



**Rotich v Kenya Ports Authority (Cause 34 of 2020)  
[2023] KEELRC 2843 (KLR) (9 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2843 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 34 OF 2020  
M MBARÚ, J  
NOVEMBER 9, 2023**

**BETWEEN**

**NICHOLAS KIPTOO ROTICH ..... CLAIMANT**

**AND**

**KENYA PORTS AUTHORITY ..... RESPONDENT**

**JUDGMENT**

1. The claimant was employed by the respondent on 8 February 1999 as a crane operator until 3 April 2020 when he was dismissed from his employment by the respondent. He was unionised under Dock Workers Union and his employment regulated under the policies of the respondent.
2. The claimant was issued with notices to show cause dated 14 and 29 January 2020 signed by different officers of the respondent. He replied through his letter dated 31 January 2020.
3. The respondent alleged that following a report from CAJ, a complaint had been received from Michael Kutere Ndiema that the claimant had defrauded him Kshs. 750,000 and the complaint filed in court and the subject of Criminal Case No.2618 of 2018 at Makadara Law Court, Nairobi and that this was a good basis of institutional disciplinary action against him. In the charge sheet in court, the complainant is noted to be Irene Mumbi Muriuki and not Michael Mutere Ndiema and hence the notice to show cause was misleading and not factual.
4. The issues giving rise to Criminal Case No.2618 of 2018 relates to an agreement for sale of a motor vehicle to one Irene Mumbi Muriuki, a police officer and the claimant introduced her to a motor vehicle dealer and through a sale agreement dated 28 February 2018 she agreed to buy motor vehicle registration No. KCP 891T at Kshs. 1,040,000 and she made a deposit of Kshs. 430,000 and agreed to service the balance through instalments of Kshs. 50,834. There were no payments of the balance and upon default, the claimant and the car dealer hired an auctioneer to follow. Being a police officer, Irene Muriuki used her office and arrested the auctioneers and retained the vehicle which is now subject of



an ongoing court case. It was therefore not correct of CAJ to report that he had defrauded Michael Ndiema a sum of Kshs. 750,000.

5. The respondent and CAJ abused power by intervening in a matter that was ongoing in court and the respondent acted in a matter that did not relate to its ordinary business. CAJ has no power to direct the respondent to undertake a parallel process when there is an ongoing court case. The policy of the respondent is that an employee who is charged in a criminal case is supposed to be suspended and not dismissed while the matter is alive in court.
6. The respondent also alleged that Kennedy Okoth and Samwel Chondo had registered grievances against the claimant that he had been paid ksh1.2 million by Chondo to procure a tractor and that Okoth had paid the claimant Kshs. 300,000 to procure for him a motor vehicle and which matters had been reported at Tononoka Police Station when the claimant failed to deliver these vehicles.
7. There were allegations that Naomi Muasya lodged a complaint on 15 November 2016 that she had given the claimant Kshs. 500,000 in august 2016 to procure a motor vehicle from Japan but failed to note this matter had been resolved.
8. There was an allegation that Maurice Agesa had filed a complaint against the claimant that he had paid him Kshs. 730,000 to procure a vehicle but failed to note that this matter had been resolved.
9. The claim is also that, in his reply to the notices to show cause, the claimant addressed all matters. The complaints made in the year 2016, the respondent had done nothing about them yet he had been settled. To introduce these matters in the disciplinary process was in bad faith. under the policy, matters which arose in the year 2015 and 2016 were vitiated.
10. Through letter dated 3 April 2020 served on 15 June 2020 the respondent dismissed the claimant without being given a hearing or a chance to cross-examine the accusers. He had a right of appeal within 30 days from the date of summary dismissal but such time had lapsed due to late service of the notice.
11. Despite the summary dismissal, the claimant retained his employment benefits for two (2) months and in the staff housing. He hence lodged his appeal on 18 June 2020 and a decision of 24 December 2020 where the appeals committee made a finding that clause K7 of the Human Resource Manual, 2017 had not been followed in dismissing the claimant and the period until the dismissal was to convert to an interdiction but the dismissal was upheld to take effect on 19 January 2021.
12. The appeals committee by considering new evidence commenced fresh inquiry and on the finding that due process was not followed, the matter should have been returned to the disciplinary committee and the decision to dismiss the claimant was invalid. The rights of the claimant under Article 50 of the Constitution were violated. His rights under Section 41, 43 and 44 were violated.

The claimant is seeking the following orders;

- a. A declaration that employment terminated unlawfully;
- b. A declaration that notice issued on 3 April 2020 dismissing the claimant was overtaken by events by the inaction of the respondent when it failed to execute the decision;
- c. A declaration that the period of appeal became unavailable for the claimant after 30 days and the appeal constituted was incompetent;
- d. An order of reinstatement be issued with all benefits and without loss of seniority;
- e. Costs of the suit.



13. The claimant testified in support of his case that he did not engage in car import business as alleged by the respondent. There were complaints by Chondo who was a workmate when the claimant assisted him to purchase a motor vehicle. He was just but an agent which is not part of the respondent's business. He assisted other persons to import vehicles as an agent of a car importer and he had several clients like Naomi Muasya, Maurice Agesa and Samwel Chondo, Kennedy Okoth and Michael Ndiema.
14. In the import business, the claimant acted as the agent which resulted in the buyers making complaints against him and the matters were reported to the ombudsperson, the police and to the respondent.
15. The claimant testified that in the year 2018 he was charged in criminal case No.2816 of 2018 at Makadara, Nairobi.
16. During the disciplinary hearing, he admitted to being absent from work in the year 2019 but this was not part of the allegations made against him.
17. On the car deals, he was invited to respond and noted that most of the complaints made had been settled and others he had refused the paid monies while the criminal case is ongoing. The disciplinary hearing was before appeals panel where he attended with a union official. The respondent found him guilty and confirmed the summary dismissal.
18. At the time of summary dismissal, the claimant was housed by the respondent.
19. The claimant testified that while in the employment of the respondent, there was nothing to stop him from running his business and car sales. This is not in conflict of interest and is thus seeking for an order of reinstatement back to his position without loss of benefits.
20. In response, the respondent's case is that initially, the claimant was employed on contract until 15 September 2013 when his employment converted to permanent and pensionable status and he worked until 3 April 2020 when he was dismissed for gross misconduct. at the time, the claimant was working as a winch/crane operator.
21. The respondent issued the claimant to notices to show cause and required him to respond within 72 hours. A second notice issued when the claimant failed to respond. The two notices are clearly referenced in this regard.
22. The matters addressed with the claimant in the notices to show cause warranted summary dismissal in accordance with Section 44 of the Employment Act and the respondent's Human Resource manual 2017.
23. The decision to terminate the claimant's employment was not based on the criminal charges he was facing but purely on grounds of misconduct addressed in the notices to show cause. These matters related to the claimant's fraudulent activities and involvements which caused embarrassment to the respondent warranting summary dismissal. By invoking the internal disciplinary procedures against the claimant, he was informed of the complaints made against him in the notice dated 29 January 2020 but he failed to give a response. The criminal proceedings the claimant was facing were not a bar to the respondent taking internal administrative disciplinary procedures including summary dismissal. His conduct caused embarrassment to the respondent and under the policy, summary dismissal was allowed and notice in this regard issued on 3 April 2020 but took effect on 15 June 2020 when the same was served upon the claimant.
24. The 30 days right of appeal were allowed which the claimant applied and lodged his appeal through letter dated 18 June 2020. The appeal was considered and the claimant allowed a hearing and through



- letter dated 21 January 2021 the appeal was allowed with a conversion of the disciplinary process into interdiction and the sanction of summary dismissal confirmed. Dismissal took effect on 21 January 2021 and was paid all his terminal dues up to May 2020 and shall be paid accruing dues to 21 January 2021 upon undertaking clearance having been issued with a Clearance Form Serial No.409 which he has failed to return.
25. The claimant's appeal against his summary dismissal was concluded and this communicated through letter dated 21 January 2021 which he received on 1<sup>st</sup> February 2021. All benefits that arose from his employment terminated and his occupation of the company house, all rent due is payable and the claims made should be dismissed with costs.
  26. In evidence, the respondent called Fatma Safi the human resource officer who testified that the claimant's employment was regulated under his employment contract as a crane/winch operator. He however engaged in fraudulent activities and complaints were received from various departments concerning the claimant especially from the head of ethics and integrity, police, complaint from Kipkemoi Korir, Zephaniah Ogonda, Kithi & Company Advocates and letters from Commission on Administrative Justice (CAJ).
  27. The complaints received against the claimant were of a similar nature that he had defrauded unsuspecting members of the public of their money asserting that he would help them import cars because he had connections at KPA. Some cases were reported to the police who charged him in court and others reported to CAJ and to the respondent. such brought disrepute to the respondent.
  28. There were indicators of conflict of interest on the claimant's part. He worked for KPA in the Conventional Cargo Operations department, the same department where motor vehicles and other non-containerised cargo imported through the port of Mombasa were cleared. His actions were in breach of the respondent's Code of Conduct and Ethics which applied to all employees which among others did not allow employees to engage in activities which would impair the ability to perform their duties. Employees would become personally or financially involved in any business in competition or in conflict with the interests of the respondent and or influence by use of position held to obtain facilities or personal favours. The respondent also required its employees not to use their employment to secure special favours to friends and relative.
  29. Through letter dated 4 April 2019 the head of Conventional Cargo Operations department informed the respondent head of human resources that some employees were found absent from duty for long period in the year 2018 who included the claimant. He was absent for over 100 days without authorisation. Such absence was due to domestic and social issues.
  30. On 28 November 2019 there was an accident as a result of the claimant's failing to carry out his duties properly.
  31. Following these complaints, the claimant was issued with a notice to show cause and through letter dated 31 January 2020 he responded and confirmed being involved in the personal businesses of car importation. These related to the various complaints received by the respondent.
  32. In his response, the claimant gave various explanations which were found unsatisfactory leading to summary dismissal. He appealed against the summary dismissal through letter dated 18 June 2020, the appeal was heard on 1<sup>st</sup> September 2020 and present was a representative of his trade union.
  33. The appeal panel made a finding that the claimant should have been given a hearing in persona before the summary dismissal. The respondent considered these recommendations and made a finding that the claimant should have been on interdiction from 3 April 2020 to 18 January 2021 but confirmed



the summary dismissal. The salary for the period of interdiction is payable but the claimant must clear with all departments which includes the debt in accrued rent in his allocated housing.

At the close of the hearing, both parties filed written submissions.

34. Through letter dated 21 August 2023, the respondent employed the claimants as a Crane/Winch Operator and his employment was to be regulated under his contract read together with various policies regulating employees and reviewed from time to time.
36. However, during the course of his employment, the respondent received various complaints against the claimant particularly with regard to cases of defrauding various persons including his work colleagues. This was noted to be contrary to his letter of employment and the policies of the respondent. These included the following complaints;
  - On 31<sup>st</sup> May 2017 a compliant was lodged by Kipkemoi Korir;
  - On 13 December 2019 a complaint was lodged by Michael Kutere Ndiema;
  - On 10 July 2017 a complaint was lodged by Zephaniah Ogonda;
  - On 7 December 2017 a compliant was lodged by Kithi & Company Advocates.
37. All these complaints resulted in a show cause notice dated 8 January 2020. It related to facts that, the claimant, being an employee of the respondent defrauded Michael Kutere Ndiema Kshs. 750,000 in a car sale transaction in January 2018. Following such fraud, the claimant was charged in criminal case No.2618 of 2018 Makadara for obtaining money through false pretences. The matter and complaint was investigated by the respondent who established other similar complaints against the claimant. Such conduct was noted to have caused embarrassment to the respondent and contrary to Section K.1 (c) (vii) of the Human Resources Manual 2017.

The claimant was given 72 hours to respond to the show cause notice.
38. Another notice to show cause issued dated 14 January 2020. This notice gave further details with regard to the claimant's conduct particularly a letter and report the respondent had received from CAJ dated 18 October 2019 with regard to various complaints of fraud by the claimant. He was directed to respond within 72 hours.
39. Indeed, on 31 January 2020 the claimant responded and indicated that that CAJ report had not been shared with him and the complaints from his colleagues, Samwel Chondo related to noted transactions for payment of vehicles but he had experienced problems in completing the importations. He made an undertaking to refund the monies received as this was his work colleague.
40. With regard to the case of Naomi Muasya and Maurice Agesa, the claimant noted that these were his colleagues who had requested him to assist to import vehicles but the transactions delayed. Naomi's vehicle delayed as funds for demurrage were due and the person who was to assist the claimant in the payments changed his mind. For Agesa, the claimant noted that he refused to pay demurrage. These related to matters of over 4 years and had since been settled. That the other incidents noted in the show cause notice related to events of over 2 years and these did not relate to his work duties and the respondent did not suffer any loss.
41. Basically, the claimant agreed that indeed the allegations made were correct save, these were settled matters going back 4 and 2 years and were unrelated to the respondent.



42. On his response to matters addressed in the show cause notice, having admitted the allegations made, the motions of Sections 41 and 44 of the Employment Act, 2007 were completed. Save, no notice issued at this point.
43. Through notice dated 3 April 2020, the claimant was dismissed from his employment. He lodged an appeal which was heard on 1<sup>st</sup> September 2020 and the claimant attended together with his union representative.
44. The respondent, through notice dated 21 January 2021 informed the claimant that he had been found to be of gross misconduct justifying summary dismissal and that;
- ... however, management has carefully considered the period from the time you were dismissed from the services of the Authority i.e. 3<sup>rd</sup> April 2020 to 18 January 2021 to be treated as an interdiction period which is hereby lifted with subsequent payment of salary withheld during the interdiction period. Your dismissal from the Authority is therefore with effect from 19<sup>th</sup> January 2021.
45. This notice introduced new dynamics which had been resolved by the notice dated 3 April 2020. That from 3 April 2020 to 18 January 2021, the claimant was considered to be under interdiction.
46. This conversion effectively returned the claimant back at the shop floor.
47. An employee who is on interdiction, before he is found to be of gross misconduct must be given a hearing in terms of Section 41 of the Act.
48. The respondent filed part of its Human Resource Manual 2017 and the outline at clause K.4 relates to interdiction, suspension and criminal charges. The particulars thereof noted to be at page 61 of the document are not attached.
49. In the case of *Mutwol v Moi University* (Civil Appeal 118 of 2019) [2022] KECA 537 (KLR) (28 April 2022) (Judgment), the Court of Appeal in addressing the case of a suspension from duty to allow for investigations held that;
- ... there is no law that prohibits the placement of an employee on compulsory leave. It is our further view that it was necessary to have the appellant sent on compulsory leave to enable the respondent to carry out meaningful investigation. It is not possible for an employer to carry out effective investigations against an employee who, in spite of accusations of wrong doing, continues to occupy her/his office. In any case, looking at the circumstances of this matter, the appellant was informed and understood that she was being placed on compulsory leave to allow for investigations and she was given the opportunity to show cause why disciplinary action should not be taken against her. We do not find any good grounds to impugn the decision of the respondent which in our view was fair, reasonable and justifiable.
50. An employer is allowed to remove the employee from duty through suspension, compulsory leave or interdiction, to allow for investigations. Upon such investigations, the employee may be found innocent and allowed to resume duty. If any matter is found to justify a response, a notice should issue to allow the employee to be heard within the protections of Section 41 of the Act. Such requires the employer to hear the employee in the presence of his representative.
51. Beyond the provisions of Section 41, there is Section 45(5) of the Act which requires the court to consider the following matters;



- (5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour officer, or the Industrial Court shall consider—
- (a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision; (b) the conduct and capability of the employee up to the date of termination;
  - (c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41; (d) the previous practice of the employer in dealing with the type of circumstances which led to the termination; and (e) the existence of any previous warning letters issued to the employee.
52. The conduct of the employee during employment and during the disciplinary process should be put into account. Any work record, culpability and warning(s) issued, these should be brought to bear in taking a decision to terminate employment and whether to award any compensation.
53. Upon his appeal, the claimant was allowed to serve the intervening period as interdiction. Such necessitated a new process of hearing. Where the investigations were completed and found him culpable of misconduct or gross misconduct, he ought to have been invited to make his representations. To convert the time to be under interdiction and then proceed to dismiss him, the purpose of the appeal and the interdiction period was of no consequence. Payment of salaries for the period under interdiction did not sanitise the process.
54. There was unfair termination of employment. The due process of Section 41 and 45 of the Act was not adhered to.
55. The claimant is seeking an order of reinstatement without loss of benefits.
56. As noted above, through his response to the notice to show cause, the claimant admitted to receiving monies from various persons including his workmates and other members of the public to assist in vehicle importations and other transactions. He has since been charged in court with a criminal offence over some of these matters in Makadara Criminal Case No.2816 of 2018. He was able to resolve some cases. This much he admitted.
57. Also, the claimant had been absent from work without permission or good cause for over 100 days. This, he did not offer any response. It was noted that the claimant's absence from duty was due to domestic and social issues.
58. Cumulatively, the motions of Section 45(5) of the Act do not put the claimant in good standing. He was of gross misconduct and there is a litany of records in this regard.
59. To order reinstatement, even where due process under Section 41 of the Act was not adhered to would be to return the claimant to the shop floor on a background of several cases of gross misconduct. Such does not foster good labour relations and practices. It can only harm fair labour practices.
- An order of reinstatement is not available.
60. On the same vein, to order compensation would be to reward gross misconduct. The claimant is entitled to zero (0) compensation.



61. Notice pay is due in a case where the employer failed to abide The due process of the law as outlined above. However, this is not pleaded and the claimant did not testify as to how much he was last earning.
62. At the end of employment, the claimant was paid for the entire period he was in employment and further, for the period converted to interdiction. Such fully compensated him for his time.
63. The claimant has remained in the occupation of the respondent's house. By an order of the court on 1<sup>st</sup> September 2020 the court allowed him to, pending investigations, the respondent shall not evict the claimant from the Staff House.
64. Following his appeal, the claimant was paid for time converted to interdiction. The appeal decision issued on 21<sup>st</sup> January 2021. The summary dismissal was confirmed. The claimant ought to have vacated the allocated housing or to pay the due rents therefrom as of 21<sup>st</sup> January 2021.
65. The claim analysed as above, the claimant is not entitled to an order of reinstatement. He shall vacate the allocated house of the respondent and pay rents due from 22 January 2021 to the date he hands over through clearance failure to which, the respondent shall recover its costs as necessary.

On this findings, no orders on costs.

66. Accordingly, judgment is hereby entered for the claimant for zero (0) compensation. Each party to bear own costs.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 9<sup>TH</sup> DAY OF NOVEMBER 2023.**

**M. MBARŪ**

**JUDGE**

**In the presence of:**

Court Assistant: Japhet Muthaine

..... and .....

