



REPUBLIC OF KENYA



**Mwangi v Almasi Bottlers Limited (Cause E046 of 2022)
[2023] KEELRC 2402 (KLR) (6 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2402 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CAUSE E046 OF 2022
ON MAKAU, J
OCTOBER 6, 2023**

BETWEEN

FESTUS KARURI MWANGI CLAIMANT

AND

ALMASI BOTTLERS LIMITED RESPONDENT

JUDGMENT

1. The claimant was employed as a Computer Supervisor on 1st August, 2000 by the predecessor in title to the respondent. Thereafter he rose through the ranks to become a Depot Manager, which is a high echelon Management level in the organization. His salary was Kshs.465,183.00 per month.
2. On 5th May 2022, the claimant was served with a show cause letter accusing him of dishonesty in his reason for failure to attend an online meeting on 24th April 2022; and misrepresentation of data in his On Day in Full (ODIF) KPI and thereby raising integrity issues. He responded by the letter dated 7th May, 2022 but his response was not satisfactory and he was called for a disciplinary hearing on 19th May 2022. He attended the hearing which he described as unfair, hostile and an ambush. Thereafter he was dismissed vide a letter dated 3rd June, 2022.
3. Aggrieved by the decision, he brought this suit alleging that his employment was unfairly terminated and prayed for the following reliefs:-
 - a. A declaration that the claimant's termination of employment is both procedurally and substantively unfair and in breach of his Constitutional rights.
 - b. An order for his reinstatement and reabsorption without any victimization and with all benefits.In the alternative and without prejudice to the foregoing;
 - a. A declaration that the termination of the claimant was unfair and contrary to law.



- b. 3 months pay in lieu of notice amounting to Kshs.1,395,549.00.
 - c. General damages for wrongful and unfair termination at 12 months' pay amounting to Kshs.5,582,196.00
 - d. Kshs.20,000.00 wrongfully deducted from his pay in 2021.
 - e. The amount due under the balance of the claimant's contract as aggravated damages amounting to Kshs.49,466,115.86.
 - f. Projected bonuses, increments and other emoluments.
 - g. Costs of the suit in any event.
4. The respondent filed response to the claim denying the alleged unfair termination. It averred that the reasons for the dismissal were valid because it was established that the claimant, knowingly and willfully misrepresented and lied to the logistics Director that he was not able to attend logistics meeting because he was in training meeting; and that, he knowingly and willfully misrepresented the KPI on ODIF in his weekly reports and particularly any time it fell below the target of 95% between January and April, 2022.
 5. It averred that the claimant was taken through a fair disciplinary process starting with show cause letter and culminating with disciplinary hearing. It further averred that throughout his tour of duty in the company, the claimant's performance was wanting and he had been warned severally. Consequently, it prayed for the suit to be dismissed with costs contending that it is not predisposed to re-absorb the claimant in light of his general poor work integrity deficit and poor interpersonal work relationships with other staff of the Company.

Evidence

6. The claimant testified as CW1. He basically adopted his written statement dated 15th October, 2022 and produced a bundle of 22 documents as exhibits. He testified that on 16th May 2022, he reported back from leave and at around 12.30pm he received a WhatsApp text form the Chief HR Officer Mr.Timothy Muthini inviting him to a staff Advisory meeting on 17th May, 2022 in Nairobi. He called the CHRO and it was clarified that the meeting was in connection with a disciplinary issue and that he should expect an email.
7. He never received any email and he travelled to Nairobi thinking he was just going to clarify the issues of failure to attend virtual meeting; the discrepancies in the figures which were not looking okay; and the delayed claims by drivers. According to him, the issues had been resolved between him and the logistic Director Mr.David Eames who was still in the company.
8. He testified that the meeting was not cordial as the panel was very hostile to him instead of concentrating on the issue that were of concern they went back to issues which had earlier been dealt with and settled. His attempt to explain himself was thwarted with hostility and when he sought for adjournment of the meeting it was rejected.
9. He stated that, during the meeting, he agreed that he missed the logistics meeting because after training of Supply Chain at 2pm, he joined another meeting on crisis of supplies in the market country wide. The meeting was virtual and he wrote a text to the Logistics Director that he had a crisis meeting for commercial, manufacturing and logistics and he responded "okay".



10. He testified that after the meeting, he went back to Nyeri, but the CHRO followed him asking him to resign but he declined. On 3rd June 2022 he was served with termination letter. He admitted that the respondent's HR Manual provides for appeal. He contended that he was placed on performance improvement plan (PIP) for three months in April but he was dismissed before the lapse of that period. He further contended that his contract was upto normal retirement at 60 years but he was dismissed at the age of 55 years.
11. He testified that he had no problem with his department or any other department and therefore a reinstatement was a proper remedy. He contended that the position he was serving has not been substantively filled. He explained that he was competent academically and had served the company for 20 years.
12. On cross-examination he admitted that part of his duties included doing weekly ODIF Reports. The Reports were in logistics and monitoring performance. He admitted that the Logistics Director Mr.David Eames wrote an email dated 25th April, 2022 to the CHRO among others raising a red flag about his integrity and manipulation of ODIF Report by indicating scores of above 98%. The email also requested for investigation on integrity of reporting. He contended that the issue of reporting was not limited to him alone since other staff were also inputting data.
13. He admitted that a report extracted from the system by the Operations Accountant, Christina Nzyima indicated that his ODIF report for week 14 was 97.73% while the correct figure in the system was 93.05% being a variance of 5%. He admitted that during the disciplinary hearing, one of the charges related to integrity issues. He admitted that the show cause letter also accused him of misrepresenting the true ODIF figures which was putting Kenya's integrity to question.
14. He further stated that the show cause letter accused him of failure to attend virtual meeting on 26th April, 2022 called by the Logistics Director. He admitted that the issues raised in the show cause letter were the same ones he faced during the disciplinary hearing. He admitted that he knew his right of appeal but he never appealed.
15. He further admitted that there were drivers who complained to the Mr.Xavi, the Managing Director CCBA but he contended that the complaint against him was not clear. He admitted that he never complained for being placed on PIP on the said issues. He further admitted that the erroneous data entries had impact on his performance score and they could have led to erroneous rewarding.
16. He admitted that the company incurred costs in respect of staff who contracted Covid-19 but he clarified that he is not the one who infected them since he was away on leave when they contracted the virus. Nevertheless he was surcharged Kshs.10,000.00 for each driver totaling to Kshs.20,000.00.
17. RW1 was the respondents CHRO Mr.Timothy Muthini. He also adopted his written statement dated 4th February, 2023 and produced a bundle of 5 documents as exhibits. He testified that data was put in the system by other staff members but the claimant's duty was to extract the data to prepare weekly ODIF Report. The data in the system could not be tampered with but the claimant was able to tamper with the ODIF report. He contended that on 25th April, 2022, David Eames wrote to him to investigate the claimant. He contended that under the respondent's HR Manual and code of Business misreporting is a major offence under the breach of procedures.
18. He further testified that the claimant caused the company to incur costs by breaching Covid-19 control measures. He testified that the claimant authorized an infected driver to travel with another driver to Eldoret instead of isolating the driver. The first person to query the issue was the driver who was told to carry the infected driver. On his way back he carried another driver from Eldoret to Nyeri and as



- such Kshs.20,000.00 was used for testing the two drivers for Covid-19. He contended that the HR Manual clause 1.71 provides for a surcharge policy and the claimant was surcharged because he caused the company to incur costs by breaching covid-19 control measures.
19. He testified that he generally enjoyed cordial relationship with the claimant but clarified there are times the claimant took issues personal when he called him for work related issues. He further clarified that after the disciplinary meeting, he called the claimant as a friend and told him that things were not good and then he sought his advice. He then advised him that he could resign.
 20. He further testified that the discrepancies in the ODIF reports were not only in week 14 but since January 2022. As a result, the respondent lost trust with the claimant due to integrity issues and proceeded to dismiss him. For the same reason of loss of trust, the company opposes the prayer for reinstatement of the claimant to his former employment.
 21. On cross examination he admitted that the letter inviting the claimant to disciplinary hearing was served to him via WhatsApp and he acknowledged receipt. He admitted that the claimant requested for another hearing date but he was notified that the date would not be rescheduled. The invitation letter was clear on the charges and the claimant never sought any clarification on the same.
 22. He maintained that the claimant was manipulating ODIF Reports for his own advantage. He referred to page 65 of the claimant's documents where it shows that the system indicated a lower percentage than what the claimant presented as ODIF. He contended that the information is contained in the investigation report by Christina, the company Auditor, which she derived from the Navision system. He admitted that the company never called any witness during the disciplinary hearing. He admitted that the power B1, which was used by the claimant to extract data from the main system was new. However, he testified that the claimant never contested the figures in the report by Christina.
 23. After the hearing the claimant never signed the minutes alleging that there were errors and inconsistencies. He testified that the claimant refused to sign the minutes after the corrections. He was then served with a termination letter. He contended that the disciplinary process outlined in clause 27.3 -27.7 of the HR Manual was followed before the termination. He admitted that the claimant denied that he authorized the driver to carry another driver during the covid-19 period.

Submissions

24. The claimant submitted on three issues; one whether the termination of the claimant's employment was fair both substantially and procedurally; two, whether the action by the respondent observed the Constitutional right to fair labour practices; and three, whether the claimant is entitled to the reliefs sought.
25. On the first issue, he submitted that the respondent's HR Policy Manual outlines the procedure for terminating an employee's services. First, it provides that only the CEO of the respondent can terminate the services of an employee; second it is clear on the offences that can lead to termination; and third it provides for the employee to be given an opportunity to improve, counselling, warning, hearing and appeal. He submitted that the allegations against him constituted minor offences.
26. He submitted that the procedure set out in the HR Policy Manual was not followed. The claimant's supervisor ought to have first notified him of the offence with a copy of the HR department; thereafter, the department would assess and if necessary suspend him. The supervisor would then issue him a show cause letter with a copy to CHRO. If response was not satisfactory, the CHRO would then ask the HR department to commence disciplinary proceedings before the staff disciplinary committee for hearing; finally, the committee would make a decision or recommendation after the hearing.



27. He contended that the proper procedure was not followed and the allegations made against him by David Eams were not the ones that were continued by the disciplinary process. In his view the charges in the show cause letter were not the same as the ones that occupied the disciplinary hearing and as such clause 27.6 (h) and (g) of the HR Manual were breached. Finally, he submitted that under clause 27.9 the employer had a duty of forming an appeal committee and notify him.
28. On the question of substantive fairness, the claimant submitted that his was a case of giving a dog a bad name then hang it. He contended that the respondent had issue with his competence and performance but forgot that he had been placed on a PIP program which had not even run its cause by the time the charges were laid against him. Nevertheless, he maintained that the alleged issues of impropriety was merely imputed but not substantiated. He contended that the disciplinary committee never recommended for any dismissal but a termination. He prayed for the reliefs sought considering his age and good relationship with other employees of the company.
29. To fortify his submissions, the claimant cited several precedents from the Court of Appeal and this court including the case of *Muthaiga Country Club v KUDHEIHA Workers* (2017) eKLR. The full case digest was annexed to the written submissions.
30. The respondent, on the other hand submitted on two issues, namely, whether the termination of the claimant's employment was unfair and contrary to the law; and whether the claimant is entitled to the reliefs sought.
31. On the first question, it was submitted that the claimant has not proved that the termination was unfair. It was observed that the claimant admitted and apologized for misrepresentation of ODIF score for week 14 by indicating 97.73% instead of 93%. It was submitted that the foregoing is prove that the reasons cited for dismissing the claimant were valid including: -
 - a. Exhibiting dishonesty and doubtful integrity in that he lied to his line director to avoid a routine meeting.
 - b. Manipulating and/or misrepresenting business information and hence his performance scores contrary to the company's Code of Business Conduct and Ethics.
32. It was submitted that there were reasonable grounds to believe that the claimant was dishonest or his integrity was doubtful because his ODIF scores were not reflecting the complaints on the ground and the delays in delivery by the company on orders made by customers. Further, the claimant had lied to his Line Director, David Eames that he could not attend a routine meeting because as at 14.07 hours he was still in a training meeting, yet the training meeting had ended. Consequently, the respondent maintained that the root cause for the dismissal of the claimant was dishonesty, violation of essential condition of his employment contract, the dishonesty breached the faith inherent to the work relationship.
33. It was further submitted that the respondent's HR Policy Manual Clause 27.4.3 imports the provisions of section 44(4) of the *Employment Act* that careless and improper performance of any work which under the contract is supposed to be performed carefully and properly is gross misconduct and it renders the employee liable for summary dismissal. Hence the manipulation of ODIF scores by the claimant amounted to deliberate improper performance of work which justified his dismissal.
34. As regards, procedural fairness, it was submitted that the claimant was served with a show cause letter and he replied. Thereafter he was invited to a hearing with a witness but he attended without any witness. He was heard and his representations were considered. He was served with minutes and he said it had errors which were corrected. Thereafter he was served with dismissal letter and never appealed



but came to court. According to the respondent, the procedure followed was in tandem with the procedure set out in its HR Manual and section 41 of the *Employment Act*.

35. In support of its submission the respondent cited several judicial precedents including *Water Ogal Onuro v Teachers Service Commission* (2013) eKLR and *Kenya Ports Authority v Fadhil Juma Kisuwa* (2017) eKLR where the court discussed the essential factor of a fair termination of employment of an employee. In the instant case, it was submitted that the claimant has not discharged his burden of proof of unfair termination and therefore he is not entitled to the reliefs sought or even the alternative remedy.

Issues for determination and analysis

36. There is no contest that the parties herein related as employer-employee from 1st August, 2000 to 3rd June, 2022 when the claimant was summarily dismissed for gross misconduct. The issues for determination are:
- a. Whether the reasons for the dismissal were valid and fair
 - b. Whether a fair procedure was followed.
 - c. Whether the reliefs sought are merited.

Reason for the dismissal

37. The termination letter dated 3rd June, 2022 stated as follows:

“Festus Karuri Mwangi

O Box 623-10100

Nyeri.

Dear Festus,

RE: Summary Dismissal

This has reference to records held in your personal employment file, our show cause letter issued to you dated 5th May, 2022 and staff advisory committee meeting held on 18th May, 2022. The said correspondences and subsequent disciplinary meeting questioned your integrity and conduct in the performance of your work. Having considered all correspondences and personal representation in regard to the integrity concerns raised, you were found culpable and guilty of lying to your director for your own convenience and your predisposition traced to your past habit of skipping or joining meetings late without reasonable excuse. You were also found guilty of manipulating and or misrepresenting business information against the company’s code of Business conduct which you have been trained on and are well versed with.

This letter now serves to advice of your summary dismissal from employment in Almasi Bottlers Limited with effect from 3rd June for;

- i. Exhibiting dishonesty and doubtful integrity in that you lied to your line director to avoid attending a routine meeting. This was a build-up on other related incidences in the past.
- ii. Manipulating and or misrepresenting business information and consequently your performance scores which is out rightly against the company’s code of



business conduct and ethics. This action has implication on your short-term incentives and salary increments which are based on your performance in line with the company policy and is deemed constructive fraud.

Your final dues will be paid upon completion of the company's clearance procedures and will include the following.

1. Days worked up to 3rd June, 2022.
2. Leave days earned and not taken if any
3. Unpaid travel and subsistence claims due if any
4. Any other dues as may be applicable within your contractual terms and nature of exit.

The above shall be paid subject to statutory deductions and less any monies you may be owing the Company.

Your retirement benefits contributions shall also be paid directly to your account by the fund manager upon your instructions to the trustees of the scheme in line with the scheme trust deed and rules and the Retirement Benefit Authority Act.

Please arrange to immediately complete the company clearance and hand-over procedures. Let me take this opportunity to thank you for the contribution you made in this company and wish you all the best in your future endeavors.

Yours faithfully,

For: Almasi Bottlers Limited

Timothy Muthini

Chief HR Officer

Cc: Logistics Director-CCBA Ke

Human Resource Director-CCBA Ke

Managing Director-ABL

Chief Finance Officer-ABL

Financial Accounting Controller-ABL

Personal file.”

38. The reasons for the termination were largely two, dishonesty and doubtful integrity exhibited by lying to his line director to avoid attending a routine meeting; and secondly, manipulating and / or misrepresenting business information and consequently, his performance scores contrary to the company code of Business conduct and ethics. The said manipulation amounted to fraud according to the employer.
39. In my view the issues are fairly straight forward. There is evidence that the claimant admitted the two offences during the disciplinary hearing and before this court. He admitted that he had finished the training meeting as at 14.07 hours when he texted his Line Director that he was still in the training and therefore could not attend the routine management meeting. He also admitted that his ODIF report contained incorrect information. He admitted that his ODIF report indicated a score of 97.73% instead of 93 and that posted a variance of 5%.



40. He admitted that the misrepresented score were in respect of the weeks where he had not achieved the target of 95%. He further admitted that the said misleading score could impact on his performance and reward by the employer.
41. On the other hand, the respondent saw the manipulation as impacting negatively on the company's performance and integrity. It also impacted negatively on the business logistically. Further the manipulation was easily detectable because it was not reflecting the actual position on the ground where there were complaints of delivery of orders and complaint by drivers who had not been paid their wages for some time.
42. Having considered all the material presented to the court, I find and hold that the respondent has discharged its burden of proof of valid reasons for dismissing the claimant as required under section 43 and 45 (2) of the *Employment Act*. Although the claimant alleges that the offences were minor, I am of a contrary view, because the offences went to the core of the employment relationship between the parties. Failing to attend a crucial management routine meeting and lying that he was engaged in a training painted him badly and the employer was entitled to the opinion that he had no trust on the claimant.
43. Further the manipulation or misrepresenting business information in order to achieve performance targets was both improper performance of duty, and also fraud which is criminal offence against the employer. The two offences entitled the employer to dismiss him under section 44(4) (c) and (g) of the *Employment Act*.

Procedure followed

44. Section 41 of the *Employment Act* provides that: -
 - “(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
 - (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”
45. In this case the claimant admitted that he was served with show cause letter and he responded. Thereafter, he was invited to a disciplinary hearing before a committee and was allowed to bring along a fellow employee. He admitted that he was interrogated by the committee and thereafter he was served with a copy of the minutes where he protested some errors. Further he contended that the committee was hostile to him and did not call any witness to testify against him.
46. Having considered the evidence before the court and the submission by both parties, I am satisfied that a fair procedure was followed before dismissing the claimant. He was served with show cause letter and invitation to the disciplinary hearing citing the allegations against him. He understood the allegations and defended himself. He was given a hearing notice of 3 days which I find to be sufficient in



circumstances of this case because the claimant had been served with a show cause letter and responded before the hearing notice was issued.

47. In *Walter Ogal Anuro* case, supra that for termination of employment to pass the fairness test, there must be substantive justification and procedural fairness. The substantive justification relates to the reason for the termination while procedural fairness relates to the process including the right to be heard fairly before the termination is decided.

Reliefs

48. In view of the finding above that the reasons for dismissing the claimant were valid and fair, and that a fair procedure was followed, I decline to make a declaration that the dismissal was unfair and contrary to the law.
49. For the same reasons I find and hold that the claimant is not entitled to the substantive prayer of reinstatement or the alternative prayer of compensatory damages.
50. As regards the claim for refund of Kshs.20,000.00 surcharge for alleged violation of covid-19 control measures, policy, I have seen the claimant's email to the RW1 dated 24th March 2022 apologizing for contravening the said policies. Therefore, I also find that relief to be unmerited.
51. Finally, the claim for Kshs.49,466,115.86 being salary for the period he would have worked before normal retirement is also dismissed because it lacks basis in law, public policy and his contract of employment. In conclusion, I find no merits in the entire suit and proceed to dismiss it with costs.

DATED, SIGNED AND DELIVERED AT NYERI THIS 6TH DAY OF OCTOBER, 2023.

ONESMUS N MAKAU

JUDGE

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 April 2020, this judgment 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.

ONESMUS N. MAKAU

JUDGE

