



**Ng'ang'a v Kinangop Dairy Limited (Employment and Labour Relations Cause  
2469 of 2017) [2023] KEELRC 2433 (KLR) (6 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2433 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 2469 OF 2017**

**AN MWAURE, J  
OCTOBER 6, 2023**

**BETWEEN**

**WILLIAM KAMAU NG'ANG'A ..... CLAIMANT**

**AND**

**KINANGOP DAIRY LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant filed a memorandum of claim dated 15<sup>th</sup> December 2017.

**Claimant's Case**

2. The claimant avers that vide a letter of employment dated 18<sup>th</sup> July 2011, he was employed by the respondent as an accounts supervisor at its head office and he rose through the ranks over the years to become an assistant manager-sales administration.
3. The claimant avers that on 16<sup>th</sup> October 2017, he reported to work and was issued a termination letter and that at that time he was earning a gross salary of Kshs 77,000.
4. The claimant avers that he was handed a letter of termination, a release letter and a payslip showing payment for accrued leave days of 31 days and was forced to immediately sign copies of the letters and leave the premises.
5. The claimant avers that the respondent did not give him any notice of intention to terminate or explain the reason for termination of the contract and therefore the termination was unfair and unlawful.
6. The claimant avers that at the time of termination he was servicing a loan with Barclays Bank of Kenya and the respondent was aware of the same since the deductions were done directly from his salary.



## **Respondent's Case**

7. In opposition of the claim, the respondent filed its statement of defence dated 26<sup>th</sup> March 2018 denying the claimant's claim.
8. The respondent avers that:
  - a. the claimant made double payment to one of the suppliers occasioning loss to the company in November 2014.
  - b. on 23<sup>rd</sup> February 2015, the claimant was issued a caution letter for making a double payment to the general manager (sales & marketing) by consecutively issuing a cheque and electronic bank transfer.
  - c. on 22/06/2016 claimant was issued a warning letter for misplacing a client's payment of Kshs 428,993 by erroneously paying it to a wrong account causing loss to the company and for exhibiting arrogance/ disrespect towards his immediate supervisor.
  - d. the claimant engaged in practices resulting in conflict of interest by borrowing money from one of its distributors who registered a complaint on 15/07/2017 after the claimant refused/ failed to repay the money.
  - e. in breach of its laid down procedures, the claimant authorized the processing of an order to a new client and misled the respondent that payment had been made through cash whereas the cheque bounced causing loss to the respondent.
9. The respondent avers the claimant failed, refused and/or neglected to diligently perform what he was employed to do carefully and properly and in the circumstances the claimant's employment was properly and lawfully terminated.
10. The respondent avers that since the claimant was summarily dismissed for gross misconduct and was paid all legal dues payable to him and the claimant acknowledged receipt and was issued with a certificate of service.

## **Evidence in Court**

11. The claimant testified and adopted his witness statement and list of documents dated 15/12/2017 as his evidence in chief.
12. The claimant testified that he was terminated on 01/10/2017 and was handed a termination letter which quoted clause 10 of his employment contract that provides for one-month notice but however, he was not paid one month in lieu of notice or given a reason for termination.
13. The claimant testified that he made double payment and informed his supervisor and also made payment to the general manager without knowing that payment had already been made. He says the same was recovered.
14. The claimant testified that after these incidents he was promoted in 2013 and 2016 and he received a salary increments in 2013, 2015 and 2016. He says that being taken to the sales department was because he was doing well.
15. The claimant testified that on termination he has paid 16 days salary, one-month notice and unpaid leave for 31 days. He said he had never proceeded on leave from 2011.
16. The claimant testified that he was not involved in a disciplinary process leading to termination.



17. The respondent did not have any witness to produce in court.

### **Claimant's Submissions**

18. It was submitted that the claimant in his evidence in chief responded to each allegation of gross misconduct.
19. The claimant submitted that the respondent did not adduce any evidence to support its allegations of gross misconduct and the claimant demonstrated in his evidence in chief that the allegations were but an afterthought to try and justify the termination.
20. The claimant submitted that he terminated the employment of the claimant without giving him the required notice, hearing and the reasons given in its defence lacked fairness, was unjust and not genuine and had the claimant been given a hearing and chance to argue his defence- the termination would have been unnecessary.
21. The claimant submitted that in breach of section 41 of the *Employment Act* the respondent dismissed his employment without according him a fair hearing in the presence of another employee or representative of his choice.
22. The claimant submitted that he was dismissed without valid reasons and without following due process therefore the dismissal was unfair and unjustified as provided under section 45(2) of the *Employment Act*.
23. The claimant submitted that he was unfairly and unlawfully terminated and therefore prays for compensation equivalent to 12 months pay to offset the financial loss resulting from the respondent's wrongful act.

### **Respondent's Submissions**

24. The respondent submitted that it conducted a fair disciplinary hearing and awarded the claimant an opportunity to be heard during the hearing and they invited the court to look into the validity and merits of the reasons for termination as opposed to relying solely on the procedure as held in *Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union* [2017] eKLR.
25. The respondent submitted that the burden imposed under section 43 of the *Employment Act* is that of demonstrating the reasons of termination were based on facts, matters and circumstances that existed at the time of termination and the respondent genuinely believed that the actions of the claimant called for termination.
26. The respondent submitted the claimant's claim for compensation has been filed out of malice and unjust enrichment and relies on the respondent's internal memo dated 26<sup>th</sup> October 2017 which confirm the claimant was paid his terminal dues.

### **Analysis and Determination**

27. The following issues have been raised for this court's determination:
  1. Whether the claimant's termination was unfair and/or unlawful
  2. Whether the claimant is entitled to the reliefs sought



28. For termination of an employee’s employment to be deemed lawful and fair the respondent must establish to this court that the process was both substantively and procedurally fair as set out in section 43 and 47 (5) of the *Employment Act* which state:

Section 47 (5)

“For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

Section 43 of *employment act* provides as follows:

“43. Proof of reason for termination

1. In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
2. The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”

29. In respect to substantive fairness, Section 45 (2) of the *Employment Act* provides:

“A termination of employment by an employer 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; and
- c. that the employment was terminated in accordance with fair procedure.”

30. Section 44 (3) and (4) (c) of the *Employment Act* provides for summary dismissal as follows:

“(3) Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.

(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:—

- (c) an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly



performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly.

31. The respondent avers that the claimant was summarily dismissed on account that he wilfully neglected to perform his work diligently.
32. Having considered the pleadings herein, the respondent produced various warning letters and demand letters requesting for explanations for the erroneous payments made by the claimant and complaints against him earlier in support of its decision to summarily dismiss the claimant. This affirms that its decision was substantively just.
33. However, for termination to be lawful, the employer must show that it followed due procedure as set out in section 41 of the [Employment Act](#) which states:
  - “(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.”
34. Having considered the circumstances of the claimant’s summary dismissal, this court holds that the respondent failed to follow the mandatory provisions of law because he did not call him for a disciplinary hearing even though he informed him of the blunders he made from time to time. In fact he did not dismiss him summarily according to the termination letter dated 10<sup>th</sup> October 2017 but claims to have terminated him under section 10 of his Employment contract. That section of claimant’s contract provides that either party can terminate the services of an employee by giving one-month notice or payment in lieu of the notice.
35. Even if that was the case nevertheless the respondent needed to give the claimant a chance to defend himself. In the absence of the same the court must find the termination was both unlawful and unprocedural.
36. The set principal on this was well captured in the case of [Walter Ogal Onuro v Teachers Service Commission](#) (2013) eKLR where court held:-

”..... for termination of employment to pass the fairness test there must be both substantive justification with establishment of a valid reason for termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”
37. In view of the foregoing, the court finds and holds that the respondent did not adhere to best practices in labour matters and therefore enters judgment in favour of the claimant. The claimant and deserves to be compensated therefore.
  - a. The claimant is awarded damages for unlawful termination at 6 months equivalent @ 77,000/- in accordance to section 49(4) which is kshs 462,000/-.



- b. The prayer for service pay is unmerited as claimant was not terminated through redundancy and furthermore, he has not proved that his NSSF dues were not being remitted. Prayer is declined.
- c. At the Court's discretion each party will meet their costs.
- d. However, interest is awarded at court rates from date of judgment till full payment.
- e. Claimant to be issued certificate of service within 30 days.

Orders accordingly.

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

**ANNA NGIBUINI MWAURE**

**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 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 has 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 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.

*A signed copy will be availed to each party upon payment of Court fees.*

**ANNA NGIBUINI MWAURE**

**JUDGE**

