



**Nyamweya v Geothermal Development Company Limited (Cause
202 of 2020) [2023] KEELRC 3327 (KLR) (8 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3327 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 202 OF 2020
SC RUTTO, J
DECEMBER 8, 2023**

BETWEEN

CONVINE OMONDI NYAMWEYA CLAIMANT

AND

GEOTHERMAL DEVELOPMENT COMPANY LIMITED RESPONDENT

JUDGMENT

1. It is common ground that the claimant was employed by the Respondent *vide* a letter dated April 22, 2010. He was subsequently, appointed to the position of Geologist, Internal Audit and transferred to the Respondent's Internal Audit Department. Through a letter dated June 19, 2013, the Claimant was transferred from the Audit, Risk and Compliance Department- Nairobi to Geothermal Resources Management- Nakuru, with effect from July 1, 2013 and was redesignated as Scientist II.
2. The Claimant appealed the decision to transfer and re-designate him but the same was declined. Subsequently, he reported to his new station. Through an interdepartmental transfer, the Claimant was transferred *vide* a letter dated October 4, 2016, from the Geothermal Resources Management Department to the Geothermal Resources Assessment Department.
3. That transfer is the genesis of this dispute as the Respondent states that the Claimant failed and/or neglected to report to the Geothermal Resources Assessment Department or to report to work for six months while the Claimant avers that he was informed by the Human Resource Department that they were not aware of his transfer, hence advised him to continue with his work. In this regard, the Claimant avers that he diligently discharged his duties as Scientist II at the Geothermal Resource Management Department for six months without a problem.
4. From the record, the Claimant was issued with a show cause letter dated March 13, 2017, through which he was asked to show cause why disciplinary action should not be taken against him for absenteeism from work. This culminated in his summary dismissal which he has now sought to



challenge through the instant suit. The Claimant's claim against the Respondent is for a sum of Kshs 2,868,041.26 being payment of one month's salary in lieu of notice, compensation under section 49(1) (c) of the *Employment Act* and payment of accrued leave days.

5. Opposing the Claim, the Respondent filed a Reply and Counterclaim. The Respondent has asked the court to dismiss the Claim with costs and enter judgment against the Claimant for the sum of Kshs 1,195,668.42, which it avers is the salary he earned for the period beginning November 1, 2016 to April 3, 2016 (sic).
6. The matter proceeded for hearing on July 12, 2023 and July 26, 2023, during which both parties called oral evidence.

Claimant's Case

7. The Claimant testified in support of his case and to start with, he adopted his statement of claim, verifying affidavit, witness statement as well as the list and bundle of documents filed on his behalf, to constitute his evidence in chief.
8. It was the claimant's evidence that while at the audit, risk and compliance department, he raised audit queries, uncovered irregularities touching on the entire Geothermal Resource Development Department (which includes Geothermal Resource Assessment and Geothermal Resource Management divisions and produced reports on processes and decisions by various staff and offices and highlighted many areas of non-compliance, irregularities and outright breach of procedures and regulations in that department.
9. That some of the reports he produced while discharging his duties at the Audit, Risk and Compliance Department did not sit well with the Respondent's management leadership.
10. Following growing hostility towards him arising from his work at the Audit, Risk and Compliance Department, he was issued with a Letter of Caution dated April 4, 2013 after his laptop containing the data and some reports he was working on, went missing at his workplace. He has reason to believe that it was internally orchestrated and designed to silence him.
11. Shortly after receiving the letter of caution, he was transferred to the position of scientist II, GRM at the Geothermal Resource Management Department. He was not happy with the transfer as he had already invested in Technical Auditing as a career. His appeal against the transfer was rejected without any reason whatsoever.
12. He obeyed the transfer order and reported to his new station on July 1, 2013 where he met a hostile reception from the divisional leadership as a result of his audit work at his previous post in the audit, risk and compliance department.
13. He averred that at the Geothermal Resource Development Department, he was continuously intimidated, harassed and frowned upon because of the technical audit queries and irregularities he had uncovered while serving at the Audit Risk and Compliance Department as a Technical Auditor.
14. According to the Claimant, there was bad blood between himself and the then Acting General Manager, Geothermal Resource Development, Mr. John Lagat, who frustrated his work as the Scientist II at the GRM Department.
15. The Claimant further averred that on October 4, 2016, the said Mr. John Lagat wrote a malicious letter of transfer purporting to transfer him from Geothermal Resource Management to the Geothermal Resource Assessment division.



16. He averred that the purported letter of transfer was secretly written with an obvious intention to frustrate him and induce him into resignation. He also noticed that the Human Resource Department was not copied or notified of the transfer and he took it upon himself to contact them and they confirmed that they were not aware of the purported transfer and advised him to continue with his work.
17. He diligently discharged his duties as Scientist II at the Geothermal Resource Management division for six months without a problem hence was shocked to receive a letter dated March 13, 2017 from Mr. John Lagat, inviting him to show cause why disciplinary action should not be taken against him on allegation of absenteeism for the entire six months. He was dumbfounded.
18. He took the matter up with Mr. Lagat's office who brushed it off and dismissed him with contempt.
19. The Claimant was categorical that he had never absented himself from work as there is no way his absenteeism would have gone unnoticed even for three days. That during the six months he was being accused of absenteeism, he was reporting to work, carried out his duties and received his salary without fail.
20. He averred that on April 13, 2017, he received a dismissal letter from the respondent on grounds of gross misconduct on allegations of absenteeism, neglect of duty and refusal to obey command.
21. According to the claimant, he was dismissed without any opportunity granted for hearing or any representations of defence from his side. That he was never invited for a hearing before a disciplinary committee as required by law and contrary to the rules of natural justice as well as the respondent's own HR Manual.
22. He appealed against the dismissal but the same was never considered by the Respondent.
23. He averred that no investigations were conducted into the matter before he was dismissed from duty.
24. That as a result of the unlawful and unfair dismissal, he has been deprived of his employment income, suffered financial loss and damage and has been condemned to a life of misery and suffering.

Respondent's case

25. The Respondent called oral evidence through Mr. John Lagat and Ms. Mariam Yunus who testified as RW1 and RW2 respectively. Mr. Lagat who identified himself as the Respondent's Regional Manager, North Rift and the Manager Geothermal Resource Assessment, was the first to go. Similarly, he started by adopting his witness statement and the documents filed on behalf of the Respondent to constitute his evidence in chief.
26. RW1 stated that in a bid to implement the new career progression guidelines, it was necessary to transfer employees to the appropriate departments and stations. Consequently, the Claimant was re-designated and transferred from the Audit, Risk & Compliance Department Nairobi office to the Geothermal Resources Management Department Nakuru with effect from 1st July 2013.
27. Further in line with the Claimant's qualifications, he was promoted from scientist II, GRM GD 7 to Scientist Geothermal Resources Management, Grade GD6 with effect from January 1, 2015.
28. The management made a decision to make interdepartmental transfers to ensure optimal staffing and productivity within the Geothermal Resource Assessment Department.
29. Consequently, he issued an internal memo dated September 22, 2016, stating that the management had identified employees with requisite skills to be transferred to the Geothermal Resource Assessment



- Department, within the Geothermal Resource Development Division with the Claimant being among the three identified names.
30. He issued a letter dated October 4, 2016 to the Claimant informing him of inter-departmental transfer from the Geothermal Resource Management Department to the Geothermal Resource Assessment Department. The transfer was to take effect from November 1, 2016.
 31. A copy of the said letter was neither filed in his personal file nor his receiving department, Geothermal Resource Assessment.
 32. RW1 further averred that sometime in March 2017, he bumped into the Claimant in Nairobi and upon inquiring why he was in Nairobi and not in Nakuru where he ought to be working, he (Claimant) indicated that he was doing exams.
 33. That instance prompted him to go check and the biometric report from the 1st of October 2016 to March 2017, where the results indicated that the Claimant had only appeared on the 11th of November 2016 but continued to earn his full salary. Consequently, he raised an alarm of absence from work by the Claimant to the Management.
 34. Vide a letter dated March 13, 2017, he did a show cause letter, requiring the Claimant to respond within 72 hours why disciplinary action should not be commenced against him for absenteeism from work.
 35. The show cause letter was then forwarded by the Supervisor Senior Geologist on March 15, 2017 and subsequently served on the Claimant.
 36. He is aware that even after receiving the show cause letter, the Claimant never responded to it.
 37. RW1 averred that since he met with the Claimant in Nairobi, they have never had any formal meeting with him nor discussed anything relating to his absenteeism from work.
 38. According to RW1, the claimant was given ample time to explain his absenteeism and failing to do so, was summarily dismissed vide a letter dated April 13, 2017.
 39. Ms. Mariam Yunus who testified as RW2, identified herself as the Acting General Manager, Human Resources and Administration at the Respondent company. Similarly, she adopted her witness statement and the documents filed on behalf of the Respondent to constitute her evidence in chief.
 40. RW2 reiterated RW1's testimony and added that following the claimant's summary dismissal, he appealed *vide* a letter dated April 27, 2017.
 41. That in his Appeal letter, the Claimant admitted to misdoing and explained his reasons for absenteeism being that he had family issues having gone through a hostile Divorce and Children custody battle.
 42. The Claimant was invited for a hearing before the appeal committee *vide* a letter dated June 2, 2017. The hearing was scheduled for 9th June 2017. That vide a letter dated 29th June 2017, the meeting was rescheduled to 3rd July 2017.
 43. At the Disciplinary Appeal Committee meeting held on July 3, 2017, the committee noted that the Claimant was evasive and not forthright on the assertions that he was working during the period in question and could not clearly prove who used to assign him duties.
 44. The Disciplinary Appeal Committee recommended that they probe the matter further and proposed that the Claimant's Managers and Supervisors appear before the committee on July 7, 2017.
 45. During the second Disciplinary Appeal, it was established that during the period in question, the Claimant did not report to the Geothermal Resource Management Department or the Geothermal



Resources Assessment Department and was neither assigned duties by the respective department heads and/or supervisor.

46. On the basis of the findings of the Disciplinary Appeal Committee, the committee found that the decision to summarily dismiss the Claimant was merited and recommended that the same be upheld.

Submissions

47. The Claimant did not file written submissions despite being granted a further extension to do so on September 28, 2023.
48. On its part, the Respondent submitted that the termination was lawful having been based on grounds spelt out under the law as constituting gross misconduct. In support of this position, the Respondent cited the cases of *Rodgers Titus Wasike v General East Africa Limited* (2020) eKLR and *Thomas Dzombo Kirunga v Krystalline Salt Ltd* (2020) eKLR.
49. It was the respondent's further submission that the Claimant was given every opportunity to have his case heard and that it cannot be held liable for his own failures to utilize the opportunities accorded to him to defend himself. To this end, the Respondent placed reliance on the case of *Felix Muchemi Thirima v Kenya Pipeline Company Limited* (2020) eKLR and *David Njeka v Lavage dry Cleaners Limited* (2013) eKLR.
50. With regards to the counterclaim, the respondent submitted that the claimant admitted drawing salary during the six months that he was absent. It thus urged the Court to order restitution of the said funds to the public through its coffers where they were drawn.

Analysis and Determination

51. Having carefully considered the pleadings on record, the evidentiary material before me and the rival submissions, the following issues stand out for determination: -
- i. Whether the termination of the claimant's employment was substantively justified;
 - ii. Whether the claimant's termination was in line with the requirements of a fair process;
 - iii. Whether the respondent has proved its counterclaim; and
 - iv. Whether the claimant is entitled to the reliefs sought.

Substantive justification?

52. Substantive justification entails proof of the reason or reasons for which an employee was terminated. In this respect, under section 45(2) (a) and (b) of the *Employment Act* (Act), it is considered unfair termination where the employer fails to demonstrate that the reason for the termination is valid, fair and related to the employee's conduct, capacity, compatibility or is based on its operational requirements. Further, it is instructive to note that section 43 (1) of the Act specifically places the burden on the employer to prove the reason for termination and in default, such termination shall be deemed to have been unfair within the meaning of section 45.
53. In the instant case, it is discernible from the claimant's letter of termination that he was terminated pursuant to section 44(a) (c) & (e) on grounds of absenteeism, neglect of duty and refusal to obey lawful commands issued by his employer.



54. As stated herein, the issue in dispute stemmed from the Claimant's transfer from the Geothermal Resource Management (GRM) Department to the Geothermal Resource Assessment (GRA) Department, which was to take effect from 1st November 2017.
55. The Claimant's position is that following his transfer, he contacted the Human Resource Department, who notified him that they were not aware of the transfer hence he continued working at the GRM Department for six months without a problem. He further stated that his absenteeism would not have gone unnoticed even for three days.
56. What manifests from the foregoing is that the Claimant did not report to the GRA Department as directed in his transfer letter dated October 4, 2016. He admitted as much during cross-examination.
57. In essence, the claimant did not challenge his interdepartmental transfer and did not report to his new work station. It is clear that this conduct was contrary to section 44(4) (e) of the Act which provides as follows:
- (4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause....
 - (e) an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer;
58. Therefore, on that ground alone, the Claimant by his own conduct gave the Respondent a reason to commence disciplinary action against him.
59. In the event, the claimant was dissatisfied with his transfer from the GRM Department to the GRA Department, nothing stopped him from lodging an appeal against the same. His explanation that he stayed put as the Human Resource Department was not aware of his transfer, does not hold. Indeed, one wonders why he did not deem it fit to revert to his supervisor and seek a clarification instead of disregarding the transfer.
60. The bottom line is that the Claimant had been deployed by his supervisor to another Department but he failed to comply with said directive and in so doing, failed and refused to obey a lawful and proper command.
61. Further, the Claimant stated that he continued discharging his duties within the GRM Department and was assigned duties during that period by Janet Suwai. This was contrary to what the said Janet Suwai stated during the Appeal disciplinary proceedings as she denied assigning the Claimant any duties. This revelation casts doubt on the Claimant's version that he was on duty at the GRM Department during the period in question.
62. In light of the foregoing, I am led to conclude that the respondent has proved on a balance of probabilities that it had sufficient and reasonable grounds to take disciplinary action against the claimant. Suffice to say, his summary dismissal was substantively justified.

Fair process?

63. Far beyond proving the reasons for an employee's termination, an employer is required under section 45(2) (c) of the Act to subject an employee to a fair process prior to termination. The specific requirements of a fair process are provided for under Section 41 of the Act.



64. In this case, the Claimant contends that he was not given an opportunity to be heard. The record bears that the Claimant was issued with a notice to show cause dated March 13, 2017. As it is, the Claimant did not respond to the show cause letter hence he was summarily dismissed on 13th April 2017. According to the Claimant he was not aware that he was to respond to the said letter as he physically presented himself to Mr. Lagat, who had issued him with the show cause letter.
65. Cross examined on the issue, RW1 stated that when an employee does not show cause, he or she is summarily dismissed.
66. Therefore, it is clear that the Claimant was not invited to a disciplinary hearing to answer to the allegations levelled against him in the show cause letter.
67. Revisiting the provisions of section 41(2) of the Act, it is clear that before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4), an employer is enjoined to hear and consider any representations which the employee may make on the grounds of misconduct or poor performance. Worth noting is that the employee shall be entitled to have another employee or a shop floor union representative of his choice present during his explanation or representation.
68. Therefore, it is logical that the requirement under Section 41 of the Act, can only be fulfilled in an oral hearing.
69. The fairness of a disciplinary process cannot be over emphasized. A disciplinary process that has the likelihood of depriving the employee of his livelihood must by all means be seen to be fair.
70. Therefore, by failing to accord the Claimant an oral hearing to render his explanation to the allegations raised against him, the Respondent failed to act in consonance with the statutory requirements of procedural fairness.
71. Notwithstanding the fact that the Claimant had failed to respond to the show cause letter in writing, he deserved to be given a chance to be heard prior to his summary dismissal.
72. Granted, the Claimant was given an oral hearing at the Appeal stage. However, the damage had already been done as he was already out of employment. I reiterate that the process envisaged under Section 41 of the Act is before the termination or summary dismissal and not after.
73. The net effect of my finding is that in as much as the Respondent was substantively justified in terminating the Claimant's employment, the disciplinary process against him was not in accord with the spirit of Section 41 of the Act hence in the end, his termination was procedurally unfair hence unlawful.

Counterclaim?

74. The Respondent has counterclaimed against the Claimant the sum of Kshs 1,195,668.00 being the salary earned for the period beginning 1st November 2016 to April 3, 2017. It is notable from the onset, that the said Counterclaim was not accompanied by a Verifying Affidavit and none was filed prior to the hearing and Judgment.
75. Order 7 Rule 5 (a) of the *Civil Procedure Rules* states as follows:

“ 5. The defence and counterclaim filed under rule 1 and 2 shall be accompanied by-



.....an affidavit under order 4 rule 1(2) where there is a counterclaim.”

While order 4 rule (1) (2) of the Civil Procedure Rules provides that: -

- “(2) The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in rule 1(1) (f) above.
- (3) Where there are several plaintiffs, one of them, with written authority filed with the verifying affidavit on behalf of the others.
- (4) Where the plaintiff is a corporation the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.
- (5) The provisions of sub-rule (3) and (4) shall apply mutatis mudandis to counter-claims.
- (6) the court may of its own motion or on the application by the plaintiff or the defendant order to be struck out any plaint or counterclaim which does not comply with sub-rule (2) (3), (4) and (5) of this rule”

76. Courts have held that in as much as a Counterclaim filed without a Verifying Affidavit is defective, the said defect is not fatal as it is curable. As I have stated herein, the Respondent did not file a Verifying Affidavit at all. Therefore, the defect was sustained and was not cured. In the premises, the Counterclaim is struck out for being fatally defective.

Reliefs?

77. As the Court has found that the Claimant’s termination although substantively justified was procedurally unfair, he is awarded one (1) month’s salary in lieu of notice and nominal compensatory damages equivalent to one (1) month of his gross salary. This award takes into account the length of the employment relationship as well as the Claimant’s own contribution to the termination of his employment.
78. The claim for untaken leave days is also allowed as the Respondent did not exhibit the Claimant’s leave records as per its statutory obligation under section 74(1) (f) of the Act.
79. The claim for punitive and general damages is declined.

Orders

80. In the final analysis, I enter Judgment in favour of the Claimant against the Respondent in the following manner: -
- a. The Claimant is awarded the sum of Kshs 206,972.05 being one (1) month’s salary in lieu of notice.
 - b. The claimant is awarded compensatory damages in the sum of Kshs 206,972.05 which sum is equivalent to one (1) months of his gross salary.
 - c. The Claimant is awarded the sum of Kshs 124,183.23 being unpaid leave pay.
 - d. The total award is Kshs 538,127.33.
 - e. Interest on the amount in (d) at court rates from the date of Judgment until payment in full.
 - f. The Counterclaim is struck out with no orders as to costs.



g. The Claimant shall have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF DECEMBER, 2023.

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STELLA RUTTO

JUDGE

