



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1511 OF 2017

(Before Hon. Justice Dr. Jacob Gakeri)

RODGERS MUTINDA.....CLAIMANT

VERSUS

KENYA BREWERIES LIMITED.....RESPONDENT

JUDGMENT

1. This action was instituted by way of a statement of claim dated 1st August 2017 and filed in Court on 2nd August 2017. The Claimant alleges that he was unfairly and unlawfully terminated by the Respondent and prays for –

- a) One month's salary in lieu of notice Kshs.203,747.09
- b) 12 months' salary compensation Kshs.2,444,965.08
- c) Severance pay for 9 years Kshs.916,861.905
- d) Interest on (a), (b) and (c) at court rates
- e) Costs of this suit.

2. The Respondent filed its memorandum of response in July 2018 and prayed for dismissal of the suit with costs.

Claimant's Case

3. The Claimant avers that he was employed by the Respondent as a Customer Relations Representative and later the Territorial Management Representative (TMR) from 2008 until 16th December 2016 when he was terminated. The Claimant further avers that at the time of promotion his monthly salary was Kshs.203,747.09 as per the pay slip on record. That he was diligent in the performance of this duties and adhered to the Rules and Business Code of Conduct of the Respondent as evidenced by the many years he worked for the Respondent in various towns in Kenya. He worked with the Respondent's distributors in Nakuru, Ruiru, Machakos, Mwingi, Kitui and other places and served the Respondent to its satisfaction.

4. It is averred that in 2014 the Respondent underwent a re-organisation and as a consequence the Claimant and other employees were declared redundant. He was thereafter re-employed as a TMR which showed that he was a diligent employee and had no disciplinary issue from 2008 to 2016.

5. The Claimant further avers that after he was redeployed to Machakos he was assigned a distributor by name Regina Martins trading as Malili Distributors who was supposed to distribute the Respondent's products in Wote but her mandate was temporally extended to Machakos after the previous distributor in Machakos closed shop until a new distributor of Machakos was appointed.

6. That the Claimant introduced Malili Distributors to a stockist by the name Jonathan Mwanthi whom the Claimant had known through the previous distributor and the two carried on business under their own arrangement. That in Mid-2015, the Government of Kenya revised duty on Senator Keg and the prices went down and demand went up. In order to prevent hoarding of the product, the Respondent instructed its employees including the Claimant not to sell Senator Keg to stockists. The product had to be distributed from bar to bar.

7. The Claimant alleges that in June 2016 the Respondent appointed Manara as the new distributor of Machakos to replace Malili Distributors, who was required to concentrate on the Wote Market.

8. That the Claimant worked with the new distributor and designated routes exclusive to it in the distribution of the Respondent's products. One of the routes was Kaviani and its environs. It is further averred that the Claimant learnt that Mr. Jonathan Mwanthi, a stockist appointed by Malili Distributors was picking stock from Malili Distributors and selling the same along the Kaviani route not in Wote territory thereby locking out Manara, the authorised distributor. It is further alleged that the stockist was selling a barrel of Senator Keg at Kshs.4,000/- over and above the recommended price of Kshs.3,450/- thus breaching the Respondent's business code.

9. It is contended that the Claimant investigated the matter and obtained photographic evidence of the stockist distributing products on the Kaviani route using DHL trucks. That the Claimant reported the same to the Line Manager Mr. Samuel Kavoi for action. Mr. Samuel Kavoi wrote to Malili Distributors on the issue but the distributor denied the allegations and accused the Claimant of operating a cartel to frustrate Malili Distributor's business. The Claimant was also accused of receiving bribes through Mpesa. The Claimant avers that the allegations by Malili Distributors were false and malicious and were actuated by the exposures the Claimant had made. That the only Mpesa payments he received were from customers for the stock supplied on credit and receipting would be made after payment.

10. It is averred that on 7th November 2016, the Respondent issued a notice to show cause to the Claimant for alleged breach of the Respondent's business code. It is averred that the notice to show cause caught the Claimant by surprise since he was innocent. Relatedly, the allegations were not supported by any evidence. That the Claimant gave a detailed response to the notice to show cause through a letter dated 9th November 2016 but the same was not considered by the Respondent and he was taken through a disciplinary process without any proof of the allegations.

11. The Claimant avers that he did not delete Mpesa messages as alleged as he had no capacity to do so and his Mpesa statements had no deleted messages.

12. The Claimant states that he was terminated from employment on 16th December 2016 on various grounds including violating key processes, unexplained Mpesa transactions and failing to reconcile some statements.

13. The Claimant finally avers that the Respondent had no evidence to sustain the allegations against him and it chose to rely on malicious allegations to terminate his employment. That he was framed by Malili Distributors and Mr. Jonathan Mwanthi for their malpractices.

Respondent's Case

14. The Respondent avers that it employed the Claimant on 20th August 2009 as a Trade Developer (Malta) for a fixed term contract up to 30th June 2008, was thereafter offered employment as a Trade Developer Senator Keg – Nakuru for a period of three years 1st August 2008 to 31st July 2011. That in June 2012, the Claimant was confirmed to the position of CRR – Keg Kitui reporting to the Keg Team Leader but was declared redundant in March 2014.

15. It is also averred that following a successful application, the Claimant was appointed the TMR for Machakos from 27th March 2014.

16. That at the date of termination, the Claimant's monthly salary was Kshs.192,341.14. The Respondent denies that the Claimant was diligent and avers that in various incidences he acted negligently and contrary to the Respondent's procedures and was terminated for breaching the Respondent's Code of Business Conduct and negligence.

17. That on 6th June 2011, the Claimant was given a notice to show cause and a final warning for careless driving on 31st October 2012.

18. The Respondent further avers that the Claimant introduced Mr. Jonathan Mwanthi to Malili Distributors so that he could receive payment from Jonathan wherever Mr. Jonathan Mwanthi bought Senator Keg from Malili Distributors. That he would receive Kshs.100/- for every barrel of Senator Keg purchased by Jonathan Mwanthi from Malili Distributors.

19. It is averred that the Claimant continued dealing with Jonathan Mwanthi, a stockist up to April 2016 even after the Respondent had instructed him and other employees not to deal with stockists in the distribution of Senator Keg in mid-2015.

20. That the Claimant introduced the Kaviani bar owner to Malili Distributors in return for bribes of Kshs.10,000/- for every transaction.

21. The Respondent denies that Malili Distributors made sales on routes reserved for the Machakos Distributor as alleged by the Claimant.

22. That investigations revealed that the Claimant was involved in monetary transactions with Jonathan Mwanthi in 2015 and 2016 and the evidence gathered during the investigation implicated the Claimant. That the Respondent reviewed the responses filed by the Claimant and found them unsatisfactory to disprove the allegations raised in the notice to show cause.

23. Finally, the Respondent avers that it followed due process in terminating the Claimant since it issued a notice to show cause, considered the Claimant's responses, invited him for a disciplinary hearing and a termination letter thereafter. That the termination was for a valid and fair reason and a proper procedure was followed.

Evidence

24. The Claimant adopted the written statement and testified that he attended a disciplinary hearing but the same was adjourned and did not resume for purposes of conclusion.
25. On cross examination, the Claimant confirmed that as at the date of termination his salary was Kshs.192,341 excluding the car allowance. He also confirmed that he had a previous notice to show cause and a warning and was terminated on allegations made against him by Malili Distributors. The Claimant admitted that he was interviewed by the Investigator. He confirmed that Jonathan Mwanthi was known to him and was one of his customers since he was both a stockist and a retailer. That he introduced Jonathan Mwanthi to Malili Distributors. He denied having received any bribe from Jonathan Mwanthi.
26. The Claimant confirmed that he would load products from Malili Distributors sell them and then reconcile with the distributor and denied having deleted Mpesa messages. He testified that a payment of Kshs.5,000/- by Mr. Jonathan Mwanthi was for beers and spirits he had sold to him. The Claimant denied owing Malili Distributors any money and confirmed having taken responsibility and cleared a debt owed by a customer to the Distributor. That the debt was paid in cash withdrawn from his bank account.
27. The Claimant also confirmed being aware of the disciplinary procedures in the Respondent's Human Resource Manual from investigation clause 3.2, notice to show cause clause 3.3.1, response clause 3.3.2, disciplinary clause 3.4.1, hearing clause 3.5.1, termination letter (decision) clause 3.6.1 and appeal clause 3.7.1.
28. The Claimant further confirmed that he attended the disciplinary hearing with a witness but did not appeal the decision. The witness also confirmed that the disciplinary hearing was adjourned but did not resume and his witness was not allowed to speak. That he protested by word of mouth.
29. In re-examination the Claimant testified that he did not delete any entry in his Mpesa and had taken it from the Safaricom Garden Estate Shop and was certified. That he cleared with Malili Distributors and issued a receipt to the Customer and the Distributor cleared him which facilitated clearance with the Respondent.
30. The Respondent had two witnesses MR. JULIUS MACHARIA KAMAU (RW1), The Corporate Security Manager and MR. EVANS MUTAI (RW2), the Director, Human Resource.
31. RW1 adopted the written statement and produced the investigation report as evidence in the case. He told the Court that he held a degree in criminology and security studies from Egerton University, Higher Diploma in Forensic Psychology and Criminology and Masters on Business Administration (Strategic Management) and was a Phd student at Kenya University. He testified that he was the Corporate Security Manager of the Respondent in charge of security of people, product security, brand protection, anti-counterfeit activities and physical security.
32. He confirmed that he investigated the complaints made against the Claimant by Malili Distributors in response to an email from the Head of Emerging Business and interviewed the Claimant on two (2) occasions, Regina Martins (Malili Distributors), and Jonathan Mwanthi (alias Ngang'a) the alleged cartel.
33. The witness testified that initially the Claimant denied knowing Mr. Jonathan Mwanthi. He also denied having received bribes from Jonathan Mwanthi but provided Mpesa statements from an Mpesa shop. That from the Mpesa statement, the witness deduced that the Claimant knew Jonathan Mwanthi and knew that he was a stockist in Machakos Town and had been dishonest. That the Claimant later confessed having introduced Jonathan Mwanthi to Malili Distributors.
34. On cross examination, RW1 confirmed that the Claimant initially denied knowledge of Mr. Jonathan Mwanzi. That the Claimant had deleted Mpesa entries from 14th September – 15th October 2015. The witness confirmed that the statements given to him and the one provided by the Claimant in Court were different with some entries missing. That Safaricom's M-Ledger permitted the account owner to filter entries in the statement using google. The witness told the Court that as a trained forensic investigator, he knew how it could be done. This was possible as long as the transaction was in M-Ledger which is a personal profile. He confirmed that he received the statement when he visited Wote on 26th October 2016.
35. RW1 also confirmed that Regina Martins had not complained about the Claimant previously and did not follow up the complaint by the Claimant against Regina Martins. The witness confirmed that Mr. Musila, a DHL Operations Manager at East Africa Breweries Limited corroborated the evidence of Malili Distributors Limited that DHL had been requested to transport empties from Machakos to Nairobi.
36. RW1 also confirmed that he did not interview Jimmy Mwangi on the Claimant's allegations of encroachment into the Machakos Market by Malili Distributors since the information was provided after the investigation. That no other investigation was conducted on the complaint against the Claimant.
37. On re-examination, RW1 testified that the Claimant provided two separate Mpesa statements and some entries were missing in one copy.
38. He testified that only the profile owner could access the M-Ledger since it was accessible through the Customer's profile and only the customer could modify entries in the personal profile. That he investigated the bribery allegations only and the Claimant violated the Senator Keg business model operational at the time.
39. RW2 adopted the written statement. The witness testified that he had served the Respondent as the Head of Human Resource for the last 10 years.
40. On cross examination, RW2 confirmed that the notice to show cause to the Claimant highlighted the accusations based on the findings of

the investigation report and no documentation was attached to the notice to show cause. That the notice did not itemise the clauses violated by the Claimant but made reference to the business model. The witness also confirmed that the Claimant had made a report against Malili Distributors and the Distributor made counter allegations against the Claimant.

41. The witness indicated that he could not speculate why Malili Distributors had not made the complaint against the Claimant earlier. It was further confirmed that allegation two (2) of the notice of show cause was based on the investigation report by RW1, Mr. John Kamau.

42. That the Claimant was invited for a disciplinary hearing and one Njeri Njenga represented the Human Resource Department. He confirmed that the hearing was adjourned pending further investigations since there were loose ends and the Committee did not wish to conclude the hearing before an investigation was conducted. The witnesses was however unaware of the loose ends.

43. RW2 confirmed that the Claimant attended the hearing with a witness and minutes were prepared but were not on record for perusal. That the Claimant's suspension was extended for purposes of concluding the investigations.

44. It was further confirmed that the disciplinary committee was not reconvened but the Claimant was terminated on 16th December 2016. It was the testimony of RW2 that although paragraph 2 of the termination letter stated that the investigation had been completed, the only report the witness was aware of was the one presented by RW1 on 12th October 2016. The witness was emphatic that "*there was no other report on Rodgers*" (Claimant) and concluded by telling the Court that he thought the dismissal of the Claimant was fair.

45. On re-examination, the witness stated that Claimant's termination followed the procedure in the Respondent' Disciplinary Policy. That products pricing models were communicated through meetings or in writing and all TMRs are bound to comply with them.

46. Finally, RW2 testified that the Claimant did not receive the termination letter under protest and did not appeal the decision.

47. That the car benefit allowance was included on the payslip for November 2016 for purposes of compensation and the Respondent paid all the terminal dues owed to the Claimant.

Claimant's Submissions

48. According to the Claimant, the issues for determination are whether –

- i) There were valid reasons to terminate the Claimant;
- ii) The Respondent adhered to fair procedure in dismissing the Claimant;
- iii) The Claimant should be granted the reliefs sought.

49. As regards the reasons for termination, the Claimant submits that the genesis of termination was the complaint the Claimant made against Malili Distributors whose response consisted of accusations against the Claimant which culminated in an investigation and eventual dismissal on 16th December 2016. That the Claimant took the distributor's position as true and the Claimant become the hunted. Why had the distributor not complained earlier poses the Claimant?

50. It is submitted that the Distributor's response was meant to deflect attention from her to the Claimant who had been performing his duties diligently.

51. The Claimant further submits that he responded to the three charges in the notice to show cause in his letter dated 9th November 2016. It is also submitted that the Respondent did not produce the Senator Keg distribution model or evidence of transactions between the Claimant and Jonathan Mwanthi up to April 2016 and the latter was dealing in products other than Senator Keg.

52. That charge 2, on bribes from Jonathan Mwanthi, no evidence connects the Claimant to the amount he allegedly received from Jonathan Mwanthi of Kshs.10,000/- transaction. That no Mpesa transaction corresponds to Kshs.100/- per barrel or Kshs.10,000/- since the Claimant could pick products from a distributor and sell.

53. On charge number 3, on reconciliation with the distributor the Respondent found that the Claimant did not reconcile his account with Malili Distributor yet the allegation was not part of the allegations on the notice to show cause letter. Therefore, the Claimant was condemned on a charge he had not defended himself against.

54. Reliance is made on the decision in **James Ondima Kabesa v Trojan International Limited [2017] eKLR** to buttress the submission on the effect of reliance on grounds not put to the Claimant for his defence.

55. On the findings that certain Mpesa transactions had been deleted, it is submitted that the Respondent had not explained the connection between the deleted transactions and the allegations made against the Claimant.

56. That the findings that the Claimant breached the Respondent's code and was negligent in his duties had not been specified in the notice to show cause and the Claimant could thus not respond to them. Nor were the specific clauses of the code highlighted.

57. It is submitted that the investigation conducted by RW1 was one sided whose sole purpose was to find reasons to terminate the Claimant

since the investigator was an employee of the Respondent and only interviewed Regina Martins (Malili Distributors) and Jonathan Mwanthi and did not consider the Claimant's responses or interview independent witnesses such as the driver involved in the delivery of Malili products in Machakos. That the report rehashes the allegations made by Malili Distributors without evidence to support it. That the Mpesa statements attached did not identify the amounts the Claimant is alleged to have received from Jonathan Mwanthi.

58. Reliance is made on Section 43 of the Employment Act and the decision in **Postal Corporation of Kenya v Andrew K. Tanui [2019] eKLR** to demonstrate the heavy onus placed upon the employer to prove the reasons for termination and the procedure complied with.

59. It is contended that the Respondent cannot allege that it had a genuine reason(s) to dismiss the Claimant's since the reasons were ventilated by an individual who had a grudge against the Claimant.

60. It is submitted that the disciplinary process was abandoned mid-way to allow further investigations as confirmed by RW2 and did not resume which is an indication that the Respondent had insufficient evidence at the time. Moreover, the disciplinary committee did not reconvene to conclude the hearing.

61. In sum, the Claimant submits that the Respondent has failed to establish that it had a valid reason(s) to terminate the Claimant and the same should be declared to have been unfair.

62. As to whether the Respondent employed a fair procedure in terminating the Claimant, it is submitted that the Respondent employed a flawed procedure on account that the Claimant's witness did not testify and the hearing was abandoned mid-way for further investigations.

63. Reliance is made on the testimony of RW2 Mr. Evans Mutai who confirmed that the hearing was adjourned and did not resume. The Court is urged to notice that the Investigation Report by RW1 was concluded on 12th October 2016 and by 21st November 2016, the Respondent did not have sufficient reasons to implicate the Claimant which explains the adjournment of the disciplinary proceedings.

64. Reliance is made on the sentiments of Ndolo J. in **Rebecca Ann Maina and 2 others v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR** that the charges against an employee must be clear and must be given sufficient time to prepare their defence before his representations and those of the person who accompanied the employee to the disciplinary hearing are heard.

65. It is contended that the Respondent did not accord the Claimant's witness an opportunity to make representations.

66. Finally, it is submitted that the fact that the Respondent did not file minutes of the disciplinary hearing should be construed to mean that the evidence weighed heavily against the Respondent.

67. The Court is urged to find that the termination procedure was flawed.

68. As regards the reliefs sought Court is urged to award the remedies sought in the statement of claim.

Respondent's Submissions

69. The Respondent isolates two issues for determination, namely

whether;

- i) The Claimant was wrongfully and unfairly dismissed from employment;
- ii) The Claimant is entitled to the reliefs sought in the statement of claim.

70. As to whether the termination was unfair and wrongful, the Respondent submits that the dismissal was fair and was conducted in accordance with the provision of the Employment Act.

71. The decision in **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** is relied upon to urge that a termination must pass the test for fairness which encompasses substantive justification and procedural fairness.

72. As regards substantive justification, the decision in **Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR** is relied upon to underscore the burden of proof on the employer to establish that it had a valid and fair reason for termination and the grounds were justified.

73. It is contended that as the TMR for Machakos, the Claimant engaged in activities contrary to the Respondent's code of conduct in the distribution of Senator Keg and received kickbacks from third parties, specifically Jonathan Mwanthi who was personally know to the Claimant. That a review of the Claimant's Mpesa statements showed that he had redacted some transactions between him and Jonathan Mwanthi to conceal the same.

74. It is the Respondent's submission that it acted lawfully in terminating the Claimant's employment.

75. As regards procedural fairness, it is submitted that the Respondent's Human Resource Manual had an elaborate procedure on termination. That the Respondent complied with the requirements of Section 35, 36, 41 and 44 of the Employment Act.

76. The Respondent submits that it issued notice to a show cause letter and the Claimant responded to the allegations, was invited to a disciplinary hearing, was heard and his representations considered and was notified of the dismissal thereafter.

77. As to whether the Claimant is entitled to the remedies sought, the Respondent submits that Section 44(1) of the Employment Act empowered an employer to dismiss employees without giving sufficient notice and in the circumstances, the Claimant was not entitled to the one month's salary in lieu of notice.

78. As regards the 12 months' salary as compensation, it is submitted that the Claimant's dismissal was not only substantively justifiable but procedurally fair and no compensation is due to him. It is submitted that if the Court finds that the Claimant was unfairly terminated, determination of the quantum of compensation should be guided by Court of Appeal decisions in **Kiambaa Dairy Farmers Co-Operative Society Limited v Rhoda Njeri & 3 others [2018] eKLR**, **Koki Muia v Samsung Electronics East Africa Limited [2015] eKLR**, **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR** and **Standard Group Limited v Jenny Luesby [2018] eKLR** as well as the decision in **Edgar Khaemba Pukah v County Assembly of Trans Nzoia [2017] eKLR**.

79. As regards severance pay, it is submitted that the Claimant was a member of the NSSF as well as a pension fund for which deductions were made and for that reason the Claimant was not entitled to severance pay.

80. It is the Respondent's submission that the Claimant's case should be dismissed with costs.

Analysis and Determination

81. I have considered the oral and documentary evidence on record, pleadings, submissions by Counsel and the law. The issues for determination are whether;

- a) Termination of the Claimant's employment contract was fair;
- b) The Claimant is entitled to the reliefs sought.

82. As to whether the Claimant's termination was fair, the Claimant submits that it was unfair on account that the Respondent did not establish the reason(s) for termination. That none of the allegations set forth in the notice to show cause was substantiated. For instance, it is submitted that the Respondent led no evidence on the Keg Distribution Model allegedly violated by the Claimant. That the Claimant continued dealing with Jonathan Mwanthi in relation to other products as opposed to Keg.

83. That the Respondent highlighted no Mpesa transaction for the sum of Kshs.100/- or Kshs.10,000/- as alleged. That the investigator was not independent. Finally, the disciplinary process was never concluded. It was abandoned before conclusion allegedly for further investigation.

84. Sections 41, 43, 45 and 47(5) of the Employment Act prescribe the attributes of a fair termination as well as the burden of proof of the employer and employee in the termination of employment contracts. Specifically, for a termination of employment to be deemed lawful, it must pass the fairness test. It must be substantively and procedurally fair.

85. To start with, Section 45(2) of the Employment Act provides that –

(2) A termination of employment by an employer is unfair if the employer fails to prove —

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason—

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

86. Section 47(5) of the Act provides that –

For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

87. This Court and the Court of Appeal have steadfastly enforced these and other provisions whenever their jurisdictions are invoked to ensure that termination and dismissals are not only substantively justifiable but procedurally fair.

88. In **Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR** the Court of Appeal expressed itself as follows

“There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of

summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”

89. In **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** the Court stated that:

“For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason of the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”

90. The Court is in agreement with these sentiments.

Reason(s) for Termination

91. The letter of termination of employment dated 16th December 2016 identifies three reasons for termination;

- i) That Mr. Jonathan Mwanthi continued operating as stockist in the Claimant’s market contrary to the Keg Distribution Model.
- ii) That the Claimant received Kshs.100/- for every Keg barrel collected by the said stockist Jonathan Mwanthi and Kshs.10,000/- from Kaviani Bar for every business transaction made.
- iii) Distributor funds reconciliation.

92. The Claimant was suspended from employment indefinitely on 27th October 2016 but on full pay to facilitate investigation in the alleged involvement in a Keg pricing cartel. A notice to show cause dated 7th November 2016 was issued and the Claimant was requested to provide detailed written submissions by close of business on 9th November 2016. The show cause letter identified four (4) charges. The Claimant responded on 9th November 2016 denying the allegations and giving a different version of the facts.

93. By a letter dated 15th November 2016, the Respondent intimated that a review of the Claimant’s submissions found them unsatisfactory and/or inadequate to controvert the allegations against him and he was invited to a disciplinary hearing on 21st November 2016 in compliance with the Respondent’s Human Resource Policy and Procedures Manual.

94. Arising from the disciplinary hearing, the Claimant’s suspension was extended on 2nd December 2016. The termination letter followed on 16th December 2016.

95. It is important to note at this stage that the allegation of Distributor Fund reconciliation identified as a reason for termination was not part of the allegations or charges against the Claimant dated 7th November 2016. The Claimant had no opportunity to respond to it and did not do so in his response dated 9th November 2016.

96. Needless to emphasise on cross examination, the Claimant

confirmed that he had taken responsibility and paid the debt owed by the customer in question and reconciled with Malili Distributors. The email from Regina Martin (Malili Distributors) dated 6th September 2016 which appear to have triggered the investigation makes no allegation that the Claimant had not reconciled its dealings with the Distributor.

97. It is also true that the Claimant had complained about Malili Distributors selling in Machakos area and wrote to his boss Mr. Kavoi.

98. Be that as it may, the Respondent appear to have paid more attention to the grave allegations made against its employee and subjected them to an investigation by its Corporate Security Manager Mr. Julius Macharia Kamau and concluded the investigation on 26th September 2016 after interviewing the Claimant twice, Regina Martins (Malili Distributors), Jonathan Mwanthi and Musila, DHL Operations Manager.

99. On his part, the Claimant provided Mpesa statements dated 4th October 2016 which showed extensive dealings with Jonathan Mwanthi, a stockist in Machakos the Claimant had introduced to Malili Distributors.

100. On cross examination, RW1 confirmed that the Claimant had deleted some Mpesa entries in his statement. Entries from 14th September – 15th October 2015 had been deleted. The witness confirmed that the Mpesa statement provided by the Claimant for purposes of the investigation and the statement he relied upon in Court had differences in that some of the entries had been deleted. The witness explained that he was a trained forensic investigator and it was at that time possible to change or modify Mpesa statements through M-Ledger, a personal profile accessible through the customer profile and available to the user only. That it was possible to filter entries in the Mpesa statement and hide them in M-Ledger. However, M-Ledger did not permit the user (owner) to insert a transaction.

101. RW1 further confirmed on cross examination that he received the Jonathan Mwanthi’s Mpesa statement when he visited Wote for comparison. For instance, entry dated 19th October 2015 at 1623 hours Ref. no. JJJSAL80IV to 254722622187 (Rodgers Mutinda), the Claimant for Kshs.5,000/- is missing from the Claimant’s statement dated 10th January 2015. Pages 31 – 52 of the Claimant’s bundle of

documents. In a similar vein, entry dated 13th November 2015 at 1658 hours Ref. No. JKD3G6V9TD to the Claimant for Kshs.7,000/-does not appear on the statements provided by the Claimant.

102. Noteworthy, the alleged suspicious transactions not found in the Claimant's Mpesa statements on record consists of flat figures such as 5,000, 7,000, 8,000, 3,000 etc.

103. On his part, the Claimant explained that whereas he ceased dealings with Jonathan Mwanthi in relation to Senator Keg after directions were issued by the Respondent, he dealt with him in relation to other beers and spirits as evidenced by Mpesa records. He could however not explain the flat amounts he received from Jonathan Mwanthi coupled with absence of corresponding entries in the statements he was relying upon in Court. The Claimant had no cogent explanation on missing Mpesa entries in his Mpesa statements.

104. With regard to the breach of the Senator Keg distribution model, the Respondent relied on the Claimant's Mpesa statement to deduce that the Claimant continued dealing with Jonathan Mwanthi up to April 2016 yet stockists were not supposed to distribute Senator Keg. The Claimant neither denied having been aware of the Respondent's Senator Keg distribution model nor dealing with Jonathan Mwanthi up to April 2016 as alleged by the Respondent. His defence was that his continued dealings with the stockist related beers and spirits as evidenced by the Mpesa statements.

105. The Respondent led no evidence that the dealings complained of related to Senator Keg.

106. The Court is not persuaded that the Respondent has discharged the onerous burden of proof that the Claimant's continued dealing with the stockist violated the Senator Keg distribution model.

107. Section 43(2) of the Employment Act provides that;

The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

108. From the evidence on record, it is apparent that the Respondent genuinely believed that the Claimant was involved in unethical practices in the course of discharging his duties as its employee and disciplinary action was merited.

109. The Court is in agreement with the Respondent's submissions that it had a justifiable reason to terminate the Claimant's employment contract.

Procedure

110. The Claimant testified that he was suspended from employment on 27th October 2016 pending disciplinary investigation and received a notice to show cause on 7th November 2016 and responded on 9th November 2016. He was invited for a disciplinary hearing on 21st November 2016.

111. The invitation letter informed the Claimant that he had the right to be accompanied by a colleague of his choice and call witnesses to testify on his behalf. The Claimant confirmed on cross examination that he attended the hearing with a witness Mr. Jimmy Mwangi, a former driver of Malili Distributors who was not allowed to speak during the hearing.

112. Evidence on record show that the disciplinary proceedings were adjourned on 21st November 2016 ostensibly for purposes of further investigation and as a consequence, the Claimant's suspension was extended by letter dated 2nd December 2016 to 13th December 2016. RW2 Evans Mutai confirmed on cross examination that the proceedings were adjourned to facilitate investigations "*There were some loose ends and the committee did not want to conclude the hearing before the investigation was concluded.*"

113. Intriguingly, the proceedings did not resume and the Claimant received a termination letter dated 16th December 2016. RW2 confirmed that he was not aware of the loose ends he had referred to but was unambiguous that "*The Disciplinary Committee was not reconvened*". The witness further confirmed that the investigation report by Mr. Julius Kamau (RW1) was presented on 12th October 2016 and there was no other report on the Claimant. RW1 confirmed as much and denied knowledge of any other investigation or report on the Claimant.

Was the Claimant afforded a fair hearing as by law required?

114. Section 41(2) of the Employment Act, 2007 provides that –

Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

115. RW2 confirmed on cross examination that the Claimant attended the hearing with a witness. He also confirmed that minutes were recorded but were not filed for purposes of this case.

116. It would appear to follow that the Claimant's allegation that his witness was not heard at the disciplinary hearing remain uncontroverted. But more significantly, the Respondent did not conduct the disciplinary proceedings to conclusion. Both CW1 and RW2 conceded that the

proceedings were adjourned for further investigations which did not take place.

117. The Respondent led no evidence on the stage at which the proceedings were adjourned. Was it after introduction of the participations or after some ground had been covered or before the decision had been made? Had the Claimant been heard before the adjournment? For how long was the adjournment to be? Was the Claimant's witness to testify at the next hearing?

118. These are critical questions which the Respondent had no answers for and which are undoubtedly detrimental to its case. The Respondent led no evidence that it heard and considered the Claimant's representations granted that the witness did not testify.

119. The Court in agreement with the Claimant's submissions that the Respondent suppressed Claimant's evidence and the termination was procedurally flawed.

120. For the foregoing reasons, the Court is satisfied that the Respondent has not on a balance or probabilities established that it complied with the provisions of Section 41 and 45(2)(c) of the Employment Act.

121. In sum, the Claimant's dismissal from employment on 16th December 2016 was unfair for want of procedural propriety.

122. On reliefs, the Court proceeds as follows:

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

123. Having found that the Claimant's dismissal from employment was unfair, the Claimant is awarded one month's salary in lieu of notice as provided by the Employment Act, 2007.

(b) 12 months' compensation for wrongful, unfair and unlawful termination

124. Since the Claimant's termination was unfair, the Claimant is

eligible for the discretionary remedy provided by Section 49(1)(c) of the Employment Act subject to observance of the provisions of Section 49(4) of the Act.

125. The Court has taken into account the following;

(i) Although the Claimant was employed by the Respondent on 20th August 2007, he was declared redundant by a notice dated 13th March 2014 but was employed again from 27th March 2014 after successful application to the role of TMR until 16th December 2016, a duration of about two years and eight months but in total about nine years.

(ii) The Claimant contributed to his termination.

(iii) The Claimant did not appeal the termination.

126. In the circumstances, the Court is satisfied that the equivalent of two (2) months' salary is fair.

(c) Severance pay for nine years served

127. In **Hassanath Wanjiku v Vanela House of Coffees [2018] eKLR**, Onyango J. stated as follows:

On the severance pay claimed the Claimant appears to confuse the term with service pay. In the submissions filed on behalf of the Claimant reference is made to Section 35(5) and (6) which provides for service pay, while severance is provided for under Section 40(1)(g) as a benefit for an employee who has been declared redundant.

Under Section 35(6) an employee who is a member of NSSF is not entitled to service pay. The Claimant having been a member of NSSF is not entitled to service pay. She is also not entitled to severance pay as she was not declared redundant."

128. The Court is in agreement with these sentiments.

129. In the instant case, the Claimant's payslip for November 2016 show that he was a member of the NSSF and as submitted by the Respondent, the Claimant was also a member of a pension fund for which deductions were made. The Claimant is thus not entitled to service pay. Finally, severance is only payable in cases of redundancy which was not the case in this case. The claim is **dismissed**.

130. In conclusion, judgment is entered for the Claimant against the Respondent as follows:

(a) One month's pay in lieu of notice.

(b) Equivalent of two (2) months' salary as compensation for the unfair termination.

(c) Costs of this suit.

(d) Interest at Court rates from date of judgment till payment in full.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 21ST DAY OF FEBRUARY 2022

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