



**Mwangea & 3 others v Kenya Ports Authority (Cause E073 of 2022)
[2023] KEELRC 2694 (KLR) (30 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2694 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E073 OF 2022
M MBARÚ, J
OCTOBER 30, 2023**

BETWEEN

**TSUMA GONA MWANGEA 1ST CLAIMANT
EDGAR HAGYO 2ND CLAIMANT
ABU SHEE 3RD CLAIMANT
KENNETH MASHA 4TH CLAIMANT**

AND

KENYA PORTS AUTHORITY RESPONDENT

JUDGMENT

1. The 1st claimant was employed by the respondent as a junior technician earning Kshs. 184,435.70 per month and he worked until 16 November 2021 when he was suspended from duty and then dismissed from his employment on 15 August 2022.
2. The 2nd claimant was employed as a junior technician earning Kshs. 793,541.15 per month when he was suspended on 16 November 2021 and then dismissed from his employment on 15 August 2022.
3. The 3rd claimant was employed as an ambulance driver earning Kshs. 73,499.49 per month but on 16 November 2021 he was suspended from duty and on 15 August 2022 he was dismissed from his employment.
4. The 4th claimant was employed as a junior technician earning Kshs. 130,247.57 and worked until 16 November 2021 when he was suspended and on 15 August 2022 his employment was terminated through summary dismissal.



5. The claim is that there was unlawful and wrongful termination of employment when the respondent failed to give the claimants valid reasons, a hearing contrary to the rules of natural justice and failure to give notice or payment of terminal dues. The respondent refused to issue Certificate of Service.
6. The claim is that the claimant was dismissed over alleged theft which was malicious and acts of witch-hunt and the disciplinary hearings were conducted by the human resource committee that was not properly constitute as per clause K10(f) of the disciplinary manual handbook, 2005 and clause K.2(vi) of the human resource manual.
7. The claimants are seeking the following dues;
 - a. One-month notice pay;
 - b. Compensation at 12 months' gross salary;
 - c. Issuance of Certificate of Service; and
 - d. Costs of the suit.
8. In evidence, the 1st claimant testified that in the course of his employment with the respondent, the police arrested him and then released him on bond. On 20 September 2021 he was presented in court and denied charges of theft and when he left Shimo la Tewa prison, he was served with a hearing notice to attend on 7 July 2021 without having been served with any notice to show cause. The hearing notice did not mention any allegation he was required to respond to. During the hearing, the respondent gave him a charge sheet requiring him to state why he was absent from work but they knew he had been in custody at Shimo la Tewa prison and he was paid his salaries during this period.
9. The claimant testified that the respondent alleged that he had stolen cable and relied on CCTV footage but no witness was called. The disciplinary panel had 10 managers who harassed him and who took the decision of summary dismissal.
10. The claim is seeking reinstatement back to his employment and payment of his salaries.
11. Upon cross-examination, the claimant testified that the respondent has a biometric system for entry and exit at the gate. He was absent from work but he was paid and the respondent knew he was in custody. The notice issued on 6 September 2021 he only received it on 23 November 2021 and he did not file any response. He was invited to the disciplinary hearing after he was released from custody.
12. The claimant testified that on 26 August 2021 he reported at work at 5AM in the company of Edgar and Abu [2nd and 3rd claimants] using motor vehicle KCR 448L and after 30 minutes they left the premises. His morning shift was to start at 6.45AM. the entry was before the shift and the theft of cables is said to have been at this time.
13. The 2nd claimant testified that he was invited to the disciplinary hearing through notice dated 6 July 2022 for the next day. There was no notice to show cause issued prior to the hearing. It was just a day after he left custody following false accusations of theft and seek reinstatement back to his employment and payment of his salaries.
14. The claimant was cross-examined and testified that on 26 August 2021 he entered the workplace together with the other claimants using motor vehicle KCR 448L belonging to Kenneth Masha. It was around 5AM and his shift was not due until 6.45AM and after a few minutes he exited from the premises. He was invited to the disciplinary hearing and he attended but the entire panel comprised managers.



15. The 3rd claimant testified that he was invited to attend disciplinary hearing on 7 July 2021 after the notice dated the previous day on 6 July 2022. He had no notice to show cause issued with any allegations and the cables alleged to have been stolen was a false accusation. The disciplinary panel was hostile and failed to give him a fair chance to defend himself leading to unfair summary dismissal and seek an order of reinstatement.
16. No evidence was called for the 4th claimant, Kenneth Masha.

Response

17. In response, the respondent admitted that the claimants were employed in the Container Terminal Engineering department. Each claimant had a unique identifier code, 91020, 557577 and 559055 respectively.
18. The claimants were suspended on 16 November 2021 for being involved in vandalism of the respondent's equipment's known as spreaders and theft of copper cables within the Terminal Engineering area in the Port of Mombasa where they were placed.
19. Following their suspension from duty, the claimant failed to give any responses. They were invited for disciplinary hearing for being involved in vandalism of the respondent's equipment. The letters of suspension outlined the matters and allegations made against the claimants in accordance with the Human Resource Manual, 2017. This notice invited the claimants to show cause why they should not be dismissed from employment for gross misconduct but they failed to respond.
20. On 6 and 7 July 2022 the claimants were invited to attend disciplinary hearing. The disciplinary panel took into account evidence held by the police, the claimant's movement on the material day of the theft where they were captured in the staff card reader timelines showing their respective personnel numbers and footages and they admitted to their movements during the disciplinary hearing and the subsequent appeals.
21. The claimants were found culpable on the allegations made and subsequently, notices of summary dismissal issued for gross misconduct through letters dated 15 August 2022.
22. The claimants appealed against the summary dismissal but these were dismissed during the respondent's board 413th regular board meeting held on 12 May and 20 June 2023.
23. Employment having been terminated through summary dismissal, there are no benefits due save for Certificates of Service.
24. The disciplinary process was conducted in accordance with policy regulations and the provisions of the Human Resource Manual, 2017 relied by the claimant has since been repealed by the Human Resource Policy and Procedures manual, 2022.
25. The claimants, through Dock Workers union as members filed Mombasa ELRC Misc. Appl. No. E057 of 2021 [2022] seeking employment benefits after their dismissal. This application was dismissed on 18 May 2023.
26. In evidence, the respondent called Sharon Orimba the human resource officer who testified that the claimants were unionist under dock workers Union who filed suit on their behalf and which was dismissed. They were in the Container Terminal Engineering department prior to their dismissal on 15 August 2022 for gross misconduct and following a disciplinary process.
27. Ms Orimba testified that the claimant had personal/check numbers with specific designations used to access the check in and out and which were captured vandalism and theft of copper cables and



- simulators located at Gantry Worker shop at Terminal 1 at the Port of Mombasa and where the claimants were working. The theft was found to have been planned by the claimants together with Kenneth Masha and implemented in the morning of 25 August 2021 where the claimants were captured entering the port at 0506hours, proceeding to container terminal engineering and leaving at 0537hours after 30 minutes. They used motor vehicle No. KCR 448L driven by Kenneth Masha.
28. The claimants were captured by the police and internal security and criminally charged with the offences of theft by servant and conspiracy to commit a felony and Kenneth Masha became a prosecution witness.
 29. On 16 November 2021 the claimants were suspended from duty and required to show cause why they should not be dismissed for gross misconduct. None responded as required. They were invited for disciplinary hearing and accompanied by a union official Mr Kokonya. The reference to disciplinary handbook 2017 has since been repealed with one for the year 2017 and a subsequent one for 2022.
 30. Following the disciplinary hearings on 6 and 7 July 2022, the claimants were found culpable leading to summary dismissal through notices dated 15 August 2022. They lodged appeals which were dismissed by the board.
 31. Following the summary dismissal, the claimants are not entitled to the reliefs sought, their Certificates of Service were issued and their pensions are administered by the KPA Pension Scheme which is separate and distinct from the respondent.
 32. At the close of the hearing, both parties filed written submissions.
 33. The claimants submitted that their purported disciplinary hearings related to false accusations of theft and done contrary to the disciplinary human resource handbook, 2015. The summon to attend disciplinary hearing on 6 July 2022 was short and planned to disadvantage them after a long interdiction leaving to being condemned unheard as held in *Frederick Saundu v Principal Namanga Mixed Secondary School & 2 others*. The disciplinary process was actuated by malice and before a biased panel. The charges levelled were the same used to dismiss the claimants save that they had been accused of absconding duty but later dismissed over alleged theft. The respondent failed to inform the claimants the allegations they faced before the disciplinary hearing leading to unfair termination of employment as held in *Samson Ole Kisirkoi v Maasai Mara University & 3 others* [2018] eKLR.
 34. The respondent submitted that the claimants' employment was terminated fairly in terms of Section 41 of the *Employment Act, 2007* (the Act). Upon suspension and notice to show cause, the claimants failed to respond and their conduct of theft justified disciplinary hearing for gross misconduct and leading to summary dismissal which was a justified reason as held in *Joseph Mwaniki Nganga v United Millers Limited* [2022] eKLR. having a fair reasons leading to termination of employment is a lawful cause as held in *Cooperative bank of Kenya Limited v Banking Insurance & Finance Union (K)* [2017] eKLR. The summary dismissal followed a reasonable consequence of the claimants conduct and police investigations and charge with criminal conduct to the detriment of the respondent.
 35. On the remedies sought, the respondent submitted that compensation and notice pay are reliefs not available in summary dismissal as held in *Cooperative bank of Kenya Limited v Banking Insurance & Finance Union (K)* [2017] eKLR.

Determination

36. In the written submissions, no party addressed the matter of Mombasa ELRC Misc. Appl. E057 of 2022 which the respondent pleaded. It is important to re-visit this matter.



37. Dock Workers Union filed ELRC MISC. APPL. E057 of 2022 on 2 September 2022 seeking leave and orders of injunction against the respondent herein from evicting the claimants together with others from the KPA staff houses. The basis was that the claimants had been taken through an unfair disciplinary process leading to summary dismissal.
38. This matter was heard on the merits and application dismissed on 18 May 2023.
39. On 22 September 2022 the claimant filed this suit well aware of the previous suit.
40. On the substantive issues raised herein, through letters dated 16 November 2021, the respondent suspended the claimants from duty to allow for investigations following reports that indicated that they were involved in a case of vandalism of copper cables stolen from spreaders and simulators located beside the Gantry Workshop at Terminal 1. Such theft had occurred on 25 August 2021 at 0530hours using motor vehicle No. KCR 448L and following which, the claimants were arrested on 26 August 2021 as they were captured on the Integrated Security System on the material day executing the theft.
41. Each claimant signed for the notice to confirm service.
42. In these notices, the respondent relied on the provisions of the Human Resource Manual, 2017.
43. The response that the applicable Human Resource Manual was the one approved on KPA Human Resource Policy & Procedures Manual 2021 which took effect on 20 April 2022 cannot have related to matters which took effect and suspension on 16 November 2021. The policy cannot have applied retrospectively.
44. It is appreciated that the claimants were unionised under Dock Workers Union. Any change of policy, particularly disciplinary rules and procedures from the policy applicable from the year 2017 to 2021 or 2022, Sections 12 and 13 of the Act required the respondent as the employer to bring such changes to the attention of the employees and where the employees are unionised, to inform the trade union.
45. Under Section 12(1)(a), the employer is required to;
 - (1) A statement under section 10 shall—
 - (a) specify the disciplinary rules applicable to the employee or refer the employee to the provisions of a document which is reasonably accessible to the employee which specifies the rules;And under Section 13 (1), the employer is required to;
 - (1) If, after the material date there is a change in any of the particulars required under sections 10 and 12, the employer shall give to the employee a written statement containing particulars of the change.
46. These provisions then become critical in this case with regard to the suspension of the claimants on 16 November 2021 and their disciplinary hearing on 6 and 7 July 2022 which followed changes to the disciplinary rules and procedures and a change in the applicable document. At the time of their disciplinary hearing, the claimants were removed from the shop floor. At the time of the said theft and events of 8 September 2021 with regard to vandalism of copper cables and the arrest on 26 October 2021, the disciplinary policy in places was the one for the year 2017.
To apply any other policy was to engage in unfair labour practice.



47. The claimants filed the KPA, Human Resource Policy and Procedures manual, April 2021 as part of their records. It sets out the disciplinary procedures with regard to cases of misconduct and misconduct.
48. Under clause 11.9 of this policy, disciplinary proceedings may be taken even in a case where the employee has been charged with a criminal case or has been acquitted thereof and the managing director is not stopped from dismissing the employee or punishing him as the case may require.
49. The claimants do not contest that following events of 8 September 2021 after vandalism where copper cables were stolen from spreaders, they were arrested by the police and charged in croute with criminal offences and on 16 November 2021 the respondent suspended them to allow for investigations.
50. Ms Tsuma testified that the letter of suspension also served as notice to show cause why disciplinary action should not be taken for gross misconduct and that the claimants failed to respond.
51. The court reading of these suspension notices is that they outlined the allegations made pending further investigations into the matter.
52. Indeed, the claimants were directed not to leave their home station without permission and were required to report to the head of Employee Relations on Friday every week at 9.00 am for any further instructions.
53. The next notice is the one inviting the claimants to the disciplinary hearings on 6 and 7 July 2022.
54. The main purpose of suspending the claimants on 16 November 2016 was to allow for investigations. This is allowed in employment and labour relations so as to secure the workplace and remove the employee from inference as held in Prof. Francis M. Njeruh v Jomo Kenyatta University of Agriculture & Technology [2013] eKLR.
55. However, even where the employer enjoys the right to suspend the employee from duty, at the end of investigations, the employee should be issued with notice settling out the allegations made against him to allow him to respond and be prepared before any disciplinary hearing. Where the employee is exonerated in the investigations, the suspension is lifted and he is allowed back to work as held in the case of Sava v Kitui Cottages and Guest House (Cause 1280 of 2017) [2022] KEELRC 1499 (KLR) (23 June 2022) (Judgment). A suspension allows the employer to investigate a matter and after which, the employee may be cleared or issued with notice under Section 41 of the Act to attend and defend himself.
56. In Mutwol v Moi University (Civil Appeal 118 of 2019) [2022] KECA 537 (KLR) (28 April 2022) (Judgment), the Court of Appeal in addressing the subject of a suspension from duty held that;

Therefore, sending of an employee on compulsory leave where the circumstances warrant it and provided it is an interim measure is within the purview of the employer. Such action only removes the employee from the workplace temporarily without interfering with his terms of service. Where the employer finds it necessary to thus remove the employee from the workplace to undertake comprehensive investigations into a matter of alleged misconduct, by allowing the same to conclude could vindicate the employee or allow for him to be invited to show cause over specific allegations following the investigations. ...



57. And in the case of Thomson Kerongo & 2 others v James Omariba Nyaoga & 3 others [2017] eKLR the court in giving emphasis on the place of a suspension or compulsory leave as part of the disciplinary process held that;

... there is no law prohibiting an employer from sending an employee on compulsory leave where the circumstances warrant it and provided it is an interim measure. Compulsory leave has the effect of only removing an employee from the workplace temporarily without interfering with his terms of service. An action is only illegal if it is prohibited by law. Not all lawful matters are prescribed by law. On the contrary it is only that which is prohibited by law that is illegal or unlawful

58. The bottom line is the mandatory requirements of Section 41 of the Act. even in a case of gross misconduct which justified summary dismissal, under Section 41(2) of the Act, the claimants were entitled to notice after their suspension to allow them to make their representations. Following investigations from 15 November 2021 to 6 and 7 July 2022, the outcome of such process ought to have coalesced through a notice to show cause requiring the claimants to respond to given matters.

59. Whether the matters giving rise to the suspension were the same or had changed after investigations, the purpose of the suspension ought to have resulted in a notice requiring the claimants to respond to given allegations. It would be lost to any employee sent on suspension to expect that following investigations, some matters were cleared or other issues arose requiring them to respond and be prepared for the disciplinary hearing.

60. Without a conclusion of the reasons for the suspension, to proceed with the motions of disciplinary hearing was just but a forgone matter. A disciplinary process should not only meet the threshold of fairness and due process but be in accordance with justice and equity as required under Section 45(4) (b) of the Act that;

(4) A termination of employment shall be unfair for the purposes of this Part where—

(a) ...

(b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.

61. In this case, the matters forming reasons to suspend the claimants were grave and serious. The same seriousness in ensuring justice before the summary dismissal was required. The long suspension period should have resulted into a proper process to secure their attendance and respond.

Without the due process, employment terminated unfairly.

62. The claimants are seeking compensation and notice pay.

Without the due process, notice pay is due.

The 1st claimant was earning a gross salary of Kshs. 184,435.70 which is due in notice pay;

The 2nd claimant was earning Kshs. 73,499.49 which is due in notice pay;

The 3rd claimant was earning Kshs. 133,114.46 which is due in notice pay.

63. Despite the inclusion of the 4th respondent in the Amended Memorandum of claim, he did not urge his case at all. In the written submissions, his advocates did not include him. the purpose of amending the claim was lost.



64. On the claim for compensation, the court is required to be guided by the provisions of Section 45(5) of the Act in making a just assessment of what is an equitable relief to order. The conduct and culpability of the employee up to the date of termination is relevant consideration.
65. The claimants were faced with serious case of theft. They have since been charged in court for such matter. Save for the lapse in addressing their suspension and inviting them to show cause, the respondent issued a hearing notice and allowed the claimants to attend with their representative. Question of theft by an employee is a matter of gross misconduct under Section 44(4) of the Act and to make any award of compensation would be to reward such conduct.
66. On the findings above, the claimants are awarded zero (0) compensation.
Issuance of Certificate of Service is regulated under Section 51 of the Act. upon clearance, such should issue.
67. Accordingly, the claim herein is allowed to the extent of an award for notice pay only.
The 1st claimant is awarded Kshs. 184,435.70;
The 2nd claimant is awarded Kshs. 73,499.49;
The 3rd claimant is awarded Kshs. 133,114.46
Each party to bear own costs.
68. The claim by the 4th claimant, Kenneth Masha is without evidence and is hereby dismissed. Each party to bear own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 30TH DAY OF OCTOBER 2023.

M. MBARŪ

JUDGE

