



**Wanguru v Safaricom Kenya Limited (Cause 1919 of 2017)
[2023] KEELRC 3285 (KLR) (7 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3285 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1919 OF 2017
JK GAKERI, J
DECEMBER 7, 2023**

BETWEEN

MICHAEL KARANJA WANGURU CLAIMANT

AND

SAFARICOM KENYA LIMITED RESPONDENT

JUDGMENT

1. The Claimant initiated this suit by a memorandum of claim dated 25th September 2017 and filed on 26th September, 2017 alleging unfair and unlawful dismissal from employment and refusal by the Respondent to pay terminal dues.
2. The Claimant prays for –
 - i. A declaration that the Claimant’s dismissal from his employment was unlawful and illegal.
 - ii. The Claimant be paid his full terminal benefits totalling to Kshs.6,719,290/- as particularised below:
 - a. Salary for June 2017 Kshs.347,000
 - b. One month salary in lieu of notice Kshs.347,000
 - c. 12 months gross salary for unfair and unlawful termination 347,000 x 12 months Kshs.4,164,000
 - d. Leave not taken 2 x 347,000 Kshs.694,000
 - e. Car allowance 2 x 50,000 Kshs.100,000
 - f. Vehicle searches done for Safaricom Kshs.4,000
 - g. Benefits accrued for the period of suspension Kshs.53,000



- h. Bonus pay for the year as per the employment contract Kshs.1,010,290.50
- i. Certificate of service

Total amount Kshs.6,719,290.50

- iii. The Respondent be ordered to compensate the Claimant for wrongful termination at the equivalent of 12 months' salary.
- iv. That the Court do issue such orders and give such directions as it may deem fit to meet the ends of justice.
- v. The Respondent to issue a certificate of service to the Claimant in accordance with Section 51 of the Employment Act.
- vi. The Respondent to pay the costs of this suit and
- vii. Interest on the above at Court rates.

Respondent's case

- 3. In its Statement of Response, the Respondent avers that sometime in February 2017, it received a complaint from an MPESA Agent and its customer that after their accounts were frozen for alleged irregular activities, they were approached and advised to send "frauds" to a particular account for the account to be unfrozen.
- 4. That the Respondent issued a notice to show cause to the Claimant on 11th May, 2017 citing conflict of interest and was suspended for investigations.
- 5. The Respondent avers that investigation revealed that between 1st December, 2016 and 10th May, 2017, 4 Mpesa tills and 2 customers Mpesa records had been accessed and information shared with a 3rd party who called their lines to deposit cash for the accounts to be unblocked and the Claimant was implicated in the freezing and unfreezing of the accounts.
- 6. The investigation revealed the Claimant's involvement and disciplinary action was recommended.
- 7. The Respondent avers that it sent a Memorandum dated 16th May, 2017 detailing the allegations and invited the Claimant for a hearing on 22nd May, 2017 from 9.00 but the Claimant did not attend or respond to the Memorandum and could not be reached on his cell phone.
- 8. That the disciplinary committee reviewed the documentation including the Claimant's statement to the investigation team and recommended summary dismissal which the Respondent effected and the Claimant signed the letter on 27th June, 2017 and did not appeal the decision.
- 9. It is the Respondent's case that it had a fair and valid reason to summarily dismiss the Claimant and employed a fair procedure.
- 10. In his Reply to the Respondent's response dated 9th January, 2023, the Claimant avers that he had provided the Respondent with contact details including physical address, house number, postal address of his next of kin and emergency contact and had an official email address mwanguru@safaricom.co.ke.
- 11. The Claimant denied having known one Anna Munyao.



12. That he was interrogated by Mr. Patrick Kinoti for 8 hours. He admits having accessed the MPESA records as part of his duties and requests to freeze or unfreeze accounts were regularly made in the Departments WhatsApp Group.
13. He denies having received the Memorandum alleged by the Respondent yet he had access to the official email address.
14. The Claimant avers that he was arrested on 26th May, 2017 and taken to Parkland Police Station and released on cash bail, charged on 22nd June, 2017 but the charges were withdrawn on 1st November, 2021.
15. That he was unaware of the disciplinary hearing and no one called him or notify him of the meeting even after visiting the Respondent's office on 26th May, 2017, 12th June, 2017 and 14th June, 2017.
16. It is the Claimant's case that he received the dismissal letter on 27th June, 2017.

Claimant's evidence

17. On cross-examination the Claimant confirmed that he worked in the Risk Management Division and was promoted in 2015 and his duties included conducting investigations of fraud.
18. The witness further confirmed that he received the suspension notice which stated the reasons therefore and it was meant to facilitate investigations.
19. That he was not questioned or called by the investigator but wrote a statement courtesy of one Mr. Emmanuel under duress.
20. That the Mr. Emmanuel read out to him what to write and it was at 8.00 pm.
21. The Claimant testified that he did not receive the letter inviting him for the disciplinary hearing and was unaware of the email address the letter was sent to and he was called by Nancy to sign the dismissal letter.
22. The witness confirmed that he did not appeal allegedly because of the environment he was in.
23. On the reliefs, sought, the witness testified that the June salary had not been paid.
24. Finally, the witness confirmed that it was possible to engage in the activities alleged in the dismissal letter.

Respondent's evidence

25. RWI, Mr. Emanuel Mulwa testified that a complaint had been received on freezing and unfreezing of accounts after payment and investigations showed that the Claimant was involved in the freezing and unfreezing of 17 MPESA accounts.
26. The witness confirmed that he interviewed the Claimant during the investigation.
27. According to the witness, the Claimant's duties included freezing and unfreezing of accounts and funds were paid to one Anna Munyao, but there was no evidence of communication between the Claimant and Anna Munyao.
28. The witness confirmed that when the report was finalized, it was submitted to Human Resource and he did not avail a copy to the Claimant.



29. On re-examination, the witness testified that for the tills and customer lines accessed by the Claimant, Anna would call and funds would be transferred to her account No. 0795098777.
30. RWI confirmed that the investigation report recommended disciplinary action against the Claimant.
31. RWII, Mr. Odhiambo Ooko testified that the Claimant was suspended on full salary and benefits.
32. The witness confirmed that he served the investigation report and invitation vide the Claimant's Gmail address mike.wanguru@gmail.com.
33. That when the Claimant was employed, he provided contacts, of the next of kin but the report and the invitation were forwarded through the Gmail account only and the Claimant had no access to the official email address while on suspension.
34. The witness testified that he was unaware of the fact that the Claimant as not using the email the Respondent used to forward the documents to him.
35. That he was unaware of the communication between the Claimant and Nancy.
36. According to the witness, all employees were entitled to bonus as long as they had a good rating, payable in June but it was not payable in cases of dismissal.

Claimant's submissions

37. Counsel isolated three issues for determination including costs.
38. As to whether the summary dismissal of the Claimant was in contravention of the provisions of the Employment Act, 2007, counsel urged that the Claimant was not notified of the disciplinary hearing and the investigation report was not forwarded to the Claimant.
39. Reliance was made on the sentiments of the court in *Mary Chemweno Kiptui V Kenya Pipeline Co. Ltd* on the requirements of Section 41 of the Employment Act to urge that the summary dismissal was contrary to the law.
40. The decisions in *Postal Corporation of Kenya V Andrew K. Tanui* (2019) eKLR, *Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR and *Janet Nyandiko V Kenya Commercial Bank Ltd* (2017) eKLR among others were also cited to reinforce the submission that termination of employment must be substantively justifiable and procedurally fair.
41. As regards the reliefs sought, counsel submitted that Claimant was entitled to bonus payment paid to other employees in 2017 and 12 months salary compensation for the dismissal.

Respondent's submissions**

42. By 2nd November, 2023 when the court retired to prepare this judgement, the Respondent had not filed its submissions and its counsel was not in court on 31st October, 2023 when a judgement date was given.

Determination

43. The issues for determination are;
 - i. Whether the summary dismissal of the Claimant by the Respondent was lawful and fair.
 - ii. Whether the Claimant is entitled to the reliefs sought.



44. As regards summary dismissal from employment, the provisions of the *Employment Act*, 2007 are explicit on the essentials.
45. Section 44 of the Act, exemplifies acts or omissions which constitute gross misconduct and warrant summary dismissal with or without notice, though the provision is not exhaustive.
46. Section 44(4)(g) provides that, it amounts to gross misconduct where;
 - “an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer’s property.”
47. Section 45 of the *Employment Act*, 2007 is the substratum or foundation of fair termination of employment. It lays bare the requirements of a fair termination of employment.
48. In summary, the employer must demonstrate that it had a valid and fair reason to terminate the employee’s employment based on his or her conduct, capacity, compatibility or operational requirements of the employer and terminated the employment in accordance with a fair procedure.
49. Other critical provisions in termination of employment are Section 43 on the reason(s) for termination, 47(5) on justification and the mandatory procedure under Section 41 of the Act.
50. These requirements were aptly captured by the Court of Appeal in *Pius Machafu Isindu V Lavington Security Guards Ltd (2017) eKLR*.
51. In a nutshell, for a termination of employment or summary dismissal to pass the fairness test, it must be shown that the employer had a substantive justification for the termination or summary dismissal of the employee and conducted it in accordance with a fair procedure as succinctly captured by *Ndolo J. in Walter Ogal Anuro V Teachers Service Commission (2017) eKLR* as well as the Court of Appeal in *Naima Khamis V Oxford University Press (EA) Ltd (2017) eKLR*.
52. I will now proceed to apply the foregoing provisions and propositions of law to the facts of the instant suit.

Reason(s) for termination

53. The suspension letter dated 11th May, 2017 accused the Claimant of conflict of interest dealings with Safaricom M-Pesa agents.
54. The suspension was for purposes of investigation for 30 days and on full salary and benefits as the Claimant confirmed on cross-examination.
55. Records reveal and RWI confirmed on cross-examination that the Respondent had received a complaint from an M-Pesa agent (052018-EI Moran Vintage Telecomm as well as a customer by the name Vitalis Litala Shangala, cell phone number 0791928236 on their lines being frozen and unfrozen after remitting funds to a 3rd party named Anna Munyao cell phone number 0795098777.
56. RWI confirmed that the Respondent conducted investigations in May 2017 and found that the Claimant had accessed the accounts of 4 M-Pesa tills and 2 customers between 1st December, 2016 and 10th May, 2017 and all had been frozen and unfrozen within a short time by the Claimant.
57. The investigation found that the Claimant was working with a colleague, one Mr. Erastus Mugweru who would make irregular requests on customer account details on calls, registration, location and M-Pesa information which the Claimant would share.



58. The investigation also found that the Claimant had accessed the accounts of two deceased customers, cell phone numbers 0722316782 and 0713932243 and funds were withdrawn from the accounts after a sim swap.
59. The investigation recommended disciplinary action against the Claimant.
60. The Claimant admitted on cross-examination that he wrote a statement for purposes of the investigation.
61. The allegation that he did it under duress could not avail him as he adduced no iota of evidence to demonstrate coercion or the form(s) it took.
62. The four page statement is meticulously written and signed on every page.
63. Although the Claimant alleged that he was not asked any question by the investigator(s), RWI confirmed that they had a discussion during the investigation and he was interviewed before he was arrested.
64. The Claimant did not contest any part of the report and admitted on cross-examination that his duties included freezing and unfreezing of accounts in the course of conducting investigations of fraud. He was categorical that he had access to customer transactions on M-Pesa and account numbers.
65. Finally, the Claimant admitted that in his position, it was possible to engage in the allegations made in the dismissal letter.
66. In his statement to the investigator(s), the Claimant stated that he joined Safaricom in 2014 initially in the Fraud Investigation Department.
67. The letter of appointment dated 25th November, 2015 refers to the Office of Principal Officer –Fraud Detection & Analysis in the Risk Management Division appears to confirm the Claimant’s evidence that he had joined earlier and this was a promotion.
68. Paragraphs (i) and (v) of the letter acknowledge that fact. Equally, RWII confirmed that the Claimant joined the Respondent on 18th September, 2013.
69. According to the Claimant, the scheme was initiated by one Siyad Maalim sometime in 2016 with whom the Claimant became friends and would send the Claimant cash after executing his requests.
70. The statement is explicit that the relationship between the two grew gradually and he could not question the person’s motives as they were friends collaborating in business.
71. Based on the investigation report and the Claimant’s undated statement, it would appear that the Claimant put himself in a position of conflict of interest and facilitated fraudulent transactions for financial gain.
72. Strangely, although the Claimant alleged that he did not know who Anna Munyao was and evidence showed that they did not communicate on phone, the investigators found that for all the alleged accounts the Claimant accessed, froze and unfroze, money was sent to Anna Munyao’s cell phone number 0795098777. The Claimant did not controvert this evidence.
73. Could this have been coincidental? It would appear highly improbable.
74. Both RWI and RWII confirmed that the Claimant was arrested and charged.
75. RWII confirmed that the Claimant’s employment was terminated on 19th June, 2017 notwithstanding the fact that the letter of dismissal is dated 31st May, 2017.



76. The letter catalogued 5 infractions committed by the Claimant as revealed by the investigation.
77. The Claimant's dismissal was grounded on violation of the Respondent's code of conduct and policy on confidentiality of customer information and the Risk Management Code of Ethics.
78. The Respondent characterised the Claimant's infractions as gross misconduct to warrant summary dismissal.
79. In determining whether the Respondent had a valid and fair reason to dismiss the Claimant summarily, the court is guided by the provisions of Section 43(2) of the *Employment Act*, 2007 and case law.
80. Section 43(2) of the *Employment Act*, 2007 provides that;
- “The reason or reasons for termination of a contract are the matters that the employer at the time of the termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee.”
81. This provisions require the employer to demonstrate that it genuinely believed that the grounds relied upon in the termination or summary dismissal were reasonable and sufficient as held in *Kenya Revenue Authority V Reuwell Waithaka Gitahi & 2 others* (2019) eKLR.
82. Similarly, the provisions of Section 43(2) of the *Employment Act* comport with the reasonable employer under “band of reasonableness test” as explained by Lord Denning in *British Leyland (UK) Ltd V Swift* (1981) I.R.L. R 91 as follows;
- “The correct test is; was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, the dismissal was unfair, but if a reasonable employer would have dismissed him the dismissal was fair. It must be remembered in all these cases that there was a band of reasonableness within which an employer might reasonably take one view; another quite reasonably take a different view . . .
- If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair though some other employer may not have dismissed him.”
83. The court is guided accordingly.
84. Based on the evidence adduced by both parties, it is clear that Respondent provided sufficient evidence to show that the Claimant placed himself in a position of conflict of interest and without exercising due care facilitated transactions that may have been fraudulent. He did not deny that he had accessed all the accounts he is alleged to have frozen and unfrozen and that money was sent from those accounts.
85. He did not contradict the investigation report in any way or allege that he was framed by the Respondent.
86. The Claimant engaged in gross misconduct and the court is satisfied that the Respondent has on a balance of probabilities proved that it had a substantive justification for the summary dismissal of the Claimant.

Procedure

87. It requires no emphasis that the procedural precepts provided by Section 41 of the *Employment Act* are mandatory for a termination of employment or summary dismissal to pass muster. (See *Pius Machafu Isindu V Lavington Security Guards Ltd* (Supra)).



88. Courts have variously isolated the requirements of Section 41 of the *Employment Act*, 2007, such as explanation of the grounds of termination in a language understood by the employee, grounds on which termination of employment was being considered, entitlement of a representative of the employee's choice or shop floor representative during the explanation and hearing and considering the representations made by the employee and/or representative as held in *Postal Corporation of Kenya Ltd V Andrew K. Tanui* (Supra), where the Court of Appeal held that a termination or dismissal not conducted in accordance with the provisions of Section 41 of the *Employment Act*, 2007 was irregular.
89. In the instant suit, the Claimant testified that he did not receive the invitation to the disciplinary hearing scheduled for 22nd May, 2017.
90. RWII testified that he sent the investigation report and the invitation notice to an email in the name and style of mike.wanguru@gmail.com and the message did not bounce back.
91. Instructively, this was not the Claimant's official email address at the Respondent's office as it had been disabled following his suspension. (Mwanguru@safaricom.co.ke).
92. The Claimant's uncontroverted evidence is that he was not using that email at the time and the Respondent could have reached him through the next of kin or the emergency contact he had given on employment, a fact RWII confirmed on cross-examination.
93. Having disabled his official communication channel with itself, it was incumbent upon the Respondent to satisfy itself that it was communicating with the Claimant.
94. It behooved the Respondent to ensure that the Claimant received the investigation report and the invitation notice so as to defend himself. A call or message to the Claimant to confirm whether the documents had been received would have settled the matter.
95. Noteworthy, RWII adduced no evidence of the email that forwarded the documents to the alleged email address.
96. The two documents were the substratum of the Claimant's defense and the right to be heard on the allegations he was facing.
97. It is axiomatic that a person cannot participate in a meeting or proceedings he/she is unaware of.
98. The Claimant's uncontroverted evidence is that he did not receive the two documents and thus had no opportunity to respond to the report or participate in the hearing as evidenced by the minutes dated 23rd May, 2017.
99. Although the Respondent's witness Mr. Odhiambo Ooko testified that the Claimant's mobile phone was off at the time of the hearing, and thus could not be reached, he did not avail any evidence as to by whom and when the calls were made and to which number.
100. Assuming the notice of the meeting was sent on 16th May, 2017, it would have afforded the Claimant at least 5 days to communicate any issue or clarification he may have had in preparation for the hearing including sufficiency of the duration.
101. The Respondent did not accord the Claimant that opportunity and instead of postponing the hearing to ascertain why the Claimant had not attended, the meeting proceeded and recommended summary dismissal of the Claimant.
102. In the court's view, the disciplinary committee had no verifiable evidence that the invitation notice had been received by the Claimant.



103. Notice of the disciplinary hearing is so critical that the employer ought to have sufficient evidence to prove service.
104. In the instant case, the Respondent had no scintilla of evidence that it served the notice on the Claimant.
105. In the premises, the question whether the notice was sufficient or fit for purpose does not arise in this instance.
106. From the foregoing, it is the finding of the court that the Respondent has failed to prove on a preponderance of probabilities that it conducted the summary dismissal of the Claimant in accordance with a fair procedure within the meaning of Section 45(2)(c) of the *Employment Act*, 2007.
107. The provisions of Section 41 of the Act were not complied with thus rendering the summary dismissal procedurally flawed and unfair.

Appropriate reliefs

a. Declaration

108. Having found that termination of the Claimant's employment was unfair for want of procedural propriety, a declaration to that effect is merited.

b. Terminal dues

(i) Salary for June 2017

109. The Respondent's witness RWII testified that the Claimant's employment was terminated on 16th June, 2017 and was therefore entitled to salary for 16 days in June 2017.

110. However, paragraph 3 bullet 1 of the Notice of Summary dismissal states that the salary for the days worked in the month of summary dismissal i.e June 2017 had been paid out through the payroll.

111. However, the Respondent tendered no evidence that the 16 days were paid for.

112. The Claimant is thus awarded salary for the 16 days he was still in office, unless already paid.

(ii) One month's salary in lieu of notice

113. Having found that the Respondent had a substantive justification for the summary dismissal and did so without notice, no pay in lieu of notice is payable to the Claimant.

The claim is declined.

iii. Leave not taken

114. The Claimant adduced no evidence of the particulars of the leave not taken. He tendered no evidence of his leave entitlement per year, number of leave days not taken and when they fell due or how the number was arrived to sustain the claim.

The prayer is unsubstantiated and is dismissed.

iv. Car allowance

115. The Claimant adduced no evidence of this prayer. The payslip on record shows that the Claimant's monthly salary had a car allowance of Kshs.50,000/=.



116. It is unclear to the court whether this is another car allowance or part of the monthly salary. If it is, then no particulars were provided nor is it provided for in the contract of employment on record.

The claim is declined.

v. Vehicle searches done for Safaricom

117. The Claimant adduced no evidence of the alleged searches and how the amount claimed was incurred or arrived at.

118. It is unclear whether this was a task he undertook at the behest of the Respondent and had been promised reimbursement.

The prayer lacks the necessary particulars and is dismissed.

vi. Benefits accrued for the period of suspension

119. The Notice of suspension dated 11th May, 2017 was explicit that during suspension, the Claimant was entitled to full salary and benefits as per the company policy and terms of employment.

120. Neither the written statements on record nor the oral evidence led in court make reference or explain the benefits prayed for.

The prayer is dismissed.

vii. Bonus pay for the year as per the employment contract Kshs.1,010,290.50

121. Regrettably, the letter of appointment on record dated 25th November, 2015 has no provision for bonus pay.

122. In his submissions, the Claimant referred the court to pages 80 and 81 of his list and bundle of documents which he did not testify about or make reference to.

123. The two documents dated 15th May, 2015 and 15th May, 2016 relate to the Incentive Payout for 2014/2015 and 2015/2016 when the Claimant was paid Kshs.523,125.00 and Kshs.590,287.50 respectively.

124. While the two documents reveal that the Respondent had an incentive payout policy, and RWII confirmed as much, the documents do not explain how the sum of Kshs.1,010,290.50 was arrived at or how the Claimant was rated in the 2016/2017 year.

125. The payout was based on performance of the business and personal and in both instances the Claimant's performance was characterised as Good.

126. From the letters, it is also clear that the Respondent paid the incentive payout in the month of May.

127. RWII testified that the Claimant did not have a good rating and this was a case of dismissal whereas part of the incentive may have accrued in early 2016, at least before the Claimant met Mr. Siyad in 2016, his overall performance could not have been rated as good had the investigation report been prepared earlier.

128. With no credible evidence of his performance score coupled with the fact that the Claimant did not file a notice to produce for the score to be availed, the documents relied upon are historical with no probative value on the Claimant's entitlement to bonus pay.

The prayer is declined.

viii. 12 months gross salary for unfair termination



129. Having found that the Claimant's summary dismissal was unfair, the Claimant is entitled to the remedies provided by Section 49(1) of the *Employment Act*, 2007, subject to taking into consideration the relevant circumstances under Section 49(4) of the Act.
130. In determining the quantum of compensation, the court has taken into account the following;
- i. The Claimant was an employee of the Respondent for about 3¹/₂ years which is not long.
 - ii. The Claimant had no record of previous misconduct or cases of indiscipline.
 - iii. The Claimant substantially contributed to the summary dismissal by engaging in discreditable conduct.
 - iv. The Claimant did not appeal the Respondent's decision to dismiss him from employment.
 - v. The Claimant did not express his wish to continue in the Respondent's employment.
131. In the circumstances, the court is satisfied that the equivalent of one month's salary is fair, Kshs.347,000/=.
132. In the upshot, judgement is entered in favour of the Claimant against the Respondent as follows;
- a. Declaration that the Claimant's summary dismissal by the Respondent was unfair.
 - b. Salary for 16 days in June 2017, if unpaid.
 - c. The equivalent of one (1) month's gross salary Kshs.347,000/=.
 - d. Costs of this suit.
 - e. Interest at court rates from date of judgement till payment in full.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 7TH DAY OF DECEMBER 2023

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the covid-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of the **Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of **Section 1B** of the *Civil Procedure Act* (**Chapter 21 of the Laws of Kenya**) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

