



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO.2213 OF 2016**

**(Before Hon. Lady Justice Anna Ngibuini Mwaure)**

**BILLY MOSES NJARI.....CLAIMANT**

**VERSUS**

**MWEA RICE GROWERS MULTI-PURPOSE CO-OPERATIVE**

**SOCIETY LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The Claimant has filed the Memorandum of Claim dated 28<sup>th</sup> October 2016 suing the Respondent for wrongfully dismissing him from employment. He avers that the Respondent employed him in 1999 through a written contract of service as an Internal Auditor at a gross annual remuneration of Kshs.108,000/=. That his demonstrated ability made the Respondent to appoint him Acting Finance Manager through a letter dated 06/03/2013 and that there were no disciplinary issues regarding his service throughout his employment with the Respondent. That however on 01/10/2013 he was served with a suspension or interdiction letter accusing him of working under “cautionable circumstances” but did not offer any explanation. That he was subsequently issued with a dismissal letter on 01/11/2013 terminating his employment for gross misconduct based on alleged malpractice.

**CLAIMANT’S CASE**

2. The Claimant further avers that prior to termination of his employment he had been in continuous employment of the Respondent for approximately 15 years. That he was not afforded a chance to be heard on the allegations made against him and no impropriety was proved against him and that the purported summary dismissal was bereft of due process and therefore unfair. He also contends that the final dues and emoluments paid to him by the Respondent were wrongly calculated based on unfounded deductions and that he has unsuccessfully sought negotiations with the Respondent. He prays for orders against the Respondent for award of damages for wrongful dismissal equivalent to 12 months’ basic salary; payment of one month’s salary in lieu of notice; certificate of service; costs of the suit; and interest.

**RESPONDENT’S CASE**

3. The Respondent filed a Defence dated 19<sup>th</sup> December 2016 averring that on various dates it issued the Claimant with warning notices over the alleged misconduct and further constituted a disciplinary committee meeting on 01/10/2013 wherein he defended himself and a resolution duly made based on the evidence and his admissions.

4. He was properly dismissed from his employment in accordance to law. The Respondent computed all the Claimant’s benefits and carried out all relevant deductions including the recovery of unaccounted cash entrusted to the Claimant which it did lawfully. It is the Respondent’s averment that the Claimant lacks any reasonable cause of action against it and thus the orders sought for in the Claim are not available to him. That the parties and cause of action herein arose within Kirinyaga County and therefore this Court lacks the requisite territorial jurisdiction to entertain this suit. It prays that the Claim be dismissed with costs.

5. The Respondent also filed a Witness Statement by its General Manager, Munene Muriithi who states that the Claimant was suspended after the Respondent discovered he was involved in improprieties as the Acting Finance Manager. That the Claimant admitted the said acts of gross misconduct during his disciplinary hearing and that is why the Respondent resolved to recover the lost cash from his terminal benefits instead of handing him over to the Police. He further states that the Claimant never cleared in the normal manner after his dismissal and never requested to be issued with a certificate.

6. The Claimant submits that his was a case of unlawful termination of employment in that his disciplinary proceedings was irregular due to

a lack of proper notice to show cause, lack of the opportunity to present his case, lack of chance to hear the evidence tendered by the Respondent's witness and lack of explanation on why his employment was terminated.

7. Further, he was not furnished with the information material relied on during his disciplinary hearing and that the Respondent never released to him the decision of the disciplinary committee before handing him the termination letter. That the Respondent thus violated **Articles 35, 47 and 50 of the Constitution of Kenya and Sections 4(3) (a) and (g), 4(2) and 6 of the Fair Administrative Action Act.**

8. He further avers that the procedure for terminating employment by summary dismissal is outlined under **Section 41 of the Employment Act** and is mandatory as held in **MARY CHEMWENO KIPTUI V KENYA PIPELINE COMPANY LIMITED [2014] EKLR**. That however the Respondent did not follow the procedure as statutorily outlined as it conducted his disciplinary hearing before carrying out investigations and has further not tendered any evidence to show how the disciplinary proceedings were carried out.

9. That the Court in **SAMSON OLE KISIRKOI V MAASAI MARA UNIVERSITY & 3 OTHERS [2018] EKLR** emphasised the importance of producing disciplinary hearing proceedings. It is the Claimant's submission that the Respondent's actions fail the fair trial test elucidated in **WALTER OGAL ANURO V TEACHERS SERVICE COMMISSION [2013] eKLR** and that there was no justification for his dismissal as required by **Section 43 of the Employment Act**.

10. The Claimant submits that he thus ought to be compensated for the unfair termination as under **Section 49 of the Employment Act** and that the Court should consider he worked for the Respondent for 15 years. On these submissions he relies on the Court of Appeal decision in **PACKAGE INSURANCE BROKERS LTD V SIMON GITAU GICHURU [2019] EKLR** and on the case of **ALFRED MUTHOMI & 2 OTHERS V NATIONAL BANK OF KENYA LIMITED [2018] EKLR**. He further submits that the general rule is that costs follow the event but the Court has discretion in awarding costs and that considering his case as pleaded herein, it is only fair and just he be awarded the cost he has incurred pursuing justice.

11. The Respondent submits that the Claimant has failed to adduce sufficient evidence to support his claim for unfair and wrongful termination of employment. That the Respondent on the other hand has produced documents showing that the Claimant defrauded the Respondent Society and was rightfully dismissed for gross misconduct after being issued with warning letters, a suspension/interdiction letter, and a letter inviting him to attend the disciplinary proceedings where he was duly heard and advised to invite a union representative as his witness.

12. That the disciplinary minutes also capture what transpired during the Claimant's hearing and that the Respondent did not therefore breach any law or procedure as asserted by the Claimant. Furthermore, the Claimant's allegation of incorrect and unfounded deduction lacks merit as his terminal benefits statement is clear that all lawful deductions including his house rent and statutory deductions arrears were made and the balance transmitted to the Claimant's Magsta Sacco to offset a loan he owed the Sacco.

13. The Respondent admits that it did not calculate service benefits for the 10 months of January 2013 to October 2013 in favour of the Claimant constituting Kshs. 67,286.63 when he was dismissed and that the said sum is thus the only amount due to the Claimant.

#### **ISSUES FOR DETERMINATION**

14. (i) Was Claimant's employment unlawful and unprocedural?

(ii) Is he entitled to the reliefs prayed.

#### **DECISION**

15. The Claimant avers he worked for the Respondent from 1999 to 1<sup>st</sup> October, 2013 when he says he was served with a suspension letter. There were no specific reasons given for the said suspension but was described as cautionable circumstances.

16. He was then taken through a purported disciplinary hearing on 1<sup>st</sup> October, 2013 where he says he was going for a budget meeting and was ambushed with a disciplinary meeting.

17. The Respondent attached a letter dated 15<sup>th</sup> September, 2013 purporting to invite Claimant for a disciplinary meeting on 1<sup>st</sup> October, 2013. He was advised to invite a union representative as his observer.

The same day he was suspended on 1<sup>st</sup> October, 2013 is the same day he was invited to attend a disciplinary meeting.

Indeed the minutes of the disciplinary meeting produced as exhibits by the Respondent are dated 1<sup>st</sup> October, 2013.

18. On 1<sup>st</sup> November, 2013 the Claimant was informed the investigations had been completed and a decision was made to dismiss him for gross misconduct.

The Claimant says he was not availed the minutes of the disciplinary meeting and he was not advised of any witnesses who testified against him.

19. The court finds that the Respondent did specify the transgression of the Claimant in the suspension letter dated 15<sup>th</sup> September, 2013. He as well advised him to invite a representative at his hearing.

20. Where I found the anomaly is during the hearing on 1<sup>st</sup> October, 2013.

First of all Claimant had been sent on an indefinite suspension on 1<sup>st</sup> October, 2013 for working under cautionable circumstances.

That was the same day he was invited for a disciplinary hearing. There is confusion from the Respondent and is like they had not decided what action to take against the Claimant.

21. In the disciplinary meeting there is no evidence that the Claimant signed those minutes and that he was represented by any witness. He is purported to have accepted the offence and asked for leniency but he did not sign the minutes.

22. The court has no evidence therefore that the Claimant consented to any wrong doing.

The Claimant's firmly states he was not informed of the disciplinary meeting and so he was ambushed with a disciplinary hearing. When he was attending a meeting to present the budget.

23. The court having critically considered the evidence which includes the pleadings and the submissions and evidence adduced before the court, I find that the Respondent did not comply with Section 41 of the Employment Act in conducting the termination process.

Section 41 of the Employment Act is couched in mandatory terms as it was held in the case of **MARY CHEMWENO KIPTUI VS KENYA PIPELINE COMPANY LIMITED (2014) eKLR**. The Judge further observed that where employer fails to follow the mandatory provisions whatever the outcome of the process is bound to be unfair as the effected employee has not been accorded a hearing in the presence of their union representative or a fellow employee of their choice.

24. The court therefore have held time and again that to terminate the employment of an employee there must be a valid reason that touch on grounds of misconduct, poor performance or physical incapacity.

Once this is established the employee must be issued with a notice, given a chance to be heard and then sanctions are decided by the Respondent based on the representation made by the affected employee. It is now established best practice to allow for an appeal for such an employee with the internal disputes resolutions mechanisms with due application of provisions of Section 5(7) (c) of the Employment Act.

25. The Respondent may have had a valid reason to put the Claimant through a disciplinary process but the process itself was flawed. There is no statement of witnesses who testified against the Claimant and the actual fraud alleged is not substantiated.

26. In further support of this case before me is the observations in **RAYMOND CHEROKEWA MRISHA VS GUKON LIMITED (2014) eKLR** where the court observed that the Claimant was entitled to a fair hearing under the Employment Act.

The court further states that where that had not been done and summary dismissal was rendered it amounted to unfair termination within the meaning of Section 45 of the Employment Act.

The court found that the reason for dismissal was therefore invalid and unfair.

27. The case of **WALTER OGAL ONURO VS TEACHERS SERVICE COMMISSION (2013) eKLR** the court held that even if the Respondent had a genuine reason for terminating the Claimant's employment as required under Section 43 of the Employment Act, however, for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness.

28. I find there is no specified reason given except a claim that he owed the society some Kshs.243,000/=.

In the alleged disciplinary meeting he was accused of purporting to buy rice from one Anne Muthoni and John Mureithi at Kshs.158,730/= and Francis Ngugi at Kshs.251,845/= respectively which rice was never delivered. These are mere claims but no proof.

There is also reference of Kshs.873,000/= unaccounted for which again was a claim with no evidence.

I find the Respondent has not complied with Sections 41, 43 and 45 of the Employment Act in providing a valid reason for terminating Claimant's employment and secondly using fair procedure to terminate his employment.

29. The Respondent pleaded in his response lack of territorial jurisdiction because the cause of action happened in Kirinyaga. The court would only observe that this court has jurisdiction to try any case in any part of this country. There is indeed reasons where courts are established all over the country for easy access to justice.

The Respondent should have made an application before the hearing challenging territorial jurisdiction and the court would simply have transferred the case to Nyeri.

The same was not done an so the court will not allude to that matter as it does not deny this court jurisdiction to hear the case.

30. In view of the foregoing, I find the issues of jurisdiction does not arise.

Secondly, I find from the reasons of the above the Claimant was unlawfully terminated from employment and I proceed to enter judgement in his favour.

### **REMEDIES**

31. (i) I will award him 6 months compensation which amounts to Kshs.154,755/=.
- ii. One month salary in lieu of notice Kshs.30,951/=.
  - iii. Costs are awarded to the Claimant.
  - iv. Interest is also provided at court rates from date of judgement till full payment.
  - v. Claimant is entitled to his certificate of service within 30 days from today's date.
32. The total award is totalling Kshs.185,706/=.

**DELIVERED, DATED AND SIGNED IN NAIROBI THIS 18<sup>TH</sup> DAY OF MARCH, 2022**

**ANNA NGIBUINI MWAURE**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 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.

A signed copy will be availed to each party upon payment of court fees.

**ANNA NGIBUINI MWAURE**

**JUDGE**