termination in accordance with a fair procedure.

Appropriate reliefs

101. On entitlement to reliefs, the court proceeds as follows;
 - a. Declaration
102. Having found that termination of the Claimant's employment was unfair within the meaning of Section 45 of the [Employment Act, 2007](#), a declaration to the effect is merited.
 - b. Three months salary in lieu of notice
103. Clause 20 of the Letter of Appointment provided for a notice of 90 days by either party and since the Respondent did not give notice or pay in lieu of notice, the Claimant is entitled to 3 months salary in lieu of notice and the same is awarded Kshs.975,000.00.
 - c. 12 months compensation
104. Having held that termination of the Claimant's employment was unfair, the Claimant is entitled to the relief under Section 49(1)(c) of the [Employment Act, 2007](#) subject to due consideration of the relevant factors under Section 49(4) of the [Employment Act, 2007](#).
105. In this case, the court has taken into account the following;
 - i. The Claimant was an employee of the Respondent from 31st October, 2014 to 22nd May, 2018, a duration of about 3 years, 7 months.
 - ii. The Claimant had no prior record of misconduct or indiscipline as confirmed by RWI.
 - iii. The Claimant did not in any way express his wish to remain in the Respondent's employment and did not appeal the Respondent's decision.
 - iv. The Claimant contributed to the termination of employment though not substantially.
106. In the circumstances, the court is satisfied the equivalent of 3 months salary is fair.
 - d. Annual leave
107. The Claimant tendered no evidence on the particulars of the leave claimed as annual leave. He availed neither the number of days claimed nor when they accrued as he had just reported from his annual leave of three weeks.

In the absence of particulars, the prayer is declined.

 - e. Severance pay
108. Since the Claimant was not declared redundant and confirmed as much on cross-examination, the prayer for severance pay is unsustainable and is accordingly dismissed.
 - f. Unpaid performance variable pay



109. The Claimant provided no particulars of the amount prayed for under this head and how it arose. Copies of the commission schedule produced by the Claimant comprises 5 unauthenticated and undated pages.
110. On cross-examination, the Claimant confirmed that he did not generate the document but did not explain how and from where he obtained it, as it was not his work and had not written to the Respondent's finance for a copy of the commission schedule.
111. In sum, the 5 printed pages have neither an author nor authentication and the figures there were not testified about and have no probative value.
112. Equally, the Claimant's written statement makes no reference to the 5 pages and what their contents are.
113. In a nutshell, although the Respondent admitted that the Claimant was contractually entitled to commissions, the Claimant has not demonstrated that any commission was due to him as at the date of termination as he adduced no evidence to establish the same.
114. Even assuming that part of the commission was outstanding, it is unclear as to the amount and the duration concerned.
115. In the absence of credible evidence of any outstanding commission, the prayer for unpaid performance variable pay is dismissed.
116. In conclusion, judgement is entered in favour of the Claimant against the Respondent in the following terms;
 - a. Declaration that termination of the Claimant's employment by the Respondent was unfair.
 - b. Three months salary in lieu of notice Kshs.975,000/=.
 - c. Equivalent of 3 months salary Kshs.975,000/=.
Total Kshs.1,950,000.00
 - d. Costs of this suit.
 - e. Interest at court rates from date hereof till payment in full.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 31ST DAY OF OCTOBER 2023

DR. JACOB GAKERI

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.

DR. JACOB GAKERI

JUDGE

