



Maina v Retriever Limited (Employment and Labour Relations Cause E607 of 2020) [2023] KEELRC 2744 (KLR) (2 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 2744 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E607 OF 2020
BOM MANANI, J
NOVEMBER 2, 2023**

BETWEEN

JAMES KAMAU MAINA CLAIMANT

AND

RETRIEVER LIMITED RESPONDENT

JUDGMENT

DIVISION - Introduction

1. The dispute before the court relates to the alleged unfair termination of the Claimant’s contract of service. The Claimant avers that the Respondent terminated his employment on spurious grounds and without the benefit of due process. Consequently and by these proceedings, he pray for the various reliefs as set out in his Statement of Claim.
2. On the other hand, the Respondent contends that the Claimant committed acts which constitute gross misconduct. In the Respondent’s view, this provided a valid basis for the decision to terminate his contract of service.
3. The Respondent further contends that before terminating the Claimant’s service, he was taken through a disciplinary process. Therefore, due process was upheld in processing his termination from employment. As a result, it is the Respondent’s prayer that the claim be dismissed with costs to it.

Claimant’s Case

4. The Claimant avers that on 26th September 2017, the Respondent offered him employment in the position of Key Account Manager Sales. It is the Claimant’s case that he served in this position on probationary terms until 28th May 2018 when his appointment was confirmed. On confirmation, the Claimant avers that the Respondent offered him a two-year fixed term contract that was to run from 1st June 2018.



5. The Claimant avers that before the expiry of the above term, he was on 3rd July 2019 offered a new position of National Sales Manager. According to the Claimant, his salary in the new position was fixed at Ksh. 150,000.00 per month.
6. The Claimant states that on 27th September 2019, he received a letter from the Respondent in which he was accused of various infractions including unauthorized receipt of money from a client and fraudulent payment of commissions to third parties. It is the Claimant's case that the said letter required him to proceed on suspension pending an inquiry into the allegations against him.
7. It is the Claimant's case that on 2nd October 2019, he was issued with a letter of notice to show cause through which he was asked to offer his response to the accusations that had been raised in the letter of suspension. The Claimant avers that he offered a comprehensive response to the accusations through his letter to the Respondent dated 6th October 2019.
8. The Claimant avers that despite his aforesaid response, the Respondent convened a disciplinary session for 18th October 2019 at which he was invited through the Respondent's letter of 11th October 2019. The Claimant states that he attended the session only to be handed with a letter of termination of his contract of service.
9. The Claimant contends that no hearing took place at the disciplinary session of 18th October 2019. He contends that the session lasted for hardly fifteen (15) minutes before it was brought to a close.
10. The Claimant further avers that by the time he was getting into the session for 18th October 2019, the letter to terminate his contract of employment had already been prepared and was hastily handed to him. In the Claimant's view, the decision to dismiss him from employment was pre-determined and the purported disciplinary session was a mere smokescreen to accord legitimacy to a flawed process.
11. The Claimant called a witness who was part of the disciplinary process. This witness appeared to concur with the Claimant's position that the disciplinary session was a sham meant to window dress a flawed process.
12. The witness stated that the disciplinary panel had already taken a decision to terminate the Claimant's employment. She said that by the time the disciplinary session commenced, the panel had already prepared the Claimant's letter of dismissal from employment and merely handed it to him without the benefit of a hearing.
13. To authenticate her assertion that there was no disciplinary session, the witness alleged that there were no minutes prepared for the session. When shown the minutes of the disciplinary session, the witness denied that they were authentic.

Respondent's Case

14. On its part, the Respondent asserts that it came to learn that the Claimant had been diverting its clients' particulars to outside service providers with the view of having the said service providers appear as the ones who had introduced the clients to the Respondent. According to the Respondent, this scheme was fraudulently executed by the Claimant in order to earn commissions from these clients' work through these service providers. The Respondent singled out one Lucy Kamau as one of the service providers that the Claimant had been using to raise false claims for commission payments.
15. The Respondent further accuses the Claimant of trading with its clients for personal gain whilst in its service. For instance, the Respondent states that the Claimant was diverting its clients for his personal gain and collecting cash meant for it from some of them. The Respondent flagged one incident in



which the Claimant was said to have collected Ksh. 32,000.00 from one Wilfred Ikaba but failed to surrender the cash to the Respondent.

16. The Respondent states that following this discovery, it suspended the Claimant from employment in order to carry out investigations. It is the Respondent's case that its investigations revealed that the Claimant had been involved in the foresaid malpractices. As a result he was issued with a notice to explain why disciplinary action should not be taken against him for the alleged infractions.
17. The Respondent further states that after reviewing the Claimant's response, it found it unsatisfactory. As a result, it invited him to a disciplinary session on 18th October 2019. The Respondent states that in the letter inviting the Claimant for the disciplinary session, he was notified of the right to be accompanied by a witness or a trade union official.
18. The Respondent avers that it conducted the disciplinary session during which the Claimant was offered an opportunity to defend himself. It is the Respondent's case that the explanation given by the Claimant about the cash that he had received from the client did not match with the statement he wrote at the police station on the same issue. Whilst the Claimant's statement at the police station indicated that he surrendered Ksh. 31,436.00 out of Ksh. 32,000.00 to the Respondent's cashier, his explanation to the Respondent suggested that he remitted only Ksh. 18,618.00 to the Respondent for a car track devise and retained the rest of the cash to be used for other services that the Respondent could not render.
19. The Respondent avers that having regard to these discrepancies and other evidence on improperly paid commissions, the disciplinary panel did not believe that the Claimant was being candid about the matter. As a result, the panel recommended that his contract of service be terminated.
20. The Respondent avers that before the Claimant was released from employment, he was paid all his terminal dues. In the Respondent's view, the procedure followed in terminating the contract of service between the parties accorded with due process.

Issues for Determination

21. After evaluating the pleadings and evidence on record, it is my view that the following are the issues for determination:-
 - a. Whether the Claimant's contract of service was unlawfully terminated.
 - b. Whether the parties are entitled to the reliefs that they seek through their respective pleadings.

Analysis

22. In order to justify a decision to terminate an employee's contract of service, the employer is obligated to demonstrate the existence of a substantive ground in support of his decision. In addition, the employer must demonstrate that the decision to terminate the contract was arrived at in accordance with due process.
23. The substantive grounds that may justify termination of a contract of service include gross misconduct, physical incapacity and poor performance by an employee. In addition, an employee may be laid off due to operational reasons affecting the employer. These grounds are enshrined in sections 40, 41 and 44 of the *Employment Act*.
24. With respect to due process, the employer is required, by virtue of section 41 of the *Employment Act*, to notify the employee of the reason why it is proposed to terminate his contract of service. This information should be relayed to the employee in a language that he understands and in the presence



of a workmate or trade union official of his choice. The employee should be given the opportunity to respond to the allegations before the decision to terminate his employment is made. In addition, the employee ought to be afforded the opportunity to review the employer's decision on appeal.

25. In terms of establishing the substantive reason for termination of the contract of service, the employer is only expected to demonstrate, on a balance of probabilities, that he genuinely believed that there was a valid ground to terminate the contract at the time he took the decision to terminate the contract. This point, which is anchored on section 43(2) of the *Employment Act* was made in the case of Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others [2019] eKLR when the Court of Appeal expressed itself as follows:-

“The standard of proof is on a balance of probability, not beyond reasonable doubt, and all the employer is required to prove are the reasons that it “genuinely believed to exist,” causing it to terminate the employee's services.”

26. In determining whether the employer's decision to terminate the employee's contract of service was valid, the employment court must resist the temptation of taking the position of the employer and substituting the employer's views with its own. All that the court is required to do is to determine whether the employer's decision was premised on the law and is one that any other reasonable employer, faced with the same set of facts, would probably have made. This test was expressed in the Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others (supra) decision as follows:-

“...In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if the dismissal falls outside the band, it is unfair.”

27. In the instant case, the Claimant was accused of receiving company money from a client through his mobile money account without the Respondent's authority and contrary to the Respondent's policies. The Claimant is accused of having received Ksh. 32,000.00 from the client for purposes of installing a car track device in the client's motor vehicle. It is alleged that the Claimant did not remit these funds to the Respondent.

28. The Respondent also accused the Claimant of processing commission payments to Lucy Kamau in respect of work where the commissions were not to have been paid to the said Lucy Kamau. It was the Respondent's case that the clients in respect of whose accounts the commissions were billed, were its direct clients who had not been introduced by Lucy Kamau. Therefore, there was no reasonable justification to pay commission to the said Lucy in respect of these accounts. According to the Respondent, the only reasonable explanation for the decision to pay the impugned commissions was that the Claimant was using Lucy to irregularly siphon money from it. It was also indicated that the Claimant had caused to be remitted to Lucy Kamau one commission that was legitimately owed to another agent.



29. When confronted with these allegations, the Claimant admitted that he indeed had received Ksh. 32,000.00 from the Respondent's client. According to the Claimant, this client was personally known to him and preferred transacting his business through the Claimant.
30. At the police station where the issue had been reported, the Claimant recorded a statement in which he said that although he received the aforesaid sum from the client, he remitted Ksh. 31, 436.00 to the Respondent's cashier in cash. The statement to the police was recorded on 6th September 2019.
31. Later in his response to the notice to show cause dated 6th October 2019, the Claimant whilst admitting receiving the sum of Ksh. 32,000.00 from the Respondent's client, asserted that he remitted Ksh. 18,618.00 to the Respondent. He indicated that he used Ksh. 13,300.00 to fit a car alarm on the client's car but through a different service provider.
32. It is noteworthy that the two statements by the Claimant about how he handled the aforesaid sum of Ksh. 32,000.00 were made within a relatively short space of one month. Yet, in the two statements, the Claimant expressed himself differently on the matter. This casts aspersions on his candidness on the subject.
33. The Claimant called a witness who was the Respondent's cashier at the time of the incident that involved the sum of Ksh. 32,000.00. This witness sought to clear the Claimant of any blemish in respect of the transaction.
34. In court, the witness asserted that the cash that the Claimant received was remitted to the Respondent. Yet, in her statement to the police on the issue, she asserted that the Claimant only remitted part of the cash (Ksh. 18, 618.00) to the Respondent's account through mobile money transfer. There was no mention of the Claimant having remitted the entire cash as the witness sought to imply in her oral evidence before the court.
35. The court takes note of the fact that at the time of giving her evidence, the Claimant's witness had resigned from her position with the Respondent. The circumstances under which she resigned from employment remain unclear but are indicated to have arisen from her failure to account for company petty cash. It is therefore probable that her evidence in court was clouded by the fact of her separation from the Respondent. As such, her evidence must be received with caution.
36. Having regard to the fact that the witness was testifying after resigning from her employment under unclear circumstances and in view of her wavering position on whether the Claimant remitted the entire of Ksh. 32,000.00 to the Respondent, this witness's evidence is generally of very low probative value. In the premises, I do not believe her evidence that the Claimant remitted the entire of Ksh. 32,000.00 to the Respondent as she sought to imply.
37. There was the other issue of payment of commissions to Lucy Kamau. The Claimant did not table evidence to demonstrate that Lucy Kamau had connected him to the clients on whose account she received the commissions that were paid to her.
38. To corroborate its assertion that the Claimant's conduct in this respect was suspect, the Respondent gave an example of one of its direct clients (Agrichem Africa) in respect of whose business the Claimant had sanctioned commission payment to Lucy. The Respondent stated that it had an existing relation with this particular client. Yet, the Claimant had authorized payment of commission to Lucy on account of the client's new business to the Respondent.
39. It was up to the Claimant to provide cogent evidence to demonstrate that despite the existing relationship between the Respondent and Agrichem Africa, Lucy Kamau was instrumental in having



this client direct its new businesses to the Respondent and that this business was not procured by the Respondent directly on account of the existing relation between the Respondent and Agrichem Africa. Apart from his bare statements on the issue, the Claimant did not provide this evidence. He did not, for instance, get Lucy Kamau to confirm that she was instrumental in procuring business for the Respondent from this existing client.

40. The net effect of the foregoing is that the Respondent had a credible basis to believe that the Claimant had misappropriated part of the Ksh. 32,000.00 that was paid to him by the Respondent's client contrary to the existing company policy on handling cash. The fact that these payments were made contrary to the Respondent's policy was confirmed by the Claimant's witness in her statement to the police dated 10th September 2019.
41. Further, the fact that the Claimant did not provide a cogent justification for remitting commissions to Lucy Kamau in respect of business from Agrichem Africa, an existing client of the Respondent provided reasonable basis for the Respondent to entertain the belief that the commissions were irregularly procured. That the payments were made pursuant to a scheme to defraud the Respondent.
42. In the premises, I arrive at the conclusion that the Respondent has demonstrated that there were substantive grounds to support its decision to terminate the Claimant's contract. There is evidence that the Claimant had committed, or was reasonably suspected to have committed a criminal offence against or to the substantial detriment of the Respondent's property. This is an act of gross misconduct under section 44 (4) (g) of the Employment Act for which the Respondent was entitled to terminate the Claimant's contract of service.
43. The next issue for consideration is whether the Respondent followed due process in releasing the Claimant from employment. The evidence on record shows that the Respondent issued the Claimant with an initial letter in which the issues under consideration were raised. This letter is dated 27th September 2019. It is by this letter that the Claimant was suspended from employment.
44. The record shows that the Respondent issued the Claimant with a letter of show cause dated 2nd October 2019. The letter set out in detail, the accusations against the Claimant and invited his response in a period of five (5) days. The record also demonstrates that the Claimant responded to the show cause by his letter dated 6th October 2019.
45. There is evidence that the Respondent invited the Claimant for a disciplinary hearing by its letter dated 11th October 2019. The disciplinary session was scheduled for 18th October 2019, approximately seven (7) days away. This, in my view, provided the Claimant with adequate time to prepare for the session.
46. The letter inviting the Claimant for the disciplinary session notified him of his right to come with a representative. The Claimant was informed of his right to be accompanied by either a fellow employee or a trade union representative.
47. There is evidence and the Claimant admits that the session of 18th October 2019 was convened. The only point of divergence is with respect to what transpired during the session.
48. The Claimant asserts that the session was of little moment. He asserts that he was not allowed to ventilate his case. He argues that he was only issued with the letter terminating his contract of service. In his view, this letter had been prepared well before the session.
49. The Claimant called one of the panelists who asserted that the disciplinary session was a smokescreen to validate a flawed disciplinary process. According to the witness, the panel walked into the session with the Claimant's dismissal letter already prepared.



50. The panelist denied that there was a hearing during the session. Her evidence was that they only allowed the Claimant to introduce himself before they handed him the letter of dismissal.
51. The witness denied that the session had minutes to authenticate the proceedings. She suggested that the minutes that were produced by the defense were falsified.
52. In hindsight, the witness stated that she believed that the Claimant was subjected to a flawed process to justify a pre-determined decision to terminate his contract of service. In her view, the decision to terminate the Claimant's contract of service was hurried and unfair.
53. Coming from a panelist who sat in the disciplinary session, the above evidence is baffling. It is shocking that the witness agreed, at the time, to lend her hand to what she now describes as a deeply flawed process only to confess her sins later on. The court must ask itself what led to this "Damascus moment" for this witness.
54. It is on record that the witness resigned from her position at the Respondent Company. The reasons for her resignation were not disclosed.
55. This leaves questions as to whether the witness's change of heart on the matter may have been influenced by her separation from the Respondent. This cannot be ruled out. Therefore, the court must treat her evidence with caution.
56. Having regard to her contradictory positions on whether the Claimant remitted the entire or only part of the sum of Ksh. 32,000.00 that had been paid to him by the Respondent's client's, the court finds this witness's evidence on the subject suspect. The court is unable to believe her testimony on the matter.
57. The Respondent produced minutes of the disciplinary session. The court believes that the minutes are genuine. The Respondent also produced evidence that it issued the Claimant with a letter of termination shortly after the disciplinary session of 18th October 2019.
58. The Claimant has tried to discredit the propriety of the disciplinary process on account of the fact that the letter communicating the disciplinary panel's decision is dated the same day as the date of the disciplinary session. In the Claimant's view, this only goes to demonstrate that the letter had already been prepared at the time of convening the session and that the whole process was pre-determined.
59. I find little persuasion from this view. There is nothing incredible about the disciplinary panel having prepared the termination letter on the very day of its session. This was not an incredible feat.
60. What is perhaps disconcerting is the way the Respondent handled the question of the Claimant's right of appeal from its decision. It is part of the right to procedural fairness that a decision maker allows the person affected by his decision to challenge it on appeal if he so elects. Indeed, under section 45(5) of the *Employment Act*, one of the matters that the court is required to consider whilst determining the fairness of an employer's decision to terminate an employee's contract of service is how the employee's right of appeal was handled by the employer.
61. Section 4 of the *Fair Administrative Action Act* also obligates a decision maker to notify the person affected by his decision of the right to appeal as part of the right to procedural fairness. This provision is couched in mandatory terms. It provides as follows:-

"Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision:-

a)



- b)
- c) notice of a right to a review or internal appeal against an administrative decision, where applicable.”

62. In its letter communicating the decision to terminate the Claimant’s contract of service, the Respondent expressed itself as follows:-

“This letter is to inform you that your employment with Retriever Limited will end as of 18, October 2019. The decision is not reversible.’ Emphasis added by underlining.

63. It is clear from the content of the letter that the Respondent was unwilling to permit the Claimant to pursue a review of the decision by its disciplinary panel. This begs the question whether this approach to processing the disciplinary process accorded with the principles of justice and equity as required under section 45 of the Employment Act. The answer to the question is in the negative.

64. That said, it is clear to me that the Respondent had valid grounds to terminate the Claimant’s contract. It is also clear to me that the Respondent substantially processed the decision to release the Claimant from employment in accordance with due process. Save for the failure to protect his right of appeal, the decision to terminate the Claimant’s contract of service would have been declared as valid

65. Given the fact that the Respondent’s procedural setbacks were at the tail end of its decision making process, the court must ask itself whether it is equitable to heavily penalize it for this omission. In my humble view, to do so would be tantamount to the court closing its eyes to the reality that the Respondent was justified to end the employment relation with the Claimant and that it substantially upheld due process in making the decision.

66. Having regard to the foregoing and doing the best to balance the scales of justice, it is my view that the Claimant is entitled to nominal compensation to acknowledge violation of his right to challenge the Respondent’s decision on appeal.

Determination

67. The Respondent’s decision to terminate the Claimant’s contract of service is faulted only to the extent that the Respondent deprived the Claimant the right to challenge the decision on appeal.

68. As a result, the Claimant is awarded compensation that is equivalent to his salary for one month, that is to say, Ksh. 150,000.00.

69. This amount attracts interest at court rates from the date of this decision.

70. This award is subject to the applicable statutory deductions.

71. The Claimant shall recover half costs of the suit.

DATED, SIGNED AND DELIVERED ON THE 2ND DAY OF NOVEMBER, 2023

B. O. M. MANANI

JUDGE

Order

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision 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.

B. O. M Manani

