



**Wafula v Africa Blooms Limited (Cause 29 of 2019)
[2023] KEELRC 3167 (KLR) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3167 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 29 OF 2019
DN NDERITU, J
NOVEMBER 30, 2023**

BETWEEN

EVANS BARAZA WAFULA CLAIMANT

AND

AFRICA BLOOMS LIMITED RESPONDENT

JUDGMENT

i. Introduction

1. The claimant commenced this cause by way of a memorandum of claim dated 16th April, 2019 filed in court on 25th January, 2016 through Janet Theuri Advocates. As expected, the statement of claim is accompanied with a verifying affidavit, claimant's written statement, a list of documents, and copies of the listed documents.
2. The claimant is seeking the following -
 - a) A declaration that the termination of the Claimant's employment was unlawful and unfair.
 - b) An order for the Respondent to pay to the Claimant his due terminal and compensatory damages as pleaded in paragraph 7 above.
 - c) Costs and interests of the suit.
 - d) Any other relief that this Honourable court may deem fit and just to grant.
3. The particulars of items in prayer (b) above are pleaded as follows -
 - i. One month's salary in lieu of notice Kshs. 37,000/=
 - ii. Unpaid/untaken leave for 62 days (Kshs. 37,000*62 days) Kshs. 76,467/=
 - iii. Unfair termination - 12 months' salary (Ksh. 37,000*12) Kshs. 444,000/=



- iv. Service/gratuity pay for the entire period of service (18/30*37,000*6) Kshs. 133,200/=
- Total Kshs. 690,667/=
4. On 17th May, 2019 the respondent entered appearance through R.O. Nyamweya & Co. Advocates and filed a response to the claim on 12th June, 2019 praying that the claimant's cause be dismissed with costs for want of merits.
 5. Alongside the response to the claim the respondent filed witness statement by Beatrice Kemunto Bokea (RW1) and a list of documents with copies of the listed documents.
 6. The claimant filed a further list of documents on 3rd October, 2019, with copies of the listed documents.
 7. On 9th June, 2022 the respondent appointed Mukite Musangi & Company Advocates to act for it in place of R.O. Nyamweya & Company Advocates and filed a further list of documents and copies of the listed documents on 28th June, 2022.
 8. This cause came up for hearing in open court on 27th February, 2023 when the claimant (CW1) testified and closed his case. The defence was heard on the same day whereby RW1 testified and the respondent's case was closed as well.
 9. Counsel for both parties addressed and summed up their respective client's case by way of written submissions. Counsel for the claimant, Miss. Theuri, filed her submissions on 16th March, 2023 while Counsel for the respondent, Miss. Obiero, filed hers on 27th March, 2023.

ii. The Claimant's Case

10. The claimant's case is expressed in the memorandum of claim, the oral and documentary evidence by the Claimant (CW1), and the written submissions by his Counsel, the same is summed up as hereunder.
11. In his statement of claim the Claimant pleads that he was engaged by the respondent in July, 2013 as a fertigation supervisor in its farm and that his last monthly gross pay was Kshs. 37,000/=. However, the court has notes that his last submitted pay-slip for March, 2019, reads his gross salary at Kshs. 47,000/=.
12. He alleges that in 2018 he started experiencing ill health with chest pains and breathing problems. He alleges that his deteriorating health had to do with the work that he was performing with the respondent (fertigation), inter alia, as a sprayer of chemicals.
13. He alleges that upon the respondent realizing that his health problems were related to his work it decided to device ways of terminating him. He alleges that allegations were made against him that he had stolen a generator pump and issued him with a show-cause letter via an email dated 26th February, 2019. For ease of reference the said email stated as follows –

Subject: FW: Loss of Generator

Importance: High

From: Beatrice Bokea

Sent: Tuesday, February, 26, 2019 4:23p.m.

To: Vermicompost

Cc: Ramnath Sarbande



Subject: Loss of Generator

Importance: High

Dear Evans,

Today meeting refers:

Involvement in Loss of Generator

It has been noted with concern that Generator Pump under your jurisdiction is missing and it has never been brought to Farm manager attention, whereby you alleged borrowed another pump without Farm manager awareness/Authority diverted into individual decisions.

Please note that this offence is tantamount to gross misconduct and you can be liable to summary dismissal. However, before any action is taken, you are hereby given a chance to show cause why disciplinary action will not be taken against you for the offence.

Your explanation will be received within 72 hours from the date of this letter, failure to which it will be assumed that you have none and Management will institute appropriate disciplinary measures without further reference to you.

Yours faithfully

For: Africa Blooms Ltd

Regards,

Beatrice Bokeu

Mobile: [particulars withheld], office Line: [particulars withheld]

14. The claimant states that he responded to the show-cause in his email of 4th March, 2019 and denied the alleged misconduct. However, his response was found to be unsatisfactory and he was terminated vide a letter of termination dated 4th March, 2019 which provided as follows -

Date: 04th March 2019

Employee: Evans Wafula

Employee Number: 512

Department: Fertigation

Designation: Fertigation HOD

RE: Termination

Your explanation as per showcase dated 26/02/2019 loss of Company Property under your area of jurisdiction and miscoordination of your team has been deemed necessarily as we have determined that you have engaged in the act which is serious violation of the company code of conduct and constitutes to serious breach of faith.

We have no alternative but to terminate your service of employment with cause based on the show cause.

Please return all company property upon which final tabulation of your dues will be presented.

Please note that you reserve the right to appeal within the next 7 days from the date of letter.

For: Africa Bloom Limited



.....

Farm Manager

Ramnath Sarbande

Date:04.03.2019

I acknowledge receipt of this letter.

Employee Signature

.....

signed

Date: 04.03.2019

Cc: Labour office

This letter should be completed in duplicate.

15. It is the claimant's plea that the termination above was unfair and unlawful lacking both in substance and form or procedure.
16. In his testimony in court, the claimant recited the foregoing contents of the memorandum of claim and adopted his filed written statement asserting that he worked for the respondent from 2013 to 2019. He stated that his duties included watering of plants, supply of fertilizer and chemicals to plants, and maintenance of pipes and pumps. He also supervised those who worked under him.
17. He stated that in 2017 a generator-run lister pump was damaged in the course of work and in 2018 he was instructed by his supervisor, Mr. Kisaka, to take the same for repairs at Salгаа. Later on, in 2019, he was accused of having sold the said pump to a dealer shop in Salгаа.
18. He stated that he was invited for a disciplinary hearing that he attended but was allegedly not allowed to defend himself. He states that no witnesses were called and that he was not informed of his rights.
19. He alleged that as at the time of his termination he earned a gross monthly salary of Kshs.47,000/= and he produced as exhibits 1 to 10 the documents filed in the two lists alluded to above. He further stated that upon termination he was offered Kshs.22,000/= as terminal dues but he rejected the same.
20. Further, he stated that he is currently unemployed and relies on peasantry farming at Salгаа area, Nakuru County. He stated that no criminal charges were preferred against him in regard to the allegedly stolen generator pump.
21. In cross-examination, he denied that any benefits were paid to him in the sum of Kshs.56,316.60 or any other sum or at all.
22. It is on the basis of the foregoing evidence and circumstances that the claimant is seeking that judgment be entered in his favour as prayed in the memorandum of claim. The submissions by his counsel shall be considered in the succeeding parts of this judgment.

iii. The Respondent's Case

23. The respondent's case is contained in the reply to the memorandum of claim, the oral and documentary evidence adduced through RW1, the human resource (HR) manager, and the written submissions by its Counsel, as summarized hereunder.



24. In the response to the claim, the respondent pleads that the claimant was fairly and lawfully terminated due to his gross misconduct.
25. In her testimony in court RW1 adopted her filed written statement and produced the filed documents in the two lists as exhibits except for the documents marked 3 which was rejected as the makers thereof were not called as witnesses. The other documents were accepted as respondent's exhibits 1, 2, 4, 5, 6, 7, 8, 9, and 10.
26. She testified that in 2019 the management discovered that a lister generator water pump was missing at the farm workshop or within the farm owned and operated by the respondent. She stated that the claimant was questioned and he at first alleged that the pump had been sold as scrap metal but no records were available for the said sale. It was also discovered that the claimant had borrowed a water-pump from a neighbouring farm to water the plants without the authority or permission from the management. She testified that other employees informed the management that it is the claimant who had taken away the pump from the farm yet the claimant had no explanation for his illegal actions. She said that the claimant, on further questioning, alleged that he had taken the same for repair yet again there was no documentation and this contradicted his earlier position that the same had been sold as scrap metal.
27. RW1 stated that due to lack of explanation for his actions the claimant was issued with a show-cause letter and subsequently terminated. She alleged that the claimant was paid his terminal dues and cleared to have his pension processed from the retirement scheme.
28. She stated that the claimant was found guilty of gross misconduct and that the respondent followed the law both in substance and procedure culminating in the termination. She alleged that the respondent investigated the issue before acting against the claimant.
29. In cross-examination, she alleged that the show-cause letter was issued on 26th February, 2019 and that the disciplinary panel met on the same date, as per the email exchanges produced as exhibits. However, she alleged that the claimant responded to the show-cause letter via an email on 1st March, 2019. She also admitted that there is no evidence that the terminal dues of Kshs.56,316.60 were actually paid to the claimant.
30. It is on the basis of the foregoing that the Respondent prays that the Claimant's cause be dismissed with costs. The submissions by counsel for the Respondent shall be considered in the succeeding parts of this judgment alongside those by counsel for the Claimant.

iv. Submissions by Counsel for Claimant

31. Counsel for the claimant identified two issues for determination by the court – whether the claimant is entitled to the prayers sought, and, who should meet the costs of the cause.
32. Counsel has submitted that it was unfair and unlawful that the claimant was served with the show-cause letter on 26th February, 2019, ordered and directed to respond thereto on the same date, and a disciplinary hearing allegedly held on the same date. Counsel has cited *Walter Ogal Anuro v Teachers Service Commission (2013) eKLR* and *Mary Chemweno Kiptui v Kenya Pipeline Company Limited (2014) eKLR* as good precedents on what entails substantive and procedural fairness under Sections 41 and 47(5) of the *Employment Act* (the Act).
33. It is submitted that the respondent approached the disciplinary process with a predetermined mind and in haste denying the claimant fair hearing and or due process. Counsel submits that the claimant is entitled to the remedies as prayed for.



v. Submissions by Counsel for the Respondent

34. Counsel for the respondent identified two issues for determination - whether the claimant was unfairly terminated, and, whether he is entitled to the remedies sought.
35. It is submitted that the respondent complied with Sections 41, 43, and 45 of the Act in ultimately arriving at the decision to terminate the claimant. In regard to substance it is submitted that the respondent lost property that was placed in the custody and care of the claimant and for which he failed to account.
36. In terms of procedure, it is submitted that the claimant was served with a show-cause letter on 15th February, 2019 and he attended a disciplinary hearing. In support of this submission counsel has cited *Kenfreight (EA) Limited v Benson K. Nguti* (2016) eKLR and *Cooperative Bank of Kenya Limited v Banking Insurance & Finance Workers Union* (2017) eKLR.
37. It is submitted that based on *Judicial Service Commission v Gladys Boss Shollei & Another* (2014) eKLR which cited *British Leyland UK Limited v Swift* (1981) 1 RLR 91, the misconduct by the claimant called for termination based on the reasonable-man test. It is argued that on a balance of probabilities the respondent has demonstrated that it had reasonable and sufficient cause in taking disciplinary action and terminating the claimant.
38. It is further submitted that based on Section 44 of the Act the respondent had sufficient grounds to believe that the claimant had committed a crime against the respondent or its property to its detriment. On this score counsel has cited *Lynus Kiplimo v Moi Teaching & Referral Hospital* (2020) eKLR re-emphasizing the reasonable-man test.
39. On procedural fairness it is submitted that the respondent complied with Section 41 of the Act. It is submitted that the respondent conducted a disciplinary hearing on 26th February, 2019 and that the claimant attended the hearing. It is submitted that the minutes of the meeting produced as an exhibit confirm the hearing. It is submitted that it is after that meeting that the claimant was served with the letter of termination as the claimant had no plausible defence or explanation of how the generator-pump was lost and or left the respondent's farm.
40. It is submitted that the claimant is not entitled to any of the remedies sought and it is urged that the cause be dismissed with costs.

vi. Issues for Determination

41. The court has carefully gone through the pleadings filed, the oral and documentary evidence tendered from both sides, and the written submissions by counsel for both parties. From the above the following issues commend themselves to this court for determination –
 - a) Was the termination of the claimant by the respondent unfair and unlawful?
 - b) If (a) above is in the affirmative is the Claimant entitled to the reliefs prayed for?
 - c) What orders are appropriate on costs?

vii. Termination

42. The issues in contest between the parties are rather straight forward. Without the necessity of repeating or recounting the contents of the pleadings and the oral and documentary evidence by the parties, which has been summarized above, the Claimant was engaged by the respondent, a limited liability



company dealing or engaged in commercial farming, as a fertigation supervisor and his last gross monthly salary was Kshs.47,000/=. From the analysis in the foregoing parts of this judgment the claimant was terminated after he allegedly caused, allowed, or negligently lost a lister generator pump from the farm in circumstances that he was allegedly unable to substantiate or justify.

43. The jurisprudence on what constitutes substantive and procedural fairness in dismissal or termination of employment contracts has fairly crystallized. An employer has to have a lawful reason on which to found disciplinary process and the procedure adopted has to be fair, just, and lawful - See *Mary Chemweno v Kenya Pipeline Company Limited* (2017) eKLR, *Loice Otieno v Kenya Commercial Bank Limited* (2013) eKLR, and *Walter Ogal Anuro v Teachers Service Commission* (2012) eKLR.
44. The foregoing position is fortified by the provisions in Sections 35, 36, 41, 43, 44, 45, 46, 47, & 48 of the Act.
45. In terms of the reason for the dismissal/termination the court has gone through the evidence, both oral and documentary, and noted that in the show-cause letter contained in the email sent out to the claimant on 26th February, 2019 at 4:23pm the claimant is accused of not reporting a missing generator pump and borrowing a pump from a neighbouring farm without the authority from the management of the respondent. The claimant was granted 72 hours (the equivalent of three (3) days) within which to respond to the said show-cause letter.
46. It turns out that the disciplinary hearing took place on the same date, 26th February, 2019, as per the minutes availed by the respondent. The court shall examine this aspect in the section on procedural fairness below.
47. It is not in dispute that the subject generator-pump was missing from the farm and that the claimant was in-charge and custodian of the same. The court notes from the minutes that the meeting of 26th February, 2019 was an inquisition upon the claimant on how the pump left the farm and why he borrowed pumps from neighbouring farms for use in respondent's farm without permission from the management. It was also alleged that the claimant had caused or effected transfer of employees under him to other departments or sections without the knowledge of the management. This latter charge was not included in the show-cause letter.
48. During the above meeting it was decided that the claimant be allowed two days to respond to the allegations in writing. The evidence on record is that the claimant responded to the show-cause letter vide a letter in an email sent out to RW1 on 1st March, 2019 at 9:38am. Nonetheless, the claimant was terminated vide a letter dated 4th March, 2019 served upon him on the same date. The reason for termination is stated in paragraph one of the said letter as

“loss of company property under your area of jurisdiction and miscoordination of your team”.

And with that the claimant was terminated.

49. In his testimony, the claimant admitted that the subject pump was missing from the farm. He alleged that the same had been taken out for repairs. He also admitted that he used pumps from neighbours to perform his duties without informing the management. He admitted that there was no record for the movement of the subject generator- pump from the farm for repair or for any other reason. According to RW1 the claimant at first alleged that the pump had been sold as scrap metal only to change the story to that the same had been taken for repairs after he was pushed to produce records.



50. In the foregoing scenario and circumstances, it is the opinion and holding of this court that the respondent had genuine, sufficient, and reasonable grounds in suspecting that the claimant had either sold, stolen, or negligently allowed the said pump to leave the farm to the detriment of the respondent. That misconduct by the claimant is within the purview of Section 44(4)(c) & (g) of the Act and forms good grounds for summary dismissal. On this score the court shall not fault the respondent for initiating the disciplinary process against the claimant.
51. However, as concerns the twin-test, that substantive fairness shall go hand in hand with procedural fairness, the respondent bungled the process for the following reasons. In the show-cause letter dated 26th February, 2019 the claimant was not informed of his right to call witnesses in form of co-workers or any other person of his choice including an officer, official, or a representative of his union, if he was such a member. While the claimant was allowed 72 hours within which to respond to the show-cause letter, a hearing, as evidenced by the minutes produced by the respondent, was held on the same date, 26th February, 2019, even before the claimant's written response to the show-cause letter was received. If the meeting of 26th February, 2019 was part of the investigations, as alleged by the respondent through RW1, when then was the 'actual' disciplinary hearing held? Where are the minutes of that 'actual' disciplinary hearing?
52. Clearly, the respondent lay the cart before the horse. The respondent purported to hold a disciplinary hearing before allowing the claimant an opportunity to respond to the show-cause letter in writing. On the day that the claimant sent his response to the show-cause letter on 1st March, 2019 there is no evidence that the said letter was considered as he was subsequently terminated on 4th March, 2019.
53. Evidently, the procedure adopted by the respondent fell far short of the Rules of natural justice as incorporated under Article 47 of *the Constitution* and the various provisions in the *Fair Administrative Action Act*. There is no evidence that the disciplinary hearing was held as envisaged in law and the various decided cases above and the letter of termination, which is actually a summary dismissal as no notice was given, does not even mention the written response to the show-cause letter. It is the view and holding of the court that after the meeting of 26th February, 2019 the respondent resolved to dismiss the claimant and as such the written response to the show-cause letter was a formality and of no consequence. That is not what procedural fairness entails.
54. Flowing from the foregoing, and the court has read and considered the written submissions by counsel for both parties, the court concludes that the termination of the claimant was unfair and unlawful in the procedure adopted, and it is so declared.

viii. Reliefs

55. Having found and held as above the court shall now consider each of the reliefs sought by the Claimant as hereunder. The reliefs sought were set out in the introductory part of this judgment.
56. Prayer (a) is for a declaration that the termination of the claimant by the respondent was unfair and unlawful. The court has already found and held hereinabove that while the respondent had good reason(s) for initiating disciplinary process against the claimant, the procedure adopted fell short of the standards expected hence denying the claimant due process in fair hearing and as such the termination is declared unfair and unlawful to that extent.
57. Prayer (b) is for compensation under the items listed as (i) to (v) in paragraph 7 of the memorandum of claim. Item (i) is for one month's salary in lieu of notice in the sum of Kshs.37,000/=. However, the court notes that the gross salary for the claimant as at the time of his dismissal, as evidenced through the pay-slip for February, 2019, which was produced as an exhibit by the claimant, was Kshs.47,000/=. In



the interest of the overriding duty to do justice at all times, the court awards the actual and applicable gross monthly salary of Kshs.47,000/= and this is the amount awarded subject to applicable statutory deductions. Contrary to the submission by counsel for the respondent, payment in lieu of notice is not equivalent to or synonymous with payment of salary for March, 2019, whereby it is submitted by counsel that the claimant worked for only four days prior to dismissal on 4th March, 2019. The claimant has not prayed for salary for March, 2019 and the court shall not award the same.

58. Item (ii) is for unpaid leave days amounting to Kshs.76,467/=. Counsel for the respondent has submitted that based on Section 107 of the *Evidence Act* the claimant was obliged to prove that he did not take leave for the days claimed. However, the court notes that the presumption in Section 107 above is rebuttable where a specific law provides otherwise. Sections 10 and 74 of the *Employment Act* place a burden, duty, and obligation upon an employer to keep and maintain employment records. It would be absurd and unreasonable to expect an employee to keep and or maintain similar or parallel records. Once an allegation is made by an employee concerning and or relating to any record that an employer is obliged in the law to keep and maintain, the burden of proof automatically shifts to the employer. Having failed to avail the leave days records of the claimant, the respondent is condemned to pay the claimed leave compensation in the sum of Kshs.76,467/=.
59. Item (iii) is for compensation for unfair and unlawful termination. The claimant is seeking for the maximum compensation under Section 49(1)(c) of the Act. However, it is noted that the claimant contributed to his own dismissal through his misconduct in removing the property of the respondent from the premises, selling, and or stealing the same altogether. It is not possible to discern from the evidence on record if the pump was ever recovered and in what condition. Had the claimant sought authority and informed the management of his actions and documented the same, his termination would probably not have happened.
60. This court has to be very clear that the fact that the claimant was not accorded procedural fairness does not mean that there were no grounds for termination or that he did not commit punishable misconduct. The court has said as much in another part of this judgment, that the respondent had good, reasonable, and sufficient grounds for taking disciplinary action against the claimant bar the procedural defects.
61. In the entire circumstances of this cause and considering the factors provided for in Section 49(4) of the Act this court takes the view that compensation for three months gross salary is fair and reasonable compensation calculated as $Kshs.47,000/= * 3 = Kshs.141,000/=$. This amount is subject to statutory deductions.
62. Item (iv) is for service-pay/gratuity. It is not explained why the two items are pleaded as if they are one and the same thing. The employment relationship between the claimant and the respondent was governed by two mutually agreed and uncontested documents being the letter of employment dated 1st July, 2013 and the job description form issued on 10th April, 2013. In neither of the two documents nor in any other is the issue of gratuity raised or agreed upon. This court has stated countlessly that gratuity, as the name implies, is a gratuitous payment by an employer to a departing employee as a token of appreciation for good services and performance while in employment. Gratuity is therefore a voluntary payment at the instance of the employer or in the alternative it could be a term within the employment contract.
63. There is no evidence on record that there was provision for payment of gratuity in the employment contract and or that the respondent agreed and or undertook to pay the same voluntarily. For the foregoing reasons, the claim for gratuity shall fail and the same is hereby denied and dismissed – See



Monica Wanza Mbavu V Roofspec & Allied Works Co. Ltd (2021) eKLR and Bamburi Cement Limited V William Kilonzi (2016) eKLR cited by counsel for the respondent.

64. The respondent remitted to NSSF dues deducted from the claimant and the claimant was paid pension through a scheme managed by PRS Provident Fund. No service pay is payable in the circumstances.
65. Item (v) is for a certificate of service under Section 51 of the Act. There is no reason given why the same should not issue and the respondent is hereby ordered to issue and deliver the same to the claimant forthwith.

ix. Costs

66. Ordinarily costs follow the event and the claimant is thus awarded costs of this cause.

x. Disposal

67. In Disposal of this cause, this court issues the following orders: -
- a) A declaration be and is hereby issued that the termination of the claimant was unfair and unlawful for lack of procedural integrity.
 - b) Consequently, the claimant is awarded a sum of Kshs. 264,467/= made up as follows -
 - i) Notice pay Kshs. 47,000.00
 - ii) Leave pay Kshs. 76,467.00
 - iii) Compensation Kshs. 141,000.00
 - Total Kshs. 264,467.00
 - c) The respondent is ordered to issue and deliver to the claimant a certificate of service within 30 days of this judgment.
 - d) Costs of the cause to the claimant.

DATED, DELIVERED VIRTUALLY, AND SIGNED AT NAKURU THIS 30TH DAY OF NOVEMBER, 2023.

DAVID NDERITU

JUDGE

