



Njuguna v K-Unity Savings & Credit Co-operative (Employment and Labour Relations Cause 265 of 2018) [2023] KEELRC 2984 (KLR) (17 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 2984 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 265 OF 2018
AN MWAURE, J
NOVEMBER 17, 2023**

BETWEEN

LEONARD NJENGA NJUGUNA CLAIMANT

AND

K-UNITY SAVINGS & CREDIT CO-OPERATIVE RESPONDENT

JUDGMENT

Introduction

1. The Claimant filed a memorandum of claim dated 5th March 2018 and sought the following reliefs:
 - a. A declaration that the Claimant's termination was both substantively and procedurally unfair and unlawful.
 - b. An award of Kshs 1,621,032 made up as follows;
 - c. Accrued leave for one year Kshs 115,788
 - d. 12 months' compensation Kshs 1,389,456
 - e. Withheld salary for the month of October 2017 Kshs 115,788
 - f. Certificate of service
 - g. Costs of the suit
 - h. Any other relief that the court may deem fit to grant.
2. The Respondent filed its defence and counterclaim on 14th June 2018 contending that it was well within its rights under section 44 and 45 of the *Employment Act* to summarily dismiss the Claimant and that the Claimant was careless and improperly performed his work.



3. In the counter-claim, the Respondent avers that the Claimant in gross violation and in contravention of the Respondent's policy and procedure caused the Respondent loss and sought the following reliefs:
 - a. Special Damages of Kshs 1,195,021.43
 - b. Costs of the counter claim.

Claimant's Case

4. The Claimant avers that he was employed by the Respondent on 30th January 2001 as a savings clerk at a basic pay of Kshs. 7,200 and 40% thereof as housing allowance *vide* a letter of offer of employment under the then outfit, Kiambu Dairy & Pyrethrum Farmers' Co-operative Union Limited.
5. The Claimant avers that due to his stellar performance during the probation period, the Respondent promoted and confirmed his employment as a bank clerk and increased his salary to Kshs 8,400 *vide* a letter dated 21st September 2021.
6. The Claimant avers that he was a consistent top performer and he raised in ranks and was promoted as a branch manager in charge of Maai mahiu branch with increased pay and benefits at a gross pay of Kshs 115,788 and that he served the Respondent diligently and faithfully for the duration he worked for them.
7. The Claimant avers that on 16th October 2017, he was issued with notice to show cause demanding an explanation for irregularly discounting a cheque of Kshs 670,000 account number 0061-7803 without following proper procedure while serving as a branch manager in charge of Maai Mahiu branch.
8. The Claimant avers that he responded to the Respondent's letter on 17th October 2017 and explained the following: -
 - a. That the cheque for account number 0061-7803 was paid after due process was followed.
 - b. That it was deposited at the Maai Mahiu branch on 8th September 2017 which was on a Friday and thus the earliest delivery to Cooperative Bank as per the Respondent's protocols was Monday 11th September 2017 which was done as per the attached copy of stamped deposit slip. By this point a response was expected to be 12th September 2017.
 - c. That no discounting was done since withdrawal took place on 13th September 2017 after the requisite clearance days as per Respondent's system had passed as could be seen in the attached statement of the customer's account. That in normal circumstances a cheque waits for two working days before payment and for this case 11th and 12th September were the dates. As at the time of cash withdrawal no information was available to the branch that the cheque had been unpaid and this came out on 14th September 2017 after getting statements from Cooperative Bank.
 - d. That he was well aware of the Sacco policies and he would never have allowed any lapse and that he endeavoured to safeguard the Sacco's interest at all times.
9. That on 19th October 2017, the Respondent issued the Claimant a letter of suspension without pay for a month with immediate effect and subsequently on 27th October 2017, the Claimant received a summary dismissal letter wherein the Respondent indicated that following an audit investigation carried out at Maai Mahiu branch which revealed that there was a payment of uncleared bankers' cheque that had bounced.



10. The Claimant avers that the Respondent never gave him an opportunity to present his case and the Respondent did not follow the prescribed process of termination as envisaged in section 41 of the Employment.
11. The Claimant avers that the Respondent had no substantive reason for dismissing his services as its decision was based on trumped up charges levelled against him which were malicious.

Respondent's Case

12. The Respondent filed an amended reply to claimant's memorandum of claim and counter claim dated 14th June 2018.
13. The Respondent admitted the Claimant was its employee and that vide a letter dated 25th November 2008 the Claimant was transferred to the Respondent's branch in Maai Mahiu from the Kikuyu branch in the capacity of acting operations manager.
14. The Respondent avers that the Claimant credited all imprest cheques into his personal account no. 0275201 in gross violation and contravention of accounting procedures and policies of the union relating to imprest management and caused payment made from withdrawals in the aforementioned account up to the date when an audit was done and confirmed that a total of Kshs 153,568 had been credited to his personal account for imprest.
15. The Respondent avers the Claimant was served with a notice to explain his actions dated 11th September 2009 and the Claimant reverted with an explanation letter dated 15th September 2009.
16. The Respondent avers that the Claimant's actions were in breach of the unions banking and accounting procedures punishable by summary dismissal but it only suspended the Claimant vide a letter dated 16th September 2009 after being given a chance to present his case and a confirmation of the violation done after an audit was conducted and a report issued.
17. The Respondent avers that *vide* a letter dated 23rd September 2011, the Claimant was promoted to a branch manager on a basic salary of Kshs 43,982 subject to a six-month probationary period and transferred from Kiriita branch to Maai Mahiu branch vide a letter dated 1st August 2016.
18. The Respondent avers that it is the company policy and procedure that cheque discounting can only be granted to specific corporate customers only up to 40% of the cheque value and is only discounted after confirmation by the branch manager from the drawing bank that everything is in order.
19. The Respondent avers that without undertaking due diligence and/or following customer policy and procedures discounted cheques received from new individual customers of account numbers 0060xxxxx000, 0060xxxxx007 and 006xxxxx007 opened vide an account form verified on 25th August 2016.
20. The Respondent avers that the Claimant was invited for a disciplinary hearing held on 20th September 2016 to explain the loss of Kshs 371,453.43 resulting to the Claimant's actions.
21. That issued memos dated 23rd and 25th November 2016 on change in tariffs and notifying and cautioning against violations of Sacco policies and procedures on discounting of uncleared cheques at a higher percentage than required.
22. The Respondent avers that a cheque of Kshs 670,000 was irregularly discounted without following proper procedures while under the supervision of the Claimant on 13th September 2017. And that



- the cheque was received on 8th September 2017 and deposited at Cooperative bank on 12th September 2017.
23. The Respondent avers that the Claimant was then served with a demand letter dated 16th October 2017 demanding an explanation in writing why he allowed the irregular discounting of cheques without following proper procedure despite being well informed of the Sacco's cheque discounting policies to which the Claimant responded vide a letter dated 17th October 2017.
 24. The Respondent avers that an audit of the Sacco's account was done and a report dated 24th October 2017 was issued which contained all account statement relating to a/c no 006xxxxx0047803 for Serah Wanjiru Njoroge relating to the aforementioned transaction and proof of negligence by the Claimant.
 25. The Respondent avers that it thereafter issued the Claimant a suspension letter dated 19th October 2017 and the Claimant was afforded a hearing to explain his actions vide a meeting with the Respondent's chief executive officer.
 26. The Respondent avers that the audit carried out in Maai Mahiu branch revealed that under the Claimant's supervision there was payment of an uncleared cheque which later bounced and the Claimant was summarily dismissed vide a letter dated 27th October 2017.
 27. The Respondent further avers that the Claimant's offence cost the Respondent a loss of Kshs 670,000 which was repeat offence to a similar offence committed in September 2017 which resulted to the Respondent's loss of Kshs 371,453.43.
 28. The Respondent says that the Claimant was paid all his benefits amounting to Kshs 2,197,360 paid via banker's cheque no. 462693, 462694 and 462687.

Evidence in Court

29. The Claimant testified and adopted his witness statement dated 5th March 2018 as his evidence in chief.
30. Upon cross examination, the Claimant testified that the Respondent's letter dated 11th September 2009 seeking for an explanation about money deposited in his account was a query and was not given as a warning letter. Further the money was imprest from the head office deposited in his account.
31. The Claimant testified that on 15th September 2016 he was called for a disciplinary hearing for unpaid cheques and violating banking policy. There was a drawing against uncleared cheques of KshS 50,000 confirmed from the paying bank.
32. The Claimant testified that there was no discounted cheque as the cheque was indicated Kshs 670,000 which was in excess of Kshs 50,000 but was paid on the value date after clearance and the same was withdrawn. Further, the money was from K-unity Bank and not Cooperative Bank.
33. The Claimant testified that with regard to the previous letters of suspension, no action was taken after he gave an explanation.
34. However, in respect to the letter dated 17/10/2017, he delivered it to the CEO giving an explanation and received a letter of summary dismissal dated 19/10/2017 without being accorded a disciplinary hearing.
35. The Respondent's witness, Catherine Ngendo Mbugua (RW1), the Respondent's HR Manager adopted her witness statement dated 16/04/2018 as her evidence in chief.
36. During cross examination, RW1 testified that the Respondent lost Kshs 1,195,021 but it has not annexed audited accounts.



37. RW1 testified that the Claimant was dismissed for the loss of money and was taken through the disciplinary procedure by the Respondent's CEO, however, there is no documentation or notice to show cause to that effect.

Submissions

38. The court considered the claimants submissions dated 24th July 2023. The court also considered the respondent's submissions dated 11th August 2023.

Analysis and Determination

39. The first issue for determination is whether the Claimant's dismissal was unfair and unlawful. In *Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR, the court observed: -

“My understanding of these provisions of law is that they seek to substantially regulate termination of contracts of service particularly by an employer. First, an employer may not terminate an employee except for good cause. Some of the grounds that constitute good cause under section 41 of the *Act* are: poor performance; physical incapacity; and gross misconduct. Section 40 of the Act provides redundancy as the other substantive ground for termination but which is unrelated to those set out under section 41.

But even where there exists substantive ground(s) to justify a termination, the law obligates the employer to observe certain procedural strictures to ensure the upholding of the broad principles of natural justice in processing the separation between him/her and the affected employee. The employer has to: provide the employee with details of the accusations against the employee; allow the employee an opportunity to respond to the charges; allow the employee to be accompanied by a shop steward or co-employee of his choice during the process; and finally provide the employee with a decision either terminating or saving the contract of service.

Where the employer fails to do the foregoing, the resultant termination is deemed unlawful. And in law, the burden of justifying the lawfulness of the termination both in terms of whether there was a substantive ground to terminate and whether procedure for release of the employee was adhered to lies with the employer.”

40. Accordingly, for a summary dismissal to be fair and lawful the employer must prove that it had a substantive justification and that it followed procedural fairness.

41. Substantive justification for summary dismissal has been set under Section 43, 44 and 45 of the *Employment Act*, 2007 which provides:

Section 43 of the *Employment Act*, 2007:

- “(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.”

42. Section 44 (3) and (4)(c) of the Act provides: -

“(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 willfully 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.”

43. Section 45 (2) of the Act provides that:

“(2) 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 employee's 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.”

44. The Respondent submitted that the Claimant neglected to follow the Respondent's policies and manuals and refused to do his work properly despite clear instructions how to do it and to make matters worse this was a repeat offence within one year and this warranted summary dismissal as envisaged by section 44 (3) and (4) of the Employment Act.

45. The Respondent however was not able to prove before this court that it had a substantive reason to dismiss the Claimant's employment. It also failed to show that it followed due procedure as set out in Section 41 of the Employment Act which provides:

“(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.”

46. The reason given by the respondent for terminating the claimant summarily were loss of money even though there were no records produced in court or even audited accounts. There were no complaints of losses by any customer even as the respondent witness admitted in court during cross examination.
47. At the worst such a huge loss would have required investigations by the police. There is no evidence that the matter was investigated by the police.
48. The counterclaim by the respondent alleging losses are therefore not proved by way of audited accounts. They are claiming losses of kshs 1,195,021/43 and so the same is not awarded not having been proved.
49. As for the procedure followed respondent witness confirmed the Claimant was not taken through due process in that;
- (a) He was never invited for a hearing in writing informing him of his right to be accompanied by an employee of his choice;
 - (b) He was not accorded a hearing as required by the same law; and
 - (c) He was ambushed with summary dismissal letter.
50. The Respondent has therefore not proved the reasons for dismissal were valid and is also evident that it failed to prove that it accorded the Claimant procedural fairness during the process. Therefore, the dismissal is declared as unfair.
51. Having established the Claimant was unfairly dismissed, the next question that the court must then consider is what remedies the Claimant is entitled to. He has prayed for the following:
- a. Withheld salary for the month of October 2017 – the Claimant testified that he was paid the aforementioned salary therefore the claim is not merited.
 - b. Accrued leave days – The Respondent herein has not objected to this claim or produced any evidence before this court to show that the Claimant took the said leave days. According, the Claimant is entitled to the relief for leave for one-year kshs 115,788/-.
 - c. 12 months’ compensation – In *Galgalo Jarso Jillo v Agricultural Finance Corporation* (*supra*) the court observed:

“I must ask whether it is equitable to appear to reward a Claimant who appears to have engaged in and or turned a blind eye to acts which directly contributed to his misfortune by ordering full compensation in his favour. The Court of Appeal in *Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike* [2017] eKLR reminds us that justice is a two-way highway and the court must endeavour to render just decisions to employees in much the same way as it must to employers.

Section 49 of the *Employment Act* which is the principle guide on the reliefs to be granted in cases of unfair termination obligates courts to take into account the extent, if any, to which an employee caused or contributed to the termination of his



contract of service while addressing the kind and quantum of relief it will award in a cause. I keep this requirement in mind as I address the question of reliefs in this cause.”

- d. As per the circumstances in this case claimant is awarded 4 months equivalent of his salary as compensation for unlawful termination
 - e. The claimant to be provided with the certificate of service within 30 days.
52. In respect to the counter claim, RW1 testified during cross examination that the Respondent has not produced in court any audited accounts to evidence the alleged loss of Kshs 1,195,021/-. Therefore, the counter claim is not merited and is dismissed.
53. The court orders costs of the suit to be awarded to the claimant.
54. The total award is kshs 468,152/- for general damages and kshs 115,788/- for one year’s leave pay. Total is kshs 578,940/- plus interest at court rates from date of judgment till payment.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 17TH DAY OF NOVEMBER, 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 15th March 2020 and subsequent directions of 21st 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

