



**Wanjiru v Muthaiga Country Club (Cause 776 of 2018)
[2023] KEELRC 2682 (KLR) (27 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2682 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 776 OF 2018
SC RUTTO, J
OCTOBER 27, 2023**

BETWEEN

PAUL KANYI WANJIRU CLAIMANT

AND

MUTHAIGA COUNTRY CLUB RESPONDENT

JUDGMENT

1. Through a Memorandum of Claim filed on 23rd May 2018, the Claimant avers that on 16th May 2014, he was offered employment by the Respondent as a Barman. The Claimant avers that he worked with utmost dedication and in accordance with the terms of his contract of employment from 16th May 2014 to 3rd August 2017 when he received a letter of termination. He avers that he was not accorded a fair hearing and was denied crucial evidence that would have exonerated him from blame. According to the Claimant, his termination was unlawful and unfair. On account of the foregoing, the Claimant seeks reinstatement to his former position and in the alternative, compensation for wrongful termination.
2. The Respondent opposed the Claim through its Memorandum of Defence filed on 20th July 2018, in which it has averred that the termination of the Claimant was fair and in accordance with the law and his appointment letter. Terming the Claimant's suit as frivolous and vexatious, the Respondent has asked the Court to dismiss the same with costs.
3. The matter proceeded for hearing on 21st June 2023, during which both sides called oral evidence.

Claimant's Case

4. The Claimant testified in support of his case and to start with, he sought to adopt his witness statement to constitute his evidence in chief. He proceeded to produce the documents filed together with his Claim as exhibits before Court.



5. It was the Claimant's testimony that on 6th June 2017, the Respondent informed him that he would be going on 14 days leave as it carries on investigations on fraudulent activities that had been going on at Pink's Bar.
6. He received a further letter dated 30th June 2017 from the Respondent informing him of the disciplinary hearing that was to be held on 5th July 2017. The letter stated the allegations that would be considered against him at the hearing. He was asked to attend with a witness.
7. Following the disciplinary hearing, he received a letter of termination letter dated 3rd August 2017, through which he was informed that the management had lost confidence in his integrity as a result of the allegations that had been made against him.
8. He appealed against the decision to terminate his employment vide a letter dated 4th August 2017 where he gave convincing reasons as to why his employment should not have been terminated. The Respondent replied to his appeal upholding the decision to terminate his employment.
9. According to the Claimant, he was not accorded a fair hearing and was further denied crucial evidence that would have exonerated him from blame.
10. Concluding his examination in chief, the Claimant asked the Court to award him compensation.

Respondent's Case

11. On its part, the Respondent called oral evidence through Mr. Daniel Katembu who testified as RW1. He identified himself as the Respondent's Internal Auditor and started by adopting his witness statement to constitute his evidence in chief. He proceeded to produce the documents filed on behalf of the Respondent as exhibits before Court.
12. It was RW1's testimony that the Claimant was on duty on various dates in May 2017 when some items were fraudulently posted to Mr. Ahmed Nzibo's account, who is a member of the club. That Mr. Nzibo was out of the country on these dates and the Claimant could not explain how this happened during his shifts.
13. RW1 further stated that the Claimant was responsible for the stock of a bottle of Macallan Whisky that went missing after the Pink's Disco Night on 31st May 2017. All the stock from that night that belonged to the Respondent had not been sold as the Claimant had sold one bottle of the Macallan whisky from the supplier, WOW Beverages who were the sponsors of the event.
14. Once the event ended, the temporary bar that had been set up was closed and the stock returned to the cellar. The Claimant was present at the time of stock taking at the end of the night and he was left behind to continue with his shift, during which time the bottle of whisky went missing.
15. RW1 further averred that the Claimant was accorded a fair hearing as he was informed of the allegations that were being levelled against him. The Claimant was further invited for a disciplinary hearing on 5th July 2017 through a letter dated 30th June 2017. He was informed through the said letter that he had the right to "ask questions of any evidence produced or of statements by the witnesses".
16. The disciplinary hearing took place on 5th July 2017 and the Claimant attended and was accompanied by his representative, Patrick Gakinya. At the hearing, he was afforded an opportunity to present his case. Patrick Gakinya, the Claimant's representative at the hearing, noted that the proceedings had been carried out in a fair manner and that the Claimant had been given a fair chance to tell his side of the story.



17. The Claimant was given the right to appeal his termination and he did so through the letter dated 4th August 2017.
18. According to RW1, the Claimant's termination was fair and in accordance with the law. That the reason for termination was valid, fair and procedurally correct and related to his conduct during his period of employment.
19. Notwithstanding that the allegations levelled against the Claimant amounted to gross misconduct that attracts summary dismissal, the Respondent elected to terminate him through normal termination by paying him two months' salary in lieu of notice.

Submissions

20. The Claimant submitted that he was not lawfully and procedurally terminated. That further, he was not accorded an opportunity for a fair hearing and neither were his concerns during the hearing addressed by the disciplinary committee. He further contended that he was asked to show cause why he should not be disciplined after the hearing. In the Claimant's view, this was not only unprocedural but subjective as the notice to show cause should precede a hearing. In support of the Claimant's arguments, the case of *Mary Chemweno Kiptui vs Kenya Pipeline Company Limited (2014) eKLR* was cited.
21. It was the Claimant's further submission that the Respondent did not inform him of the laws he had violated and only indicated that his integrity was in question.
22. In further submission, the Claimant stated that he was unfairly terminated as the reasons advanced by the Respondent are invalid and unlawful. To this end, reliance was placed on the case of *Joshua Rodney Marimba vs Kenya Revenue Authority (2019) eKLR*.
23. The Respondent on the other hand submitted that the actions of the Claimant warranted summary dismissal as he could no longer be trusted. It was further submitted that the Claimant failed to uphold the values of trust and confidence which are the cornerstone of an employee- employer relationship. The Respondent further submitted that the evidence on record shows that it did what any reasonable employer would do in the circumstances. The Respondent further posited that it had a valid reason and was justified in terminating the Claimant.
24. It was the Respondent's further submission that it observed procedural fairness in reaching the decision to terminate the Claimant's employment.

Analysis And Determination

25. Having considered the pleadings on record, the evidentiary material as well as the rival submissions, the following issues stand out for determination: -
 - i. Whether the Respondent had a fair and valid reason to terminate the employment of the Claimant;
 - ii. Was the Claimant accorded procedural fairness prior to being terminated from employment?
 - iii. Is the Claimant entitled to the reliefs sought?

Valid And Fair Reason?

26. The starting point in determining this question is Section 43(1) of the *Employment Act* (Act) which requires an employer to prove the reasons for termination and failure to do so, such termination



is deemed to be unfair. Additionally, Section 45 (2) (a) and (b) provides that a termination of employment 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; ...

27. In the instant case, the reason leading to the Claimant's termination was related to fraudulent posting into the account of one of the Respondent's members and the disappearance of a bottle of Macallan whiskey after Pink's Disco night on 31st May, 2017. This is discernable from his letter of termination which is partly couched as follows: -

“Following the above hearing, the allegations against you as detailed below were discussed accordingly:

1. Fraudulent posting of items into a member's account without his knowledge and approval. Thus, the Club incurring a loss of Kshs 18,425.55, after voiding the items from the Member's May 2017 statement.
2. Suspicious disappearance of a bottle of Macallan whiskey from the Club's premises of which you were accountable for.

In the allegation of fraudulent accounting, being unauthorized posting of items into a member's account, the pattern of the postings coincides with you being on duty, therefore management believes that you either have knowledge of what was happening or were involved in the activities.

On the second allegation, being suspicious disappearance of the bottle of Macallan whiskey the barmen who were on duty with you on that day, 31st May, 2017, including the Senior Bar Supervisor, have all written statements indicating that the closing stock was taken in your presence at the end of the promotion event and all stock was intact (no discrepancies/ variances observed) by the time they all left, leaving you behind to continue with your shift. You later reported the missing item to your supervisor, Mr. Mugambi the following day (01st June 2017) at 5 p.m.”

28. It is not in dispute that the bottle of Macallan whiskey disappeared after the Pinks Disco night on 31st May 2017. According to the Claimant, he came to know of the disappearance of the said bottle of whiskey as he was doing stock taking and he informed the stock controller as much.
29. It is apparent that following the disappearance of the said bottle of whiskey, the Respondent interviewed the Claimant as well as his colleagues who recorded statements. The said statements were exhibited before the Court by the Respondent.
30. The Claimant's colleagues stated that following the disco event, they did stock taking before handing over the stock to the Claimant.
31. The Claimant did not deny that following the disco event on 31st May 2017 at 1:00 pm, he was left in charge of the bar. He further stated during cross-examination, that he continued with his shift and did stock taking and every drink was accounted for. It would thus mean that the said bottle of whiskey disappeared while the Claimant was on his shift manning the bar. This is further noting that



in the event the bottle of whiskey had disappeared before or during the disco event, it follows that the disappearance would have been noted during the stock taking exercise and before the Claimant's colleagues handed over the stock to him.

32. The Claimant denied that he participated in the stock taking exercise with his colleagues. Supposing this is true, then prudence required that he would have confirmed the stock before proceeding with his shift. This way, he would have noted that the bottle of whiskey was missing, before taking over the bar and informed his supervisor immediately.
33. From the foregoing, it is more than probable that the Claimant was the only barman who could account for the missing bottle of whiskey.
34. In the case of Kenya Revenue Authority vs Reuwel Waitihaka Gitahi & 2 others [2019] eKLR, the Court of Appeal found that the standard of proof required is on a balance of probability and not beyond reasonable doubt, and all the employer is required to prove are the reasons that it "genuinely believed to exist," causing it to terminate the employee's services. The learned Judges further opined as follows;

"The employer was able to show that it genuinely believed that there were reasonable grounds and sufficient grounds to suspect that the respondents had committed gross misconduct in their employment and had done acts which were substantially detrimental to KRA. It is not for the court to substitute its own 'reasonable grounds' for those of the employer."
Emphasis mine

35. Similarly, and being guided by the finding in the aforesaid case, it is my finding that the Respondent only needed to prove that the reasons for which it terminated the Claimant's employment are matters it genuinely believed to exist at the time. In this case the reasons touched on the Claimant's level of honesty in the discharge of his duties.
36. The Respondent having received accounts of the Claimant's colleagues that the bar stock was balancing at the time they handed over to him, it had sufficient and reasonable grounds to believe that he was responsible for the missing bottle of whiskey. This availed the Respondent reasonable and sufficient reasons to terminate the Claimant's employment.
37. I must add that the said reason alone was sufficient to cause the Respondent to terminate the Claimant's employment.
38. In light of the foregoing, I am of the considered view that the Respondent has proved that the reasons for the Claimant's dismissal were valid, fair and related to his conduct.

Procedural fairness?

39. The requirement of fair procedure is generally provided for under Section 45 (2) (c) of the Act. The specific requirements encompassing a fair hearing are provided for under Section 41(1) of the Act. In this case, an employer is required to notify an employee of the intended termination in a language he or she understands. The employee should also be given an opportunity to present his or her defence in response to the allegations levelled against him or her.
40. In the instant case, the Claimant was invited to appear for a disciplinary hearing on 6th July 2017. The invitation was communicated to the Claimant through a letter dated 30th June 2017. It is also notable that through the said letter, the Claimant was informed of the allegations he was to answer to, during the disciplinary hearing and was further informed of his rights during the said disciplinary hearing.



From the record, the Claimant attended the disciplinary hearing and was accompanied by a colleague by the name Patrick Gakinya.

41. Interestingly, after the disciplinary hearing, the Claimant was issued with a notice to show cause dated 26th July 2017. The allegations were once again reiterated in the said show cause letter. He was further asked to show cause why he should not be disciplined accordingly. The Claimant responded to the show cause through his responses dated 27th July 2017. He was notified that he would be given feedback. What followed was his termination.
42. In the case of *Postal Corporation of Kenya vs Andrew K. Tanui* [2019] eKLR, it was held 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 is made;
 - (iv) hearing and considering any representations made by the employee and the person chosen by the employee.”
43. Applying the above decision to the instant case, I am satisfied that the Respondent complied with the requirements of Section 41 of the *Employment Act*. I say so because the Claimant was notified of the allegations for which the Respondent was considering terminating his employment. He was further given an opportunity to present his defence in a physical hearing where he was allowed to be accompanied by a colleague.
44. Notably, Section 41 has not prescribed the manner in which the allegations are to be communicated to an employee. In this case, the letter of 30th June 2017 served a dual role as it notified the Claimant of the allegations against him and which could possibly lead to his termination. Through the same letter, he was advised of the hearing of his case as well as his rights before and during the hearing.
45. Indeed, upto that point, the Respondent observed the requirements of Section 41 of the Act and it is not clear why it proceeded to serve the Claimant afresh with the notice to show cause dated 26th July 2017. In my view, this was akin to starting the disciplinary process afresh and did not serve any purpose. It was inconsequential in my view.
46. What is essential to note in this case is that the Claimant was made aware of the reasons for which the Respondent was considering his termination and gave him an opportunity to give his explanation in the presence of a colleague of his choice. In my view, this was in consonance with the spirit of Section 41 of the Act.
47. In the circumstances, I find that the Claimant was accorded procedural fairness and to that extent, the Respondent cannot be faulted.
48. In the end, the Court finds that the Claimant’s termination was neither unfair nor unlawful.



Orders

49. As the Court has found that the Claimant's termination was not unfair and unlawful, the reliefs sought in the Memorandum of Claim cannot be sustained. Consequently, I dismiss the Claim in its entirety with an order that each party bears its own costs.

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

STELLA RUTTO

JUDGE

Appearance:

Ms. Kirui for the Claimant

Mr. Githiri for the Respondent

Abdimalik Hussein Court Assistant

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 had 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.

STELLA RUTTO

JUDGE

