



Nyamu v Kenya Electricity Generating Company Limited (Employment and Labour Relations Cause 1915 of 2017) [2023] KEELRC 2672 (KLR) (27 October 2023) (Judgment)

Neutral citation: [2023] KEELRC 2672 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1915 OF 2017
AN MWAURE, J
OCTOBER 27, 2023**

BETWEEN

MARY WANJIRU NYAMU CLAIMANT

AND

KENYA ELECTRICITY GENERATING COMPANY LIMITED ... RESPONDENT

JUDGMENT

Introduction

1. The Claimant filed her Statement of Claim dated 19th September 2017.

Claimant's Case

2. The Claimant avers that she joined the Respondent as a casual labourer in June 1999 and she rose through the ranks over the years and in October 2016 *vide* a letter of employment she was appointed as an executive assistant on permanent and pensionable basis.
3. The Claimant avers that on 24th May 2016 she applied for 5 days annual leave from 27th May 2016 to 2nd June 2016. The leave was not approved therefore she proceeded on official duty to the Respondent's Kipevu Power Station in Mombasa on 29th May 2016 to 4th June 2016 with full knowledge of the Respondent.
4. The Claimant avers that upon return, she made a claim of Kshs 49,500 for reimbursement for travel to Mombasa under claim no. 1179520 which was duly authorised, executed and paid by the paymaster on 6th June 2016.
5. The Claimant avers that on 13th June 2016, her supervisor maliciously proceeded to approve the leave despite the fact that he knew the Claimant was on duty out of station and claimed and received reimbursement relating thereto.



6. The Claimant avers that she received a notice to show cause on 1st August 2016 falsely accusing her of lodging a fraudulent claim no. 1179520 and subsequently obtaining money from the Respondent.
7. The Claimant avers that she responded to the notice to show cause on 4th August 2016 explaining that she applied for some leave days which were overtaken by events as by that time she was proceeding on a tour to Kipevu/Mombasa and her leave had not been approved.
8. The Claimant avers vide a letter dated 8th September 2016 the Respondent summoned her to appear before a disciplinary hearing on 13th September 2016.
9. The Claimant avers that *vide* a letter dated 21st September 2016, the Respondent unfairly dismissed her with effect from 25th October 2016 and proceeded to authorise the chief accountant payroll to recover Kshs 49,500 from the Claimant's salary and/or other dues.
10. The Claimant avers that she appealed the dismissal vide a letter dated 31st October 2016 in which she requested the Respondent to reconsider her dismissal on humanitarian grounds as she is disabled and with a young family. The Respondent thereafter directed her to appear before the Appeals Committee on 11th May 2017 which upheld her dismissal.
11. The Claimant avers that the appeals committee's decision was communicated on 17th July 2017, a year after her termination.
12. The Claimant avers that she paid back the Kshs 49,500 as directed in the dismissal letter and this was receipted on 8th December 2016

Respondents' Case

13. In opposition, the Respondent filed a Statement of Response dated 10th November 2017.
14. The Respondent avers that the Claimant applied for 5 days annual leave which was to run from 27th May 2016 to 2nd June 2016, however, before approval, the Claimant left her work station without seeking formal permission from her supervisor.
15. The Respondent avers that the Claimant's leave application was approved by her immediate supervisor on 13th June 2016.
16. The Respondent avers that when she returned back to her work station after her unauthorized hiatus she made a claim of Kshs 49,500 through a travel claim number 1179520 purporting she was on official duty to Mombasa and the claim was made through the Chief Risk Management-Fraud & Forensics Officer who was not her immediate supervisor.
17. The Respondent avers that when its management found about the fraudulent claim, the human resource manager addressed the Claimant through a letter dated 1st August 2016 asking her to explain in writing and show cause why disciplinary action should not be taken against her.
18. The Respondent avers that Claimant responded vide a letter dated 4th August 2016; the Respondent's management considered the response and deemed it unsatisfactory and requested her to appear before a disciplinary committee to explain herself and was invited to bring witnesses in defence of her case.
19. The Respondent avers that the Claimant appeared before the disciplinary hearing committee on 9th September 2016 where she was granted an opportunity to present her case and after the hearing, the management found her explanation unacceptable and found her liable of defrauding the company Kshs 49,500.



20. The Respondent avers that it resolved to dismiss the Claimant from service with effect from 25th October 2016 in accordance with provisions of section 44(4) (c) of the *Employment Act* and clause 2.3.8 (c) and 7.3.1(c) of the *Human Resources Policies & Procedures*.
21. The Respondent avers that the dismissal letter informed the Claimant she will be paid her salary, other dues up to 25th October 2016, cash in lieu of notice in accordance with her terms of employment and 52 accrued leave days and advised the Claimant to visit Ken Gen Retirement Benefits Scheme for her details on her interest.
22. The Respondent avers that the Claimant appealed vide a letter dated 31st October 2016 which was considered by the Managing Director but nonetheless found it to be unmerited and dismissed it.

Evidence in Court

23. The Claimant testified and adopted her witness statement dated 14/2/2022 as her evidence in chief and produced documents related to this matter as exhibits marked NWN – NWN 12.
24. During cross examination, the Claimant testified that she was authorised to go to Mombasa by the Chief Risk Audit, Dan Ogotu, however, he was not her supervisor and was not working in her department, but he had authority to send her on official duties.
25. The Claimant testified that she received a letter of notice to show cause on 01/08/2016 accusing her of claiming Kshs 49,500 on basis of being on official duties to Mombasa and was told this was gross misconduct.
26. The Claimant testified she appeared before the disciplinary hearing on 13/9/2016 together with Jane Nyambura who worked in a different department but they were together in Mombasa in December.
27. The Claimant testified that she did not see the report after the disciplinary hearing and after the hearing, she received a dismissal letter on grounds of fraud.
28. The Claimant testified her dismissal was predetermined as she was incapacitated while working for the Respondent.
29. The Respondent's witness, Martin Makalab (RW1), its Chief Human Resource Officer adopted his witness statement dated 27/2/2013 as his evidence in chief and bundle of documents as exhibits 1-9.
30. RW1 testified that the Claimant's immediate supervisor was Sammy Ndiwa but her leave application was approved by Eric Munyiri.
31. RW1 testified that investigations showed she logged into Stima on 31/5/2016 and so she was not in Mombasa however the record was not provided in court.

Claimant's Submissions

32. The Claimant submitted that it is not in question that the Claimant actually made an application for leave through the relevant procedure. The leave application was made by the Claimant on the 24th May 2016 through Leave Request Number 1165779 which was approved by the Claimant's supervisor and Head of Department made the decision to accept the leave request on the 13th June 2016.
33. The Claimant submitted that unless application had been approved, the Claimant could not be presumed to have proceeded for leave and the Claimant's leave could only have commenced on the 13th June 2016 and not any other time as alleged by the Respondent. The averment by the Respondent therefore, that the Claimant was on leave from the 27th May 2016 to 2nd June 2016 is misguided.



34. The Claimant submitted that the act being alleged by the Respondent as giving rise to fraud by the Claimant only amounts to a minor offence and as such the Claimant was not liable to dismissal in accordance with Clause 2.3.8 of the Respondent's Human Resources and Administration Policies and Procedures.
35. The Claimant submitted that disciplinary process of the Respondent cannot be faulted however, the reason that was advanced as the basis for the Claimant's dismissal is what the Claimant considers to be unfair and unjustified. The Claimant never proceeded for leave and therefore her Claim for re-imburement was valid in the circumstances. This cannot be used against her neither can it be considered as a fraudulent claim.

Respondent's Submissions

36. It was submitted that the Respondent has demonstrated the valid reasons for termination of the Claimant as contained in the letter dated 21.10.2016. The Claimant was found to be liable for defrauding the Company of Kshs 49,500 through a fictitious travel claim, an act which the Respondent considered as a very serious offence amounting to gross misconduct.
37. The Respondent further submitted that during the disciplinary hearing the Claimant's own witnesses denied having invited the Claimant for any official company functions in Kipevu as alleged by the Claimant, and even if the Claimant was out on official duties, there was no evidence and or explanation issued as to why her travel claim was authorized by an officer who was not her immediate supervisor.
38. The Respondent submitted that the Claimant was taken through the disciplinary process and was found to have committed acts that were detrimental to the Respondent which led to her separation with the Respondent. The Respondent cannot and should not be faulted for doing what it was rightly mandated to do in its supervisory role.

Analysis and Determination

39. The main issue for determination is whether the Claimant's termination was substantially justified.
40. The Claimant does not fault the Respondent's procedural fairness and submitted that the disciplinary process met the standard set in section 41 of the *Employment Act* and only faults the Respondent's reason to summarily dismiss her on grounds of gross misconduct.
41. Section 43 of the *Employment Act* states:
 - “(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.”
42. Section 45 (2) of the *Employment Act* provides:
 - “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—
 - (i) related to the employees conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and
- (c) that the employment was terminated in accordance with fair procedure.”

43. Section 47 (5) of the *Employment Act* further provides:

“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.”

44. Lastly, section 44 (4) (c) of the *Employment Act* states:

“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”

45. In *Evans Kamadi Misango vs Barclays Bank of Kenya Limited* [2015] eKLR, the Court expressed itself thus;

“To my mind, the burden placed on the employer by section 43 is to demonstrate that there was a valid reason which would cause a reasonable employer to terminate the employment of the employee. The *Hulsbury’s Laws Of England* [4th Edition] at page 482 expounds this principle as follows;

“In adjudicating on reasonableness of the employer’s conduct, an employment tribunal must not simply substitute its own views with those of the employer and decide whether it would have dismissed on those facts. It must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on the same facts. The basis of this approach [the range of reasonable test] is that in many cases there is a band of reasonable responses to the employee’s conduct within which one employer might reasonably take another; the function of a tribunal as an industry jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted.



If the dismissal falls within the band, the dismissal is fair but if it falls outside the band, it is unfair.”

46. The Respondent submitted that the Claimant was found liable for defrauding the Company Kshs 49,500 through a fictitious travel claim, an act which the Respondent considered a very serious offence.
47. The claimant testifies the reimbursement was paid to her legally and she even went with a witness Jane Nyambura in the disciplinary hearing who was in Mombasa with her. The respondent did not establish any evidence to the effect that the claimant actually went on leave and did not go on official trip to Mombasa. Furthermore, even if the claimant was paid the amount and she did not have history of defrauding the respondent for all the years she served the respondent she should have been surcharged and warned. Summary dismissal was quite drastic in my opinion considering the allegations levelled against her.
48. It is trite law that for termination of employment to pass the fairness test both substantial justification must be proved and this refers to the reason for termination. The procedural fairness was followed to the dot by the respondent but the reason given for termination is not convincing. In the case of *Walter Onuro Ogal vs Teachers Service Commission* Case No 955 2013 the court held that:
- “for termination to pass the fairness test it ought to be shown that there was not only substantive justification for termination but also procedural fairness.”
49. The court finds the reason for termination of claimant’s employment is not proved and does not fall under the grounds for gross misconduct under section 44(4) of the *Employment Act* as fraud was not established. The court therefore enters judgment in favour of the claimant for failure by the respondent to give a valid reason for termination.
50. The claimant will be awarded the following reliefs:
- a. The refund of kshs 49,500/- will not be allowed as the claimant repaid it voluntarily.
 - b. All the prayers in the amended memorandum of claim numbered ii, iii, iv, v and vi are either general prayers with no supporting evidence or legal backing and all are not deserved and the court therefore declines to grant the same.
 - c. Court will grant her compensation equivalent to 4 months’ salary @ 150,000x4= kshs 600,000.
 - d. Costs are awarded to the claimant.
 - e. Interest is also awarded on the above amount from date of judgment till full payment.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 27TH DAY OF OCTOBER, 2023.

ANNA NGIBUINI MWAURE

JUDGE

