



Mereru v Tata Chemicals Magadi Limited (Employment and Labour Relations Cause 1493 of 2018) [2023] KEELRC 2632 (KLR) (26 October 2023) (Judgment)

Neutral citation: [2023] KEELRC 2632 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1493 OF 2018
BOM MANANI, J
OCTOBER 26, 2023**

BETWEEN

MUTUNKEI JOSEPH MERERU CLAIMANT

AND

TATA CHEMICALS MAGADI LIMITED RESPONDENT

JUDGMENT

1. This claim is founded on alleged unfair termination of the Claimant's contract of service. The Claimant avers that the Respondent terminated his employment without valid reason and in contravention of due process. As a result and by these proceedings, the Claimant seeks, inter alia, compensation for unfair dismissal.
2. On the other hand, the Respondent contends that there were valid reasons to terminate the Claimant's contract of service. Further, the Respondent believes that it adhered to the procedural strictures that are provided for in law whilst processing the Claimant's release. Consequently, the Respondent contends that the suit by the Claimant is devoid of merit and ought to be dismissed with costs.

Claimant's Case

3. The Claimant avers that he was first employed by the Respondent in September 2008 in the position of Documentation Clerk. He rose through the ranks to the position of Finished Goods Controller, a position that he held until his contract of service was terminated on 25th June 2018. The Claimant contends that his exit salary was Ksh. 211,181.72 per month.
4. It is the Claimant's case that he served the Respondent diligently and without blemish for the entire period aforesaid. The Claimant avers that as evidence of his exemplary service, he was issued with certificates of recognition.



5. The Claimant avers that on 15th May 2018, the Respondent issued him with a notice to show cause letter accusing him of various infractions that had allegedly resulted in stock variances and loss at the Kenya National Trading Corporation Depot, Nairobi (KNTC Depot). The Claimant states that the notice to show cause letter was immediately followed with another letter suspending him from duty. In the Claimant's view, the decision to suspend him from duty before he responded to the aforesaid accusations is proof of the Respondent's disregard for the presumption of his innocence until evidence in support of the allegations was tendered.
6. It is the Claimant's case that he was given only twenty four (24) hours to react to the accusations against him in the said notice to show cause. In his view, this did not provide him sufficient time to react to the accusations.
7. The Claimant further contends that the accusations in the notice to show cause were broad and generalized. They allegedly lacked sufficient particulars to enable a pointed response.
8. The Claimant avers that notwithstanding the generalized nature of the notice to show cause and the short time within which he was to respond to it, he was able to offer a response to the accusations. The response was sent out on 16th May 2018.
9. The Claimant denied reversing and or deleting any delivery note entries as asserted by the Respondent. In his view, the accusations against him relating to reversal and deletion of delivery note entries were imprecise and unfair.
10. In relation to the alleged stock variances at the KNTC Depot, the Claimant alleged that his role was confined to physical stock takes and not stock reconciliations. Therefore, he denied responsibility for the alleged stock variances.
11. The Claimant asserted that he always confirmed all stock received at the KNTC Depot and signed and stamped delivery notes. It was his case that records to confirm the position expressed by him were with the Respondent.
12. The Claimant also reacted to the other accusations against him. Details of his reaction are as set out in the Statement of Claim.
13. It is the Claimant's case that despite his comprehensive response to the notice to show cause, the Respondent invited him for a disciplinary hearing. The Claimant avers that in the invite for the disciplinary session, the Respondent expanded the accusations that had been communicated earlier in the notice to show cause to include new matters. The Claimant avers that he nevertheless responded to the new issues that the Respondent raised through the invite aforesaid.
14. The Claimant states that despite the Respondent asserting that it (the Respondent) had undertaken forensic investigations on the matter, it did not furnish him with a copy of the forensic audit report. This, the Claimant asserts, impeded his ability to effectively counter the accusations against him.
15. The Claimant confirms that he attended the disciplinary session that was held on 30th May 2018. He avers that he responded to all the accusations that were leveled against him.
16. The Claimant asserts that despite his elaborate defense before the Disciplinary Panel, the Respondent issued him with a letter for summary dismissal from employment dated 25th June 2018. The Claimant states that the said letter did not meet the threshold set under section 43 of the *Employment Act* with respect to specificity of the reasons for the decision by the Disciplinary Panel.



17. The Claimant avers that he appealed the decision. However, the appeal was lost. The Claimant argues that although the Appeals Committee failed to link him to the allegations leveled against him, it nevertheless upheld the decision of the Disciplinary Panel.
18. The Claimant also accuses the Respondent of subjecting him to differential treatment whilst at work. He alleges that after the Respondent promoted him to the position of Team Leader, it did not remunerate him as the previous holder of the position. Further, the Claimant avers that when he was moved from Eldoret to Magadi on promotion, his salary was increased on paper but he never got the actual pay rise. At the same time, his house allowance was allegedly withdrawn.
19. The Claimant contends that the totality of the foregoing demonstrates that the Respondent had resolved to frustrate him out of the workplace and eventually terminate his contract of service. In effect, the Claimant views his eventual dismissal from employment as a calculated move to terminate his services without valid cause.

Respondent's Case

20. In response, the Respondent admits employing the Claimant as alleged. However, the Respondent avers that contrary to the Claimant's assertion that he had a clean work record, he had received an earlier warning when he tried to conceal damage that was inflicted on the Respondent's property, a matter that put a blot on his work record.
21. The Respondent avers that shortly after the Claimant was moved to Magadi, concerns were raised about a large number of unexplained finished goods stock variances. It is the Respondent's case that this development prompted it to carry out a forensic audit of the stock management operations at its various depots.
22. The Respondent asserts that the forensic audit revealed that the Claimant may have used his User ID 20053006 to delete delivery notes and reverse Post Goods Issues from the KNTC Depot without adequate documentation, explanation or approval.
23. The Respondent avers that following this discovery, it issued a notice to show cause letter to the Claimant to explain the stock variances and stock loss. The Respondent confirms having suspended the Claimant from duty.
24. It is the Respondent's case that although the Claimant wrote a response to the show cause letter, it was wanting. This prompted the Respondent to invite him for a disciplinary hearing.
25. The Respondent avers that through its letter inviting the Claimant for the disciplinary hearing, it supplied him with particulars of the incidents that had been raised in the notice to show cause letter. As a result, the Claimant wrote a further letter reacting to the specific incidences that had been identified.
26. The Respondent asserts that it proceeded to hold the disciplinary session on 30th May 2018. It is contended that the Claimant attended the session together with a witness and both were heard in full.
27. The Respondent avers that the Claimant's response before the Disciplinary Panel was wanting. As a result, the Panel found him guilty of the various infractions as charged. The Respondent avers that the Claimant was accordingly issued with a letter of dismissal from employment.
28. The Respondent states that the Claimant challenged the Disciplinary Panel's decision on appeal. According to the Respondent, the matter was subsequently heard by the Appeals Committee which upheld the decision of the Disciplinary Panel. The Respondent states that the Claimant was allowed to call witnesses at the appeal stage as well.



29. It is the Respondent's case that it had valid reasons to terminate the Claimant as the evidence in its possession pointed to the Claimant's fraudulent involvement in the manipulation of the records under review or his negligent failure to prevent the fraud. Further, the Respondent contends that it afforded the Claimant due process in the entire exercise.
30. The Respondent has denied the other accusations leveled against it by the Claimant. With regard to house allowance, it is the Respondent's case that the Claimant was provided with physical housing when he was transferred to Magadi. Thus, he was not entitled to draw house allowance.
31. The Respondent denies that the Claimant was treated differentially at the workplace. According to the Respondent, salary increments to members of staff are pegged on their individual performance and the general performance of the Respondent. The Respondent contends that when the Claimant was moved to Magadi, his letter of transfer specifically stated that his terms and conditions of service remained the same.

Issues of Determination

32. After analyzing the pleadings and evidence on record, the court is of the view that following are the issues for determination:-
 - a. Whether the Claimant's contract of service was unfairly terminated.
 - b. Whether the parties are entitled to the reliefs that they seek through their respective pleadings.

Analysis

33. As correctly submitted by the parties, in order for a unilateral decision by the employer to terminate a contract of service to be considered valid, there must be evidence that:-
 - a. There was reasonable cause to terminate the contract.
 - b. Due process was followed in processing the employee's release from employment.
34. This requirement is anchored on the constitutional rights to fair labour practice and fair administrative action which are enshrined under articles 41 and 47 of *the Constitution* of Kenya 2010 as read with sections 41, 43, 45 and 47 of the *Employment Act* and the *Fair Administrative Action Act*.
35. Under section 47 of the *Employment Act*, an employee who alleges unfair termination of his contract of service bears the initial burden of demonstrating, on prima facie basis, that the termination is unlawful. However and by virtue of sections 43, 45 and 47 of the *Employment Act*, the primary burden of justifying the validity of the decision to terminate a contract of service rests with the employer (*Cooperative Bank of Kenya Limited v Yator* (Civil Appeal 87 of 2018) [2021] KECA 95 (KLR), *Samuel Kalomit Murkomen v Telkom Kenya Limited* [2017] eKLR, *Kenya Revenue Authority v Reuuel Waitthaka Gitahi & 2 others* [2019] eKLR and *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR).
36. In the instant case, it is the Claimant's case that he was unfairly dismissed from employment. The Claimant denied the various allegations that were leveled against him by the Respondent as per the Respondent's notice to show cause letter of 15th May 2018 and the invite to the disciplinary session letter of 23rd May 2018. The Claimant reacted to the Respondent's accusations through his responses contained in his letters dated 16th May 2018 and 24th May 2018.
37. In the responses, the Claimant denied deleting the delivery notes in question. He specifically stated that the alterations to some of the delivery notes were by the Operations Assistant, his immediate boss.



He denied that he had been granted the rights to effect material to material transfers as this right was only exercisable by the Operations Assistant.

38. The Claimant further disputed the assertion that his User ID had been used to manipulate the records in question. It was his case that the KNTC Depot had one common User ID that was accessible to and by all members of staff. As such, anyone could have manipulated the records in question. The Claimant provided a copy of the Respondent's email dated 17th April 2018 which read as follows:-

're: Sharing Of Sap Ids

Team,

Please note that all depots have since been given their individual SAP IDs and at no time will the depots be allowed to use the ID of another depot. Mombasa and Nakuru sharing IDs and this must stop.

Kindly ensure your IDs are known/used only to your depot alone.

Rgds.

Julius Chando''

39. This email from the Respondent is consistent with the Claimant's assertion that the Respondent's User IDs were depot based as opposed to individual based. Despite the Respondent asserting that the Claimant had an individualized User ID that was misused to manipulate its records, there was no evidence availed to the Disciplinary Panel to verify this fact. There was no documentary evidence to demonstrate that User ID No. 20053006 was individualized to the Claimant and was not depot based as asserted by the Claimant.
40. Having regard to the foregoing, I am satisfied that the Claimant provided prima facie evidence to point to the irregularity of the decision to terminate his contract of service. This evidence satisfies the requirement of section 47 of the *Employment Act* that an employee alleging unlawful termination of his contract of service ought to prove the unlawfulness of the decision to terminate the contract.
41. Under sections 43 and 45 of the *Employment Act*, the employer has to prove the validity of the decision to terminate a contract of service for the termination to be upheld. He does this by proving the validity of the reason for termination and demonstrating that he terminated the contract in accordance with fair procedure.
42. It is appreciated that in establishing the reason for termination of the contract, the employer only needs to demonstrate that he had genuine belief that a valid reason to terminate it (the contract) had arisen (*Kenya Revenue Authority v Reuwel Waitbaka Gitabi & 2 others* [2019] eKLR). A genuine belief about existence of a valid reason to terminate the contract is measured against the standard of a reasonable employer. In this respect, the question is whether a reasonable employer would have terminated the contract based on the set of facts that have been presented.
43. Thus, to establish whether the Respondent's decision to terminate the Claimant's contract satisfies the requirements of sections 43 and 45 of the *Employment Act*, the court must determine whether the set of facts upon which the Respondent acted disclose the infraction for which the Claimant was charged or whether those facts provided a basis for the Respondent to have reasonably entertained a genuine belief that the Claimant was guilty of the infractions he was accused of. The court must be satisfied that another reasonable employer faced with the same set of facts would have, in all likelihood, arrived at a similar conclusion as the Respondent.
44. The court is also reminded of the fact that whilst evaluating the validity of the employer's decision, it must not assume the position and role of the employer in the dispute. It must not substitute



the employer's decision with its own merely because the trial Judge considers that had he been in the employer's shoes, he would have handled the matter differently. The court's role is limited to determining whether the employer's decision falls within the parameters that are prescribed by statute and whether it meets the tenets of justice and equity. In commenting on this matter, the Court of Appeal in *Samuel Kalomit Murkomen v Telkom Kenya Limited* [2017] eKLR stated as follows:-

“In determining whether termination of an employee was fair, a court ought not to substitute its decision for that of an employer. Its duty is to determine whether the decision to dismiss was valid and fair within the circumstances of the employer.”

45. I have evaluated the facts of the instant case in the context of the above principles. In the notice to show cause dated 15th May 2018, the Claimant was accused of deleting delivery notes and reversing Post Goods Issues using his User ID 20053006 without adequate documentation, explanation and approval. In his response, the Claimant denied that he made the alterations that he was accused of.
46. The Claimant specifically stated that delivery note number 73000067099 was not reversed by him. He averred that it is his senior, the Operations Assistant, who replaced this system generated delivery note with delivery note number 7300069420.
47. During the disciplinary hearing, the Claimant maintained this version of events with respect to the aforesaid delivery note. He hazarded a guess that the alterations to the delivery note may have been necessitated by the need to include in it freight charges which had been omitted in the earlier instrument.
48. The minutes of the disciplinary session do not show that the Disciplinary Panel was furnished with evidence to controvert the Claimant's assertion that it was the Operations Assistant who altered delivery note number 73000067099. The minutes do not show that the Operations Assistant was summoned to controvert the Claimant's version of events.
49. Having regard to this sequence of events, it is difficult to see how the Disciplinary Panel reached the conclusion that it is the Claimant who replaced this delivery note and for ulterior reasons. The evidence that is available does not provide a basis for such a conclusion. Beyond indicating that there was reason to believe that the Claimant had acted fraudulently, the letter of dismissal from employment dated 25th June 2018 does not disclose the basis for the Disciplinary Panel's rejection of the Claimant's explanation on this delivery note.
50. The Claimant also denied deleting delivery note number 7300079740 as asserted by the Respondent. It was the Claimant's contention that this delivery note was still in the Respondent's system and that it had in fact been used to make two payments in settlement of invoices numbers 241364 and 462. To support his assertion, the Claimant referred to the Respondent's email trail for 27th April 2018 which was accompanied by an excel sheet containing delivery note 7300079740 alongside several other delivery notes.
51. Despite the Claimant's contention that this delivery note was not deleted and was still in the Respondent's system, there is nothing in the minutes of the Disciplinary Panel to demonstrate that the Respondent took steps to negate this assertion. The failure by the Panel to interrogate the Claimant's submissions on this delivery note coupled with the Respondent's email trail of 27th April 2018 which made reference to the delivery note in question gives credence to the Claimant's evidence that this delivery note may not have been deleted as asserted by the Respondent. If the delivery note had been deleted as suggested by the Respondent, why was this evidence not tabled before the Disciplinary Panel? Why did the Respondent fail to explain the email trail of 27th April 2018 which was in its possession and which made reference to the impugned delivery note?



52. The Claimant also denied posting stock movements via SAP Stock Movement 309. The Claimant stated that he had not been given the privileges (rights) of effecting material to material transfers. It was his case that these rights vested in the Operations Assistant. The Claimant specifically stated that this function did not fall within his Job Description but that of the Operations Assistant.
53. In relation to this same transaction, the Claimant denied that the stock transfer was executed using a User ID that had been dedicated to his exclusive use. He explained that the User ID at the KNTC Depot was a shared resource and that any member of staff could access it. He attached to his response an email from the Respondent dated 17th April 2018 suggesting that User IDs were depot based as opposed to being individualized. The email has been reproduced in this judgment.
54. The minutes of the Disciplinary Panel do not show that the Respondent offered evidence to negate the Claimant's position on this matter. Apart from the bare statements that are on record, there was no evidence to show that User ID No 20053006 had been exclusively allocated to the Claimant. There was no evidence presented to the Panel to show that this User ID was not for common use at the Depot. There was no evidence to demonstrate that indeed manipulation of the delivery notes was through this User ID. If such evidence was available, then it was concealed from the Claimant because there is nothing on record to demonstrate that it was presented to the Panel for interrogation by the Claimant.
55. During his oral testimony, the Respondent's witness stated that the organization issues two IDs: the Depot ID and the individual User ID. The witness stated that what was in contention was the misuse of the Claimant's User ID as opposed to the Depot ID.
56. This evidence is incredible for two reasons. First, this defense was not advanced before both the Disciplinary Panel and the Appeals Committee at which the issue of User ID was raised. The Respondent never suggested at these two forums that the Claimant had convoluted the issue of User IDs and that it (the Respondent) had issued both individual and Depot IDs at its depots and which were distinct.
57. Second, in the letter by the Appeals Committee rejecting the Claimant's appeal, the Committee clearly states that the identity of the individual(s) who effected deletion of the impugned delivery notes could not be ascertained because the User ID at the Depot was a shared resource. If it is true that the Claimant had a personalized User ID which was distinct from the Depot ID as was suggested before me, the Appeals Committee would not have arrived at the conclusion aforesaid.
58. The totality of the foregoing leaves me with little doubt that there was no credible material that was placed before the Disciplinary Panel to support its findings. Having regard to the disclosed record, there was nothing that would have led a reasonable employer to come to the conclusion that the Claimant was guilty of the infractions that he was accused of. Indeed, the Appeals Committee confirmed this when at paragraph one (1) of its letter dated 17th August 2018 it observed that it was difficult to ascertain who was responsible for manipulating the records in question as the User ID at the depot was a shared resource.
59. On the question of due process, it is true that the Claimant was notified of the charges against him albeit in a generalized manner in the first instance. It is also correct that the Claimant was invited to disciplinary and appeal sessions at which the case against him was heard. It is also true that the Claimant was given the opportunity to call witnesses to the sessions.
60. However, these alone are not the hallmarks of due process. Section 4 of the Fair Administrative Act requires a person who is making an administrative decision that is likely to affect the rights of another



to supply the person who is likely to be affected by the decision information, materials and evidence that will be relied on to make the decision.

61. This provision of statute obligated the Respondent to supply the Claimant with all evidence and materials that was in its possession and which was relevant to the issues under consideration. This included the forensic audit report containing the results of the forensic investigation that the Respondent had allegedly conducted on the matter.
62. As a matter of fact, the record shows that the Respondent had more information on the issues under inquiry than it shared with the Claimant. For instance, at paragraph 6 of the letter dated 17th August 2018 communicating the Respondent's decision rejecting the Claimant's appeal, the Respondent's Appeals Committee stated as follows:-

“On the issue relating to stock movement 309 and the use of SAP ID 20053006, whereas you said this could have been done at any location, the computer logs in possession of management had shown that there were several instances where stock movement 309 transaction had been done on the laptop referred to as “Tech Support” based at KNTC Nairobi, this laptop was under your control.”
63. The record does not show that the Respondent shared these computer logs with the Claimant. Yet, the Appeals Committee relied on this information to sustain the accusations against him.
64. In his initial response to the notice to show cause dated 16th May 2018, the Claimant asked that the Respondent shares the forensic audit report on the matter, if it had conducted a forensic investigation on the case. In its response dated 23rd May 2018, the Respondent asserted that it had compelling evidence that the Claimant committed the malpractices under inquiry. The Respondent then went ahead, without disclosing the source of its information, to highlight what it described as examples of incidences where the Claimant's User ID had allegedly been used to manipulate its data.
65. During cross examination of the Respondent's witness, he confirmed that the Respondent had undertaken a forensic investigation on the case which was not shared with the Claimant. He also confirmed that the Respondent had other evidence on the matter which it did not share with the Claimant.
66. Essentially, the Claimant was being tried using evidence that had been withheld from him. It was inappropriate for the Respondent to select what to share with or withhold from the Claimant relating to the charges against him. In particular, the forensic report which triggered the inquiry against the Claimant should, in all fairness, have been shared with the Claimant to enable him meaningfully respond to the various allegation against him including the alleged incriminating computer logs.
67. On appeal, the Appeals Committee went beyond what had been presented before it and the Disciplinary Panel to introduce new evidence suggesting culpability of the Claimant. In particular, the Committee commended that a burglary incident at the KNTC Depot in which the Respondent's records and computers were stolen was a scheme to conceal records pertaining to the movement of goods at the Kajjado station which was linked to the issues under consideration. These comments certainly weighed on the Appeal Committee's mind as it decided the Claimant's fate. Yet, there is no evidence that the burglary incident had been flagged early enough to give the Claimant an opportunity to comment on it.
68. Having regard to the foregoing, it is clear to me that the Respondent's handling of the Claimant's case, both at the Disciplinary Panel and Appeals Committee stages, was procedurally flawed. To quote section 45(5) of the *Employment Act* and having regard to the totality of the circumstances of the case, the decision to terminate the Claimant's employment was not in accordance with justice and equity. It is so declared.



Determination

69. The court finds that the Respondent's decision to terminate the Claimant's employment was unfair both for want of cause and for violating due process.
70. The court awards the Claimant compensation for unfair termination of his contract of service that is equivalent to the Claimant's gross monthly salary for six (6) months, that is to say, Ksh. 1,267,090.00. In awarding this amount, I have taken into account some of the factors that are to be considered under section 49 of the *Employment Act*. In particular, I have considered the length of time that the Claimant served the Respondent.
71. I award the Claimant interest on the aforesaid sum at court rates from the date of this decision.
72. The above award is subject to the applicable statutory deductions.
73. I award the Claimant costs of the case.
74. Any other relief that was sought by the parties but which has not been expressly granted under this section is deemed to have been declined.

DATED, SIGNED AND DELIVERED ON THE 26TH DAY OF OCTOBER, 2023

B. O. M. MANANI

JUDGE

In the presence of:

..... **for the Claimant**

..... **for the Respondent**

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M. MANANI

