



**Kinoti v Safaricom PLC (Cause E214 of 2021)  
[2023] KEELRC 2415 (KLR) (6 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2415 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E214 OF 2021  
SC RUTTO, J  
OCTOBER 6, 2023**

**BETWEEN**

**DESMOND KINOTI ..... CLAIMANT**

**AND**

**SAFARICOM PLC ..... RESPONDENT**

**JUDGMENT**

1. Through a Memorandum of Claim dated 5<sup>th</sup> March, 2021, the Claimant avers that on or about 25<sup>th</sup> April, 2017, he was offered employment by the Respondent to serve in the position of Area Sales Manager. He accepted the offer and according to him, he diligently, committedly and with due honesty, served the Respondent throughout his employment term. He avers that he was able, ready and willing to continue with such service throughout his employment to retirement. It is the Claimant's case that by a letter dated 28<sup>th</sup> June, 2018, the Respondent unlawfully, irregularly and prematurely dismissed him from employment without any justifiable cause and/or reason whatsoever. Consequently, the Claimant seeks the following reliefs against the Respondent:
  - a. A declaration that his summary dismissal was unfair and unlawful.
  - b. Reinstatement to his previous position/job without any loss of benefits.
  - c. Salary arrears for the entire period he has been out of employment.
  - d. Special damages as set out above and proved at the hearing.
  - e. Damages for discrimination and violation of employment rights.
  - f. Exemplary damages for inhuman treatment and oppressive action.
  - g. Maximum compensation of 12 months for wrongful dismissal.
  - h. In the alternative, payment of all terminal dues owed to him.



- i. Costs of this suit with interest thereon.
2. Through its Memorandum of Response dated 23<sup>rd</sup> April, 2021, the Respondent admits the employment relationship and avers that the Claimant's employment was terminated in accordance with fair process and for fair reason and upon payment of salary for the days worked, outstanding leave days and allowances. As such, the Respondent has asked the Court to dismiss the Claimant's Claim with costs.
3. During the hearing which proceeded on diverse dates, both sides called oral evidence.

### **Claimant's Case**

4. The Claimant testified in support of his case and at the start of the hearing, he sought to adopt his initial witness statement and supplementary 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 he joined the Respondent Company on 5<sup>th</sup> June, 2018. That as Area Sales Manager, he was not in a position to monitor the usage of devices and that he could only rely on the reports sent by the risk management team and dealer management team. He contended that the Respondent did not provide him with the necessary tools and systems to monitor usage of the devices.
6. He further stated that he kept a detailed record of all the devices and provided the Respondent with the list during his disciplinary hearing and appeal hearing but none of the investigating officers was willing to hear his side of the story. He was not aware of the number of devices acquired by the Respondent and the value thereof.
7. The Claimant stated in further evidence that the Coast Region was leading in terms of device activation. That activation meant the agent had been trained on the usage of the device, agreed to the terms and conditions outlined in the indemnity form and had carried out more than two sim card/customer registration. Reports were sent on a weekly basis and his sales region averaged above 92 % on active devices.
8. It was his further testimony that on 8<sup>th</sup> June, 2017, he received an email requiring him to account for 180 devices, which he did. Consequently, he shared an email with the investigating officer accounting for 100 devices. He denied ignoring the Respondent's request in that regard.
9. He further contended that during the whole process, none of the investigating officers questioned or raised concerns on the reports that he failed to account for the said devices. To his knowledge, he accounted for the devices to the best of his abilities and with limited resources provided.
10. That the assigned 895 devices in use by Mpesa, showed 729. Therefore, he should have been requested to account for 166 devices. That on the date of the hearing, he was accused of not accounting for 142 devices.
11. The Claimant further contended that the investigations carried out were based on false allegations and that his input to account and recover the devices was not considered during the entire process.
12. During the hearing, he raised his concerns and the Committee agreed to amend the allegations. He contended that this never took place and the errors and mischief by the investigating officers were not corrected.
13. He further averred that during the disciplinary hearing, he requested for more time to account for the remaining 30 devices and he was given 24 hours to send his final report regardless that he had to travel back to coast by road. He raised this concern with the Respondent.



14. The Claimant further stated that the letter of summary dismissal was not based on actual facts since by then, he had managed to account for all the devices. That during the appeal hearing, he managed to table all the documents showing that he had managed to account for all the devices.

### **Respondent's case**

15. The Respondent called oral evidence through Mr. Emmanuel Ndibo and Mr. Odhiambo Ooko who testified as RW1 and RW2 respectively. Mr. Ndibo was the first to go. He identified himself as the Senior Manager, Fraud Detection in the Respondent's Ethics and Compliance Department. At the outset, he adopted his witness statement to constitute his evidence in chief. He further produced the documents filed on behalf of the Respondent as exhibits before Court.
16. It was RW1's testimony that in December, 2016, the Respondent rolled out a distribution plan of 90,000 Huawei Y311 devices to its dealers, agents and shops. The Respondent incurred about Kshs 544.5 million in purchasing the devices which would be distributed for free.
17. RW1 further stated that the purpose of acquiring and distributing the devices was to enhance the process of registration of subscribers to the Respondent's network, in a bid to comply with regulatory Know-Your-Customer requirements. This would be done through a subscriber registration application installed on the devices, whose functions included the ability to take copies of customers' identification documents as well as photographs of customers.
18. That as one of the Area Sales Managers for the Coastal Region, the Claimant's responsibilities in the process included:
- i. The collection and subsequent oversight over the delivery and activation of the devices;
  - ii. Monitoring and reporting of on-ground usage statistics by the Respondent's agents; and
  - iii. Follow up on lost and faulty devices.
19. According to RW1, the Respondent put in place elaborate mechanisms to assist the Claimant in carrying out his responsibilities. These included inventory management, documentation in the form of pick lists and indemnity forms as evidence of collection and delivery of the devices and a returns procedure for faulty devices.
20. He further stated that the Respondent ensured that the Claimant was properly informed and trained in the process involved prior to rollout.
21. It was RW1's evidence that in the course of the Respondent's reviews of the subscriber registration process, it noted a slow uptake of the same which could be attributed to issues with the distribution of the devices.
22. This led to an investigation by the Respondent's Ethics and Compliance Department which unearthed several indicators that the objectives were not being met. These included devices not being used on the Respondent's network for subscriber registration activities, devices being used on a competitor network and devices being mapped to individual customers rather than the Respondent's agents or dealers.
23. In view of the Claimant's responsibilities in the entire process, the Respondent required him to account for the devices that were issued to him. The Respondent's requests were either ignored or unsatisfactorily responded to. Additionally, the Claimant recorded a statement to assist in the investigations.



24. He is aware that the Respondent commenced its formal, disciplinary process against the Claimant and during the process, he accounted for additional devices but he was unable to fully account for all the devices that were issued to him. As a result of the Claimant's negligence and improper performance of his duties, the Respondent was exposed to a financial loss of about Kshs 859,185/= in addition to potential regulatory exposure for failing to comply with subscriber registration regulations.
25. Mr. Odhiambo Ooko who testified as RW2 identified himself as the Respondent's Senior Manager-Employee & Labour Relations.
26. It was his evidence that following the conclusion of the investigations by the Respondent's Ethics and Compliance Department into the irregular distribution of subscriber registration devices by the Claimant, the Respondent issued invitation letters to the Claimant requiring his attendance at the disciplinary hearings.
27. During the hearing, the Claimant was afforded an opportunity to be heard on the allegations that faced him and to make representations to advance his defence.
28. RW2 further stated that following the disciplinary hearing, the Claimant sought for time to fully account for the devices that were issued to him. In spite of being granted more time, he is aware that the Claimant was still not able to fully account for the devices.
29. That having carefully considered the Claimant's representations, the Respondent found that his actions amounted to negligence and improper performance of his duties. Consequently, the Respondent summarily dismissed the Claimant.
30. The Claimant was afforded a right of appeal. He exercised his right of appeal, setting out various grounds of appeal. The Respondent constituted an appeal panel to hear the Claimant's appeal.
31. The Claimant attended the appeal hearing to present his position. However, having again carefully considered the Claimant's appeal, the Respondent upheld the decision to summarily dismiss him. The Respondent's decision was communicated in writing to the Claimant.

### **Submissions**

32. At the time of writing this decision, the Claimant's submissions were not on the Court's physical record and could not be traced on the online portal. This is despite the Claimant's Advocate indicating to the Court on 30<sup>th</sup> June, 2023, that they had filed and served the Claimant's submissions. Consequently, the Claimant's submissions were not available for the Court's consideration.
33. On the Respondent's part, it was submitted that the Claimant failed to continuously monitor the usage of the devices contrary to his duty and only sought to give an account when required to do so. It was further submitted that the Claimant was accorded adequate notice, granted a fair hearing prior to dismissal with the option of having an employee accompany him to the hearing.
34. Citing the case of *Kenya Revenue Authority vs Reuwel Waithaka Gitahi & 2 Others (2019) eKLR*, the Respondent submitted that it has been a fair employer at all times and has proven that it had a valid reason to believe that the Claimant was negligent in his duties, given his capacity as an Area Sales Manager. That even then, it only terminated the Claimant's services after giving him proper notice to show cause, according him ample opportunity to defend himself at the disciplinary hearing and afterwards providing him with an opportunity to appeal the decision. That all these actions satisfy Section 43 of the *Employment Act*. To this end, the Court was urged to find as much.



35. With regards procedural fairness, the Respondent submitted that the Claimant admitted to receiving a notification of disciplinary hearing with sufficient information as to the cause necessitating a disciplinary hearing. The Respondent urged the Court to consider the contents which include the particulars of the employee's negligence and improper performance. On this score, the Respondent placed reliance on the case of Charles Muema Munuve & Mary Rono vs Safaricom PLC (2021) eKLR.
36. Arguing that the Claimant failed to lead any evidence to show any distinction between himself and the Respondent's other employees, the Respondent further submitted that it was never discriminatory to the Claimant.

### **Analysis and determination**

37. Having considered the pleadings on record, the documentary evidence, oral testimonies rendered before Court, as well as the rival submissions, to my mind, 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?**

38. 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. Further along the Act, Section 45 (2) (a) and (b) provides that 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; ...
39. What this means is that it is not enough for an employer to spell out the reasons for termination of an employee's contract of service. More importantly, the employer ought to prove that the said reasons were fair, valid and related to the employee's conduct, capacity or compatibility.
40. In the instant case, it is apparent from the Claimant's letter of summary dismissal that he was terminated from employment on grounds that he failed to fully account for the Respondent's devices assigned to him as Area Sales Manager. The letter of summary dismissal reads in part:

“As at the disciplinary hearing held on 29 May 2018, you had not accounted for 142 devices. Following the hearing, you requested for more time to fully account for the devices. Subsequently, you were able to account for an additional 106 devices. However despite this additional time, you have not been able to account for 36 devices worth kes 217,822.

Having reviewed all the facts and according you a fair chance to be heard, we are of the view that your actions above amounted to negligence and improper performance of duty which was your duty to have performed properly and carefully. You are therefore in breach



of the terms and conditions of your employment and the Safaricom Code of Conduct. Consequently, the management of Safaricom Plc has decided to summarily dismiss you from employment with Safaricom with immediate effect.”

41. It is common ground that the Claimant was working as Area Sales Manager, Coast Region and that at the material time, the Respondent had rolled out a distribution plan of devices to its dealers, agents and shops in a bid to satisfy the Know Your Customer requirements and to enhance the process of subscriber registration to its network. It is also not contested that as Area Sales Manager, the Claimant was responsible for the devices distributed within his region. According to the Respondent, the Claimant was allocated a total of 895 devices which he was responsible for.
42. It was the Respondent’s case that the Claimant had the responsibility of distributing the devices and ensuring their activation, training the agents, monitoring the usage of the devices and reporting on ground statistics and following up on lost and faulty devices. The Respondent averred that when it noted that the process was not a success, it sought to investigate the reasons and found among other things, that some devices were being used on competitor networks while some were being used by individuals and some were not being used at all. That as Area Sales Manager, the Claimant was required to account for all the devices issued to him but he failed to do so.
43. On his part, the Claimant contended that he accounted for all the devices with the limited resources provided. He further stated that he was not given the particulars of the device issued to him and that the Respondent did not share the information on the indemnity of the devices. That as he did not have the necessary rights, he could not log into the Respondent’s system and retrieve the information.
44. In support of its case, the Respondent exhibited a document containing the Claimant’s feedback on the unaccounted devices. The Claimant admitted compiling the said document hence owned the comments/findings indicated therein. During cross examination, the Claimant admitted that the comment “recovered devices” and “not paired” meant that the device was not being used for its intended purpose.
45. A further review of the feedback from the Claimant’s end reveals that the status on a number of the devices was “not paired” and some with the comment being “recovered/sent to the headquarters” or “relocated” or “lost device” or “closed outlet” or “outlet demolished”.
46. On his part, the Claimant stated that he was not in a position to monitor the usage of the devices. However, he did not indicate what tools and systems he required, in order to monitor usage of the devices. And if at all he did not have the necessary tools and information to allow him perform his duties, had he requested for the same prior to being asked by the Respondent to account for the devices? Indeed, if the Claimant’s version is to be believed, how then, was he able to compile his feedback on the status of the devices he had been asked to account for?
47. It is also notable that during cross examination, the Claimant admitted that he received the devices through a pick list which contains among others, the description of the device and the serial numbers. He admitted that he retained the pick list. Therefore, having retained the pick list, at least he was aware of the description as well as the serial numbers of the devices he had been assigned.
48. Besides, the Claimant stated that he kept a detailed record of all the devices and would report lost and faulty devices. If this was the case, why did he give the information on the status of the devices only upon being prompted to do so? For instance, in some cases, the devices were reported to have been lost in 2017. One therefore wonders why the Claimant had not notified the Respondent as much from the onset? Afterall, he admitted that this was an ongoing duty.



49. The foregoing leads me to conclude that had the Claimant performed his duties as expected of him, he would not have been asked to account for the devices as the status would have been known. This is moreso noting that when cross examined, the Claimant admitted that he had Trade Development Representatives (TDRs) who were reporting to him. He further admitted that the TDRs would ensure that each device was activated and in case of loss, the agent would report the said loss to the police and then share with the TDR, who would in turn report to him as Area Sales Manager.
50. In light of the foregoing, I cannot help but conclude that the Claimant was not keeping track of the devices as expected of him. Indeed, one wonders why the Claimant would keep a record of the devices if at all he could not track their usage and report appropriately?
51. What's more, at the end of the day, the record reveals that the Claimant was yet to account for 36 devices and according to him, he would have accounted for the same given more time. However, had he undertaken his duty as expected, he would have ascertained the status of the device way before being prompted to do so by the Respondent. Hence the question of being given time to ascertain the status of the device would not have arisen in the first place.
52. It goes without saying that having been assigned a substantial number of devices belonging to the Respondent, the Claimant was required to ensure that the same were used for the purpose they were meant for and if not, the same would be taken back from the dealer or agent and surrendered to the Respondent. From the Claimant's own feedback, it is apparent that some of the devices were not being used for the purpose they were intended hence were recovered and surrendered to the Respondent. This was after he had been asked to account for the same. Had he performed his duties properly, this would not have been the case. Further, there was no evidence he had supplied the Respondent with the information regarding the status of the devices prior to being asked to do so. He admitted as much during cross examination.
53. Having failed to account for all the devices assigned to him, it is this Court's finding that the Claimant gave the Respondent a valid and fair reason to take disciplinary action against him owing to failure on his part to perform his duties properly.
54. It is against this background that I find and hold that the reasons for the Claimant's dismissal were valid, fair and related to his conduct. Therefore, his termination from the Respondent's employment was not substantively unfair.

### **Procedural fairness?**

55. The requirement for adherence to fair procedure is generally provided for under Section 45 (2) (c) of the Act. Connected to this, Section 41 (1) of the Act makes specific requirements in regards to the process to be complied with by an employer. It entails notifying the employee of the allegations levelled against him or her and granting him or her the opportunity to make representations in response to the said allegations in the presence of a fellow employee or a shop floor union representative of own choice.
56. From the record, the Claimant was notified of the hearing of his disciplinary case through a memorandum dated 23<sup>rd</sup> May, 2018. The memorandum made reference to the investigations that had been undertaken by the Ethics and Compliance team into the alleged irregular distribution of the devices. Through the said memorandum, the Claimant was also notified of the specific allegations levelled against him with regards to the devices.
57. He was further informed that he would be required to attend a disciplinary hearing, as well as the date, time and venue of the said hearing. He was also advised of the possible consequences arising from the



disciplinary hearing, which included termination from employment. More importantly, he was further advised of his right to be accompanied by a colleague to the disciplinary hearing.

58. It is therefore apparent that the said memorandum served a dual role in that it notified the Claimant of the allegations levelled against him and of the hearing of his disciplinary case.
59. From the record, the Claimant attended the disciplinary hearing where he was given an opportunity to present his defence to the allegations levelled against him.
60. In light of the foregoing, it is apparent that the Claimant was accorded a fair hearing within the meaning and spirit of Section 41 of the Act. I say so because, he was notified of the allegations against him in a language he understood, given an opportunity to appear in person before the Respondent's disciplinary committee and give his explanation with regards to the said allegations. Further, he was informed of his right to be accompanied by a colleague but he opted to attend the disciplinary proceedings alone.
61. In total sum, I find that the Claimant's dismissal was not unfair and unlawful.
62. As the Court has found that the Claimant's dismissal was not unfair and unlawful, the reliefs sought do not lie.

### **Orders**

63. In the final analysis, I dismiss the Claim in its entirety with an order that each party bears its own costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6<sup>TH</sup> DAY OF OCTOBER, 2023.**

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**STELLA RUTTO**

**JUDGE**

### **Appearance:**

Mr. Museve for the Claimant

Ms. Kaunda 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**

