



Gombe v Agricultural Finance Corporation (Employment and Labour Relations Cause 371 of 2012) [2023] KEELRC 2449 (KLR) (12 October 2023) (Judgment)

Neutral citation: [2023] KEELRC 2449 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 371 OF 2012**

**BOM MANANI, J
OCTOBER 12, 2023**

BETWEEN

WALTER GOMBE CLAIMANT

AND

AGRICULTURAL FINANCE CORPORATION RESPONDENT

JUDGMENT

Introduction

1. This is a claim for inter alia, compensation for alleged unlawful termination of a contract of employment. The Claimant, who was an employee of the Respondent, has accused the Respondent of terminating his contract of service without valid cause and in contravention of due process.
2. As a consequence, the Claimant prays that the decision to terminate his services be declared unlawful and the Respondent be compelled to reinstate him back to his position. Alternately, the Claimant prays for compensation for unfair termination.
3. On the other hand, the Respondent avers that the decision to terminate the Claimant's contract of service was informed by valid reasons. Further, the Respondent contends that the Claimant was released from service only after being subjected to a properly conducted disciplinary process. Therefore, the Respondent prays that the claim be dismissed with costs.

Claimant's Case

4. The Claimant avers that he was first employed by the Respondent in 1985 in the position of Clerical Officer. He was thereafter promoted to the position of Computer Control Clerk. According to the evidence on record, the Claimant's exit salary was Ksh 130,040.30 per month.



5. The Claimant avers that his services were first irregularly terminated in July 2001 but he was reinstated through a court order. It is the Claimant's case that on his reinstatement, he was posted to Kisumu as a cashier.
6. The Claimant contends that whilst in the Respondent's employment, he flagged areas for improvement within the organization some of which concerned the security of the Respondent's cash collection boxes. The Claimant states that he had noted that the duplicate keys to the collection boxes at the Respondent's Kisumu branch were kept by the branch officials contrary to the norm. The Claimant's position is that these keys ought to have been deposited with the Respondent's bankers for safe keeping.
7. The Claimant contends that the fact that the Respondent's branch management was in possession of the duplicate keys exposed the organization to the risk of financial malpractices. According to the Claimant, this state of affairs meant that the branch management was in a position to access and take money from the collection boxes.
8. Besides the foregoing, the Claimant avers that there were other ongoing financial malpractice at the branch. For instance, in 2007, it was discovered that some of the Respondent's clients had been given a wrong account into which they had been depositing their loan repayment instalments. The clients had been supplied with account details of an account that belonged to one Aziz Ramadhan instead of the Respondent's loan repayment account.
9. The Claimant asserts that this anomaly was discovered after some of the clients visited the branch to complain about not receiving cash deposit receipts for their loan installments despite them remitting the installments. It is at this point that it was realized that the loan repayments had been going into an account that did not belong to the Respondent.
10. The Claimant contends that after this realization, the branch officials held a meeting with Mr Aziz Ramadhan over the issue. Mr Aziz is said to have confirmed that indeed, there was money that had been credited onto his account but whose source he could not confirm.
11. The Claimant states that the Respondent's branch manager asked Mr Aziz to withdraw and hand over the money to the Respondent for purposes of re-crediting it onto the correct accounts. The Claimant avers that in response to this request, Aziz withdrew the cash and deposited it with the Respondent. It is the Claimant's case that Mr Ramadhan deposited two of such withdrawals with him (the Claimant), that is to say Ksh 32,640.00 and Ksh 27,472.00.
12. The Claimant contends that he issued Mr Ramadhan with acknowledgement slips for the two deposits. However, he did not issue him with official cash deposit receipts.
13. The Claimant avers that he did not issue official receipts for the cash deposits aforesaid because at that point, it had not been ascertained on which accounts the money was to be credited. The Claimant contends that the branch manager had instructed him not to issue official receipts for the money until after it had been credited to the correct accounts.
14. The Claimant further states that he did not bank the cash deposits for the same reason. According to him, the Respondent's management was to confirm onto which accounts the money was to be credited before it could be banked. As a result, the Claimant indicates that he kept the cash in the cash collection box at the branch office.
15. The Claimant contends that after he received the 2nd installment of Ksh 27,472.00 and placed it in the collection box, he noticed that the branch accountant had taken Ksh 20,000.00 from the amount. The Claimant says that this incident happened when he was out for lunch.



16. According to the Claimant, this incident fortified his fears regarding security for cash stored at the branch. The Claimant contends that the only way that the branch accountant could have accessed the cash was by using the duplicate keys that were in his possession.
17. The Claimant further contends that this incident exemplified the financial malpractices that were happening at the branch. According to him, the incident showed how the branch officials were misusing the Respondent's money with abandon.
18. In a bid to enforce accountability at the branch, the Claimant states that he asked the official to commit in writing that he had picked the money and that he was going to reimburse the amount. It is the Claimant's case that the official eventually acknowledged the cash in writing.
19. According to the Claimant, his stand against the wanton abuse of power by the Respondent's management at the Kisumu branch placed him at loggerheads with the officials of the branch. He states that as a result, the officials tried to implicate him in the loss of Ksh 546,500.00 at the branch. He contends that he was subsequently arrested in 2009 over the loss of the aforesaid amount.
20. It is the Claimant's belief that the arrest was instigated by the branch officials in a bid to cover up the financial malpractices at the branch. As a matter of fact, the Claimant posits that subsequent investigations into the matter absolved him of liability. According to him, the investigation results pointed to the branch manager as the individual who may have been responsible for the loss.
21. The Claimant contends that in an attempt to cover up the financial malpractices at the branch, some of the Respondent's officials pushed the Respondent's head office to open an inquiry into the issue involving Aziz Ramadhan. As a result, the Claimant contends that the Respondent now accused him of having failed to account for the cash that he received from Mr Aziz. In addition, the Claimant avers that the Respondent accused him of abdicating his responsibility by failing to report the financial malpractices at the Kisumu branch.
22. The Claimant contends that in a bid to justify termination of his employment, the Respondent instigated a flawed disciplinary process against him. The Claimant avers that he was issued with a notice to show cause which he responded to. He was subsequently subjected to a disciplinary hearing that ultimately led to the termination of his contract of service.
23. The Claimant denies that he was guilty of the infractions that were leveled against him. He believes that the process that led to his dismissal from employment was motivated by ulterior reasons. In the Claimant's view, the issue of failing to account for funds received from Aziz Ramadhan was a mere smokescreen for the Respondent to actualize its malicious decision to terminate his contract of service.
24. The Claimant has also stated that the process adopted at the disciplinary hearing was flawed. He contends that the Disciplinary Panel locked out his trade union representative from the session. As a result, he was denied the opportunity to be represented by a union official of his choice.
25. The Claimant also contends that he was denied the opportunity to cross examine the Respondent's witnesses. The Claimant further states that he was not shown the investigation report on the basis of which he was accused of the various infractions. He further contends that the Respondent refused to supply him with the minutes of the disciplinary hearing.

Respondent's Case

26. On its part, the Respondent states that the trigger for the Claimant's problems was the way he handled the cash that he collected from Aziz Ramadhan. According to the Respondent, despite the Claimant



acknowledging receipt of this cash, he did not account for it. The cash could not be traced either at the Respondent's bank or strong room.

27. The Respondent contends that its finance policy which is anchored on accepted industry practice is that all money that is collected by the organization must be receipted and banked promptly. The banking must happen the same day. Where this is not possible for cogent reasons, the banking must be done the next working day.
28. The Respondent states that the Claimant's explanation for holding the cash that was collected from Aziz Ramadhan at the branch is not cogent. It is the Respondent's case that where cash in its possession cannot immediately be assigned to a particular account, it must be placed in a suspense account and banked pending resolution of the matter. It is the Respondent's case that the Claimant violated this policy by holding the cash in the collection box.
29. Further, the Respondent contends that every cashier keeps the keys to the cash collection box that is assigned to him. The Respondent denies that duplicate keys to collection boxes are kept at its offices including the branch offices.
30. The Respondent states that the only keys that are kept by the branch management are for the strong room where the cash collection boxes are kept. The Respondent avers that cashiers deposit the cash collection boxes to the strong room after they have individually locked them.
31. The Respondent contends that if indeed the branch management at the Kisumu branch were in possession of duplicate keys to the cash collection boxes, the Claimant ought to have raised the matter with the head office. It is the Respondent's case that the Claimant did not lodge such report.
32. The Respondent also raised other matters relating to late banking by the Claimant. It was indicated that the Claimant had been flouting the Respondent's regulations by holding onto cash that was collected by him for unduly long periods before banking the money thereby exposing the Respondent to the risk of loss.

Issues of Determination

33. After analyzing the pleadings and evidence on record, it is my view that the following are the issues for determination in the cause:-
 - a. Whether the Respondent unlawfully terminated the Claimant's contract of employment.
 - b. Whether the parties are entitled to the various reliefs that they seek through their respective pleadings.

Analysis

34. Before an employer can lawfully terminate an employee's contract of employment, he must demonstrate that he has a valid reason to support his decision. Further, the employer is obligated to ensure that the procedure adopted to process the decision upholds fair process.
35. Section 41 of the *Employment Act* requires the employer who is proposing to terminate an employee's contract of service to: notify the employee of the reason for the proposed decision; allow the employee to be accompanied by a fellow employee or trade union representative during the time of notification; and allow the employee and his witnesses to make representations on the matter before the decision is made.



36. Under section 43(2) of the *Employment Act*, the employer need not have infallible evidence that the employee has committed the infraction for which it is proposed to terminate his services. All that the employer is required to demonstrate is that he genuinely believed that there was a valid reason to terminate the employee's contract of service at the time that the decision was made (see *Kenya Revenue Authority v Rewel Waitbaka Gitahi & 2 others* [2019] eKLR).
37. The reason(s) for terminating the contract may be any of the matters that are alluded to under section 41 of the *Act*. These include poor performance, physical incapacity and gross misconduct by an employee. The employer is also entitled to terminate a contract of service for operational reasons in terms of section 40 of the Act.
38. In the dispute before me, the Respondent accused the Claimant of a series of infractions. These included failure by the Claimant to: account for funds that had been entrusted with him; report financial malpractices at the branch; and bank cash collected by him within the timeframes that are set by the Respondent. Whilst the first two infractions were raised at the notice to show cause stage, the last infraction came up during review of the Claimant's appeal.
39. On the question of failure to account for the funds that he had collected from a client, the case involved the sum of Ksh 60,112.00. This amount comprised of Ksh 32,640.00 and Ksh 27,472.00 which the Claimant collected from Mr Aziz Ramadhan.
40. It is the Respondent's case that this money could not be traced in its records. Yet, there was evidence that the Claimant had received it.
41. The Claimant does not deny receiving the money from Aziz Ramadhan. He confirmed this fact both in his Statement of Claim and oral evidence in court. The fact that the Claimant received this cash is therefore not in dispute.
42. The Claimant acknowledges that the money belonged to the Respondent. It is money that the Respondent's clients had wrongly deposited on the account of Ramadhan. The cash was intended to reduce the indebtedness of the affected clients to the Respondent.
43. The Claimant states that he took the cash and placed it in the cash collection box. He did not bank it.
44. The Claimant states that out of the sum of Ksh 27,472.00 that he collected last, the branch accountant took Ksh 20,000.00 and gave it to his father. He contends that the accountant later acknowledged this in writing.
45. What is unclear is what became of the balance that the Claimant had collected. He does not cogently explain the whereabouts of the difference of approximately Ksh 40,112.00. Indeed, this discrepancy was flagged by the Appeals Committee.
46. The Claimant's assertion at the trial that the branch manager took the money was not supported by cogent evidence. Apart from this bare assertion, there was nothing to confirm this allegation. As the Appeals Committee observed, the Claimant tabled no evidence to verify this assertion.
47. The Claimant also insinuated that the money may have been taken by other branch officials because they had access to the cash collection box. However, this explanation is unconvincing.
48. The Claimant says that when the branch accountant took Ksh 20,000.00 from the cash collection box when the Claimant was out for lunch, he (the Claimant) immediately noticed this after he resumed work from the lunchbreak. If he was able to notice this, why did he fail to immediately detect when the other amount of the Ksh 40,112.00 was taken from the cash box? Why does he not explain at what



point in time the sum of Ksh 40,112.00 was taken from the cash box? Why did he not raise with the Respondent the issue about the missing Ksh 40,112.00 until the matter was flagged by the Respondent just before he (the Claimant) was taken through the disciplinary process?

49. In view of the evidence on record, I am satisfied that the Claimant did not provide a convincing explanation regarding the whereabouts of at least Ksh 40,112.00 out of the Ksh 60,112.00 that he had collected from Aziz Ramadhan. This money had come into the Claimant's possession by reason of his employment with the Respondent. Therefore, he was under obligation to account for the money to the Respondent.
50. The Respondent may not have been able to establish the other accusations against the Claimant. However, I am satisfied that the accusation relating to failure to account for the cash that was collected from Aziz Ramadhan was proved. Therefore, I arrive at the conclusion that the Respondent had a valid reason to terminate the Claimant's contract of service.
51. In respect of due process, there is evidence that the Claimant was issued with a letter detailing the accusations against him. This is evident from the Respondent's letter dated 26th February 2010. Besides the several other matters that are raised in the letter, there is specific mention of the Claimant having received Ksh 27,472.00 and Ksh 32,640.00 from Ramadhan.
52. There is evidence that the Claimant responded to the accusation through his letter to the Respondent dated February 27, 2010. In the response, the Claimant did not deny receiving the cash in question. On the contrary, he confirms that he received the cash but that the branch accountant took Ksh 20,000.00. He asserted that he could not have receipted money which was in the possession of someone else.
53. Not being convinced by the Claimant's response to the notice to show cause, the Respondent invited him for a disciplinary hearing. The letter inviting the Claimant to this session is dated April 6, 2010.
54. There is evidence that the disciplinary session of April 9, 2010 was held. This is confirmed by the Claimant. Further evidence of this is contained in the summary of minutes of the disciplinary session dated April 14, 2010 and produced in evidence by the defense.
55. After the hearing, the Respondent arrived at the decision to terminate the Claimant's contract of service. The letter terminating the Claimant's employment is dated April 30, 2010. It was produced in evidence by both parties. The letter inter alia, indicates that the Claimant was dismissed from employment for failure to account for the money that he had collected from Aziz Ramadhan.
56. The record shows that the Claimant challenged the Respondent's decision on appeal. On the matter of the cash that the Claimant had collected from Ramadhan, he stated that his supervisor took Ksh60,000.00. He indicated that there was documentary evidence to prove this. However, this was not tendered in evidence.
57. The appeal was heard and additional matters considered. It was subsequently dismissed.
58. Notwithstanding the foregoing, the Claimant has made several assertions that imply failure by the Respondent to uphold due process during the disciplinary session. First, he asserts that he was denied the opportunity to have a representative and witnesses during the session. It is the Claimant's case that a Mr Tallam turned away his Union representative.
59. Second, the Claimant contends that he was denied the opportunity to cross examine his accusers. In particular, he avers that he was denied the opportunity to cross examine a person referred to as Samuel Otima.



60. Third, the Claimant states that he was not supplied with the evidence that was in possession of the Respondent on the matters that were under inquiry including the investigation report. This is despite the Respondent asserting that it had conducted an investigation into the matter.
61. As indicated above, the employer bears the burden of justifying the decision to terminate an employee's contract of employment. The employer must demonstrate that there was valid reason to dismiss the employee from service. Further, he must prove that he accorded the employee a fair process.
62. Despite the Claimant raising the various matters on due process, the Respondent did not sufficiently respond to them. For instance, the Respondent did not provide cogent evidence to controvert the Claimant's assertion that he was denied the opportunity to call witnesses and a trade union official to represent him at the hearing. Further, the Respondent did not provide cogent evidence to controvert the Claimant's assertion that he was denied the chance to cross examine his accusers.
63. With regard to withholding critical evidence from the Claimant, the Respondent's second witness conceded that they did not furnish the Claimant with a copy of the investigation report. According to the witness, it was up to the Claimant to have requested for the report if he required it.
64. It was for the Respondent to demonstrate that it complied with the requirements of due process. This could only have been demonstrated by the Respondent tabling in evidence the full minutes of the disciplinary session (*Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR). Instead, the Respondent elected to file a summary of the minutes.
65. The summary is clearly an edited version of the proceedings of 9th April 2010. The document does not show that the Claimant was allowed the opportunity to cross-examine his accusers. It does not show that the Claimant was allowed to call witnesses in support of his case and a trade union official to represent him.
66. As noted above, the Respondent's witness has conceded that the Claimant was not furnished with a copy of the investigation report. Yet, this formed the basis of the accusations of financial impropriety against him.
67. The decision to withhold the investigation report from the Claimant was ill advised. It does not matter that the Claimant did not expressly ask for it. The Respondent had a duty to share with the Claimant the evidence in its possession on the issues under inquiry to enable him adequately respond to the accusations against him (*Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR).
68. Similarly, the decision to decline to allow the Claimant's Trade Union to attend the disciplinary session and represent him was ill advised. This went against the express provision of section 41 of the *Employment Act* which entitles an employee facing disciplinary action to be accompanied by a Trade Union official of his choice.
69. In view of the foregoing, it is clear that the proceedings that led to the decision to terminate the Claimant's contract of employment did not sufficiently accord with the requirements of due process. In the premises, I declare the decision unfair but only on account of the procedural flaws that I have highlighted above.

Determination

70. The upshot is that the Respondent's decision to terminate the Claimant's contract of service is declared procedurally flawed. As a result, the said decision is declared unlawful but only to the extent aforesaid.



71. The court awards the Claimant compensation for unfair termination of his contract of service but limited to the Claimant's gross salary for three months. This award is in reparation of the procedural flaws aforesaid. The award works out to Ksh 130,040.30 x 3 = Ksh 390,121.00.
72. The award is subject to the applicable statutory deductions.
73. The award attracts interest at court rates from the date of this decision.
74. The Claimant is awarded costs of the action.

DATED, SIGNED AND DELIVERED ON THE 12TH DAY OF OCTOBER, 2023

B. O. M. MANANI

JUDGE

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

