



Oyugi v Trees for the Future Inc (Employment and Labour Relations Cause E011 of 2023) [2023] KEELRC 3421 (KLR) (11 December 2023) (Judgment)

Neutral citation: [2023] KEELRC 3421 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
EMPLOYMENT AND LABOUR RELATIONS CAUSE E011 OF 2023
CN BAARI, J
DECEMBER 11, 2023**

BETWEEN

JACOB OTIENO OYUGI CLAIMANT

AND

TREES FOR THE FUTURE INC RESPONDENT

JUDGMENT

1. The Claimant's Memorandum of Claim is dated 24th January, 2022, and filed in court on 2nd February, 2023. Under the claim, he seeks the following reliefs: -
 - a) A declaration that he was constructively dismissed.
 - b) A declaration that his termination was unfair and unlawful.
 - c) A total of Kshs.4,088,333.33/= comprising of salary in lieu of notice, compensation for unlawful termination, salary arrears and compensation for the remainder of his contract.
 - d) Costs of the suit.
2. The Respondent opposed the Claim vide a Statement of Response and Counter-Claim dated 21st February, 2023, and filed on 28th February, 2023. The Claimant also opposed the Respondent's Counter-Claim vide a Response to Counter-Claim filed on 4th April, 2023.
3. The Claimant's case was heard on 19th September, 2023, when the Claimant testified, adopted his witness statement and further witness statement and also produced exhibits filed in support of his case. The Respondent's case was equally heard on the same date (19th September, 2023). The Respondent presented a Mr. Vincent Mainga (RW1), its Country Director to testify on its behalf, and who similarly adopted this witness statement and produced documents filed in the matter in support of the Respondent's case.



4. Both parties closed their respective cases on the first hearing, paving way for filing of submissions.
5. Both parties filed submissions in the matter.

The Claimant's Case

6. The Claimant states that he was employed as a Regional Manager by the Respondent vide a contract dated 1st September 2022, on an annual salary of Kshs. 2,200,000/=, which translates to a monthly gross salary of Kshs. 183,000/-. He further states that he was on a fixed-term contract that was to lapse in one year.
7. The Claimant states that the Respondent put him on administrative leave on the 4th October 2022, and that the leave was purposely for a comprehensive audit and not due to any disciplinary conduct on the part of the Claimant.
8. He states that he was issued a notice to show cause letter dated 14th November 2022, which stated that he misappropriated funds sent to him on the 3rd October 2022, and 5th October 2022, when he was on administrative leave and thereafter subjected him to a disciplinary hearing contrary to the mandatory provisions of Section 41 of the [Employment Act](#).
9. It is the Claimant's case that a disciplinary hearing was conducted, but which was contrary to Sections 41 and 47 of the [Employment Act](#) 2007.
10. It is his case that he was unlawfully terminated on 7th December 2022, while his contract was to lapse on the 1st September 2023, which was 9 months away. He states that he was issued with a Certificate of Service dated the 7th December 2022, which is the date he was terminated.
11. It is the Claimant's case that the Respondent withheld his November and December, 2022 salaries.
12. The Claimant states that on 4th October 2022, the Respondent put him on an administrative leave which was indefinite, and no reason was given and that it was meant to constructively terminate his services in the pretext of misappropriation of funds.
13. The funds that the Respondent Claims were the subject of disciplinary issues alleged were duly sent to him long after he was sent on indefinite administrative leave, hence maintaining that the Respondent had hatched a constructive dismissal plot from the onset.
14. The Claimant states that he was robbed of the funds subject of the counter-claim and which does not amount to negligence.
15. The Claimant confirmed on cross-examination that he served for only three months before he was terminated. He further stated that did not know what administrative leave meant and neither was it explained to him.
16. It is his position that he was aware that he remained an employee of the Respondent for the period of the administrative leave and further confirmed that he knew that he was not allowed to conduct the Respondent's operations during the period of the administrative leave.
17. The Claimant further confirmed on cross-exam that money was sent into his account on 3rd and 5th of October, 2022, and that he sought clarification and was informed that the money was meant for operations. It is his testimony that he was asked to refund the money to the Respondent's account and that he withdrew the money in cash so as to take it back to the Respondent's offices.



18. It is his further confirmation that he could have gotten the Respondent's account number through the Bank into which to deposit/transfer the money. He again confirmed that it would have been easier to reverse the transaction than withdrawing the money and carrying it in cash.
19. It is the Claimant's testimony that all the money that he withdrew was stolen. He confirmed that he did not produce the withdrawal receipt in evidence.
20. The Claimant further told court that his phone was stolen, and hence the reason he did not call the Respondent's offices to inform about the loss of their money.
21. It is the Claimant's testimony that he withdrew the money from a bank at Kisumu even though the Respondent's physical head office is at Homabay. He confirmed that he understands that the Respondent company has a right to claim money lost through an employee.
22. The Claimant told court that his last pay was for November, 2022, but that he claims salary for November and December, 2022. His final testimony on cross-exam is that his contract does not provide for payment for the entire period of the contract.

The Respondent's Case.

23. The Respondent's case is that it employed the claimant vide a fixed term annual contract of service dated the 1st September 2022. Its states that under the contract, the Claimant was first placed on probation for a period of 3 months commencing on the 1st September 2022.
24. It is the Respondent's case that per the contract, the Claimant's employment would only be confirmed when he successfully completed his probation period.
25. The Respondent states that it met most of its employees, including the Claimant, and during a consultative and deliberative meeting with the Claimant, it was mutually agreed that the Claimant be placed on administrative leave beginning the 4th October 2022.
26. The Respondent states that the Claimant's monthly gross salary was the sum of Kes 183,333/=
27. It is the Respondent's further case that upon being placed on administrative leave, the Claimant was required to return all company property and not carry out his contractual duties unless called upon or authorized by the Human Resource Managers.
28. The Respondent states that part of the object of the aforementioned audit was to conduct an examination of the Respondent's Kenyan Bank Accounts. It is its further case that during the period of administrative leave and in view of the fact that the administrative notice was not a disciplinary action, the Respondent's Former Country Director and Former Accountant, still had the authority and the mandate to initiate and approve transfers in Standard Chartered Bank Account Number 0102888932100.
29. It is its case that while the Claimant was on leave, the Respondent noticed, in the month of October, that certain sums had been irregularly disbursed to the Claimant by the Respondent's Former Country Director and the Respondent's Former Accountant, prior to his leave notice and during his leave period.
30. That the Claimant was then asked to refund the said sums, but failed to do so and was therefore issued with a notice to show cause. It is the Respondent's case that due to an inadequate response from the Claimant, he was invited to a disciplinary hearing on the 25th November 2022, via a Notification to disciplinary hearing.



31. The Respondent states that a disciplinary hearing was conducted where the Claimant admitted the lost sum was due to his negligent actions and offered to refund the sum from his salary.
32. The Respondent states that the Claimant filed Petition Number 58 of 2022 and an application dated the 30th November 2022, seeking orders stopping the disciplinary process which was heard by Justice Radido on the 5th and 6th of December 2022. It states that the application was found to be without merit and dismissed with costs.
33. That the Respondent considered the grounds and the responses provided by the Claimant and dismissed the Claimant for gross misconduct and insubordination.
34. It is the Respondent's position that the Claimant failed to strictly comply with the conditions set under his employment contract, the Human Resource manual and the Kenyan Employment Laws hence it was legally at liberty to proceed to terminate the Claimant's services.
35. It is the Respondent's case that the Claimant was in breach of his employment contract as he willingly and intentionally failed to comply with the command to return the sum owed to the Respondent amounting to Kshs. 668,850/-.
36. The Respondent states that it tabulated the Claimant's terminal dues as follows: -
 - a) Salary for the month of November -Kshs. 183,333.33
 - b) Outstanding leave days [5 days by 8,333.33] -Kshs. 41,666.67
 - c) Salary for December 2022 [5 days by 9,489.49]- Kshs. 41,666.67
37. That the Claimant owed the Respondent a sum of KES 668,850 and that the Respondent recovered part of the outstanding and admitted sum from the Claimant's terminal dues in line with Section 19 of the [Employment Act](#). It is its case that the Claimant still owes it Kshs. 402,183.33.
38. The Respondent prays for judgment against the Claimant for the following remedies: -
 - a) That the Claimant's suit be dismissed with costs to the Respondent
 - b) An order that the Claimant repays the sum of KES 402,183.33 plus interests at court rates from the date of filing suit until payment in full
 - c) Costs at court rates.

The Claimant's Submissions

39. The Claimant submits that the Respondent sent him money for his normal budget when he was away on leave. It is his submission that this was the normal cause of transaction pursuant to monthly budgetary allocation, hence he did not irregularly obtain the money.
40. It is his submission that on his attempt to return the money, he was attacked, injured and the money stolen. It is the Claimant's submission that he requested for an account number but the same was not provided by the Respondent. He further submits that after the attack, he duly informed the Respondent of this predicament and which was duly reported to the police.
41. The Claimant submits that he was called to a disciplinary hearing that did not satisfy the threshold provided in the [Employment Act](#), as he was only given a 4-day notice to attend the hearing which also lacked a quorum. It is his submission that the disciplinary hearing was conducted virtually with network glitches and the only person he spoke with was Miriam Ningome who is not an employee of



the Respondent. He sought to rely in *Kenya Ports Authority vs. Fadhil Juma Kisuwa* [2017] eKLR to support this position.

42. It is the Claimant's submission that Section 19 of the *Employment Act*, only allows an employer to make a salary deduction for a lawful cause and as permitted in an agreement, upon the consent of the employee and for loss incurred through the negligence of the employee. He submits further that the Respondent proceeded to unlawfully deduct his salary over the lost money without any notice.
43. It is his submission that 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.
44. The Claimant therefore concludes that his dismissal amounted to constructive dismissal and relied on the case of *Coca Cola East & Central Africa Limited v Maria Kagai Lugaga* [2015] eKLR to buttress the position.

The Respondent's Submissions.

45. The Respondent submits that failure to obey a lawful command is a valid reason for termination under Section 43. The Respondent relied on the case of *Kenya Revenue Authority v Reuvel Waithaka Gitahi & 2 others* [2019] eKLR to support this position.
46. It is submitted for the Respondent that the Claimant was invited to a disciplinary hearing and informed of his right to come with a representative, but opted to attend the meeting virtually.
47. It is submitted that the Claimant was not constructively dismissed, and reliance was had on the case of *Milton M Isanya versus Aga Khan Hospital Kisumu* (2017) eKLR, where Maureen Onyango J, expressed herself as follows:

“In constructive dismissal, the desire to resign is from the employee as a result of a hostile working environment or treatment by the employer. A constructive dismissal occurs where the employer does not express the threat or desire to terminate employment but frustrates the employee to the extent that the employee tender's resignation.”

48. It is further submitted that a party cannot plead constructive dismissal and at the same time, plead that his services were terminated unlawfully and unfairly.
49. The Respondent submits that the Claimant is not entitled to one month pay in lieu of notice since it has been factually and legally demonstrated that his services were terminated on ground of gross misconduct.

Analysis and Determination

50. I have considered the pleadings herein, the witnesses' oral testimonies and the rival submissions. The issues that present for my determination are:
 - i. Whether the Claimant was constructively dismissed; and if not, whether he was unfairly terminated.
 - ii. Whether the Claimant is entitled to the remedies sought
 - iii. Whether the Respondent is entitled to the reliefs sought under the Counter-Claim.



Whether the Claimant was constructively dismissed; and if not, whether he was unfairly terminated

51. The Claimant's assertion is that the manner in which the Respondent handled his termination amounted to constructive dismissal. The Black's Law Dictionary (Tenth Edition) defines constructive dismissal as:

“An employer's creation of working conditions that leave a particular employee or group of employees little or no choice but to resign, as by fundamentally changing the working conditions or terms of employment; an employer's course of action that, being detrimental to an employee, leaves the employee almost no option but to quit.”

52. Lord Denning in *Western Excavating ECC Ltd v Sharp* (1978) 2 WLR 344, had this to say on constructive dismissal: -

“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.”

53. The Claimant was sent on what the Respondent referred to as administrative leave. Parties were in agreement that at the period of administrative leave, the Claimant was still deemed to be an employee of the Respondent, on full salary and entitled to all his benefits.

54. The Claimant's undoing, arose when money earlier budgeted for the Respondent's operations, was sent to his personal account during the period of suspension when he was barred from conducting the operations of the Respondent. An email was sent to him immediately the Respondent realized that the money was wired to the Claimant directing him to refund the money. He did not refund, and hence the disciplinary proceedings and subsequent dismissal.

55. From the foregone definition of constructive dismissal, a salient feature is that an employee must leave the service of the employer through resignation, either with or without notice.

56. The Claimant did not at all allege having resigned from the service of the Respondent. Both his pleadings and his oral testimony indicate that he was taken through a disciplinary process which resulted in his dismissal. He therefore did not leave/resign from the service of the Respondent, but was instead dismissed.

57. In *Milton M Isanya Versus Aga Khan Hospital Kisumu* (2017) eKLR, Maureen Onyango J, expressed herself as follows:

“In constructive dismissal, the desire to resign is from the employee as a result of a hostile working environment or treatment by the employer. A constructive dismissal occurs where



the employer does not express the threat or desire to terminate employment but frustrates the employee to the extent that the employee tender's resignation.”

58. Further, the chronology of events from the administrative leave to the show cause and subsequent dismissal, nothing shows that the Respondent is guilty of conduct which amounts to a significant breach going to the root of the contract of employment with the Claimant. It is clear that upon the Claimant's refusal to refund company money, the disciplinary action begun in earnest and concluded within a month and cannot therefore be said to be unduly long.
59. I conclude by holding that the Claimant has not proved a case of constructive dismissal.
60. On the issue of whether the Claimant was unfairly terminated/dismissed, the question is whether both statutory and Constitutional tenets of fair process were adhered.
61. The Claimant received the Respondent's money meant for its programs. He was on administrative leave and barred from transacting the Respondent's business, which fact he told the court that he was aware of. He was issued a show cause for failure to adhere to instructions to refund the money, and subsequently an invitation to attend a disciplinary hearing.
62. The show cause letter spelt out the basis of the charges and required that the Claimant makes written representation in response to the charges. Further, the invitation letter informed him of his right to attend the hearing with a fellow employee, a right to question the disciplinary committee, a right to tender evidence and a right to an interpreter if he needed one.
63. The hearing took place on 1st December, 2022. The Claimant told court that due to a network challenge and having chosen to have the hearing conducted virtually, he was agreeable to proceeding through a phone call. He was asked whether he had a representative, and his answer was that he was not going to have any.
64. Section 41 of the [Employment Act](#), 2007, states: -
 - “(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.”
65. In *Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others* [2019] eKLR the Court laid out four elements that are discernible for the procedure to pass muster as follows: -
 - i. an explanation of the grounds of termination in a language understood by the employee,
 - ii. the reason for which the employer is considering termination;
 - iii. entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;
 - (iv) hearing and considering any representations made by the employee and the person chosen by the employee.
66. The Claimant's only issue with the disciplinary process, is that he was called to a disciplinary hearing that did not satisfy the threshold provided in the [Employment Act](#), as he was only given a 4-day notice to attend the hearing which also lacked a quorum.



67. The Claimant told Court on cross-exam that participating in a virtual hearing was his choice and that he accepted to proceed with the hearing through a phone call since his network failed. He did not at any point complain about the period between the invitation to the hearing and the actual hearing date.
68. Further, the Claimant confirmed attending the hearing and defended himself against the charges leveled against him. In *Hosea Akunga Ombwori v Bidco Oil Refineries Limited* (2017)eKLR the Court expounded on the provisions of Section 41 thus: -
- “To satisfy the requirements of Section 41 of the *Employment Act*, 2007, an employer issues what is called in ordinary parlance a show cause notice/letter. Such a letter or notice should outline the allegations or charges against the employee and also request him to respond within a reasonable time.”
69. Further in *Philip Kimosop v Kingdom Bank Limited* (2022) eKLR, the Court held that the Respondent’s action of serving a show cause letter to the Claimant, inviting the Claimant to an oral hearing, giving the Claimant the right to call witnesses, produce documents and also be represented by another employee at the hearing constituted fair procedure.
70. In my view, the Respondent adhered to the tenets of fair procedure hence, the dismissal is not unfair, and so I hold.
71. On whether the Respondent adhered to the provisions of Sections 43, 45 and 47(5) on substantive fairness, the Claimant admitted being sent money for the Respondent’s operations and failing to refund when asked to do so.
72. In *Titus Muriuki Ndirangu v Beverly School of Kenya Limited* [2022] eKLR E009 of 2021 the court held: -
- “Section 43 of the Act places a burden on the Respondent to demonstrate and prove the reason of termination based on the facts, matters, and circumstances that existed at the time of termination. As stated elsewhere in this judgment, the Respondent did not defend this cause and as such the evidence by the Claimant that there was no lawful reason that existed as at the time of his termination on redundancy stands uncontroverted and unchallenged.”
73. Further, in *John Jaoko Othino v Intrahealth International* [2022] eKLR, the Court while relying on the test of reasonableness set out by Lord Denning in the case of *British Leyland UK Ltd vs Swift* (1981), held that the test of reasonableness would be to answer the question, was it reasonable for the employer to dismiss the employee? And proceeded to state that if no reasonable employer would have dismissed the employee, the dismissal would be unfair, but if a reasonable employer might reasonably dismiss him, then the dismissal would be fair.
74. Section 45 of the *Employment Act*, provides that a termination is unfair if the employer fails to prove that the reasons for termination are valid and fair. In determining validity of reasons for termination, an employer must believe at the time of termination that an employee is guilty of the allegations against him; that he has reasonable grounds to sustain the belief, and that he carried out investigation in respect of the charges.
75. The Claimant admitted in his response to show cause that he received the money from the Respondent. Further, his reasons for failing to refund the money are that he withdrew the money and on his way to the Respondent’s offices in Homabay, he lost the money through a robbery incident.



76. In my view, the Claimant's explanation on how he lost the money, is not credible. He told court that the Respondent did not send him an account number into which to deposit the money. At the same time, he confirmed that he could have gotten the number from the Bank. He further stated that he withdrew money from his bank branch at Kisumu to carry it in cash to Homabay, before the robbery, when he could have withdrawn the money in Homabay nearer the Respondent's offices. He further confirmed that he knew that it would have been easier to reverse the transaction and have the money sent back to the account it came from but did not.
77. The Claimant did not produce the withdrawal slip to show that he indeed, withdrew the money and hence the same could have been stolen in the robbery incident which was not itself proved that it ever occurred.
78. From this explanation, the Claimant came out as dishonest, untrustworthy, sly and unreliable or would perhaps fit the perfect description of an incorrigible liar.
79. I return that the Respondent had valid, fair and justified reasons to dismiss the Claimant and the dismissal met both the procedural and the substantive fairness test.

Whether the Claimant is entitled to the remedies sought

80. The Claimant's claim for salary in lieu of notice in my view is valid having been dismissed vide a letter dated 6th December, 2022, and which was to take effect on 7th December, 2022.
81. On this account he is awarded Kshs. 183,000 as salary in lieu of dismissal notice.
82. The Claimant's claim for compensation for unfair termination fails on account of the holding that the termination is not unfair.
83. The Claimant was on administrative leave between 4th October, 2022 to 6th December, 2022. He is thus entitled to the salary arrears for this period, and is awarded as prayed. I note that the Respondent computed these salaries and applied it to recover money it lost through the negligence of the Claimant.
84. The Claimant confirmed in cross-exam that his contract with the Respondent did not provide for payment for the remainder of the contract in the event the contract is terminated, and the claim fails and is dismissed.

Whether the Respondent is entitled to the reliefs sought under the Counter-Claim.

85. In his response to the show cause notice, the Claimant admitted receiving money from the Respondent. During the hearing, he again confirmed that he received the money, sought clarification and was informed that the money was meant for the Respondent's operations. It is his case that the only reason he did not make a refund when asked to do so, is for reason that he was robbed of the money, but did not produce the withdrawal receipt in evidence.
86. The Respondent's counter-claim is thus in respect of the monies the Claimant received and failed to refund when asked to.
87. The Respondent contend that it computed the Claimant's terminal dues upon dismissal and arrived at a figure of Kshs. 266,666.67/-, comprising of salary for the month of November, 2022, outstanding leave days and salary for 5 days worked in December, 2022.
88. It is the Respondent's further assertion that it applied the amount of Kshs. 266,666.67 to recover part of the Kshs. 668,850/- that the Claimant received and failed and/or neglected to refund in compliance with Section 19 of the [Employment Act](#).



89. In the case of *Liech v Sameer Agricultural & Livestock (K) Ltd (now) Devyan Food Industries (K) Limited*, also cited by the Respondent, the court while addressing a similar issue of funds lost through the negligence of the Claimant held: -

“In view of the foregoing finding that the Claimant caused the loss of Kshs.690,000 through negligence, I allow the Respondent’s counterclaim for Kshs.310,075 being the balance of the lost money.”

90. In the same breath, I find and hold that the Respondent’s counter-claim is merited and the Claimant is liable to refund the Respondent’s funds having acknowledged receipt of the funds, and failing to account for its loss or other reason (s) for not making a refund.

91. In the end, I make the following orders: -

- i. A declaration that the Claimant’s dismissal is not unfair.
- ii. The Claimant is awarded salary in lieu of notice at Kshs. 183,000/-
- iii. Salary for November and 5 days of December, 2022
- iv. An order that the Claimant repays the sum of KES 402,183.33/- plus interests at court rates.
- v. That the awards to the Claimant be

92. Judgment of the court.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 11TH DAY OF DECEMBER, 2023.

CHRISTINE N. BAARI

JUDGE

Appearance:

..... **present for the Claimant**

..... **present for the Respondent**

Erwin Ongor- C/A

