



**Nyamai v Charleston Travel Limited (Cause 1727 of 2017)
[2022] KEELRC 1630 (KLR) (30 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1630 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1727 OF 2017**

JK GAKERI, J

MAY 30, 2022

BETWEEN

DANIEL NYAMAI CLAIMANT

AND

CHARLESTON TRAVEL LIMITED RESPONDENT

JUDGMENT

1. By a statement of claim dated 31st August, 2017 and filed on even date, the Claimant sued the Respondent for unlawful termination of employment and salary arrears.
2. The Claimant prays for -
 - i. Salary Kshs.116,889 for 12 months Kshs.1,402,632
 - ii. Any other cost the Court might deem fit to grant.
3. The Claimants case is pleaded follows;
4. The Claimant was employed by the Respondent as a credit controller on 15th February, 2010 at a monthly salary of Kshs. 70,000 and served the Respondent until 17th March, 2017 when he was dismissed allegedly for gross misconduct.
5. That he was neither given notice nor fair hearing. It is averred that the Claimant was not given sufficient reason why his employment was terminated and was not accorded a chance to defend himself.
6. That the allegations against the Claimant were never proved and the termination of employment was unlawful.

Respondent's Case



7. The Respondent filed its memorandum of response on 25th September, 2017 and denies the allegations that it terminated the Claimant's employment unlawfully.
8. It however admitted that the Claimant was its employee for six years but avers that he discharged his duties negligently and recklessly which led to a warning letter dated 10th February, 2016 that he did not improve and a further warning letter dated 12th April, 2016 was issued.
9. It is the Respondents case that through an audit, it discovered that the Claimant was fraudulent stealing from the company in cohort with a colleague, one Lucy Mandela.
10. That a show cause letter was issued on 13th March, 2017 setting out the accusations for its issuance and dismissal.
11. It is further averred that the Claimant was given an opportunity to defend himself and was dismissed after extensive deliberations of the disciplinary committee.
12. That the fraud was reported at the Parklands Police Station. It is the Respondent's case that the Claimants had accepted to negotiate the amount he had misappropriated as evidenced by letter dated 14th June, 2017.
13. It is the Respondent's case that the Claimant was procedurally and legally dismissed from employment but failed to clear with human resource as ordered by the letter of dismissal for purposes of computation of terminal dues.
14. Finally, the Respondent avers that the Claimant is not entitled to any payment since he fundamentally breached the terms of engagement agreed upon.
15. The Claimant responded to the Respondent's reply filed on 7th November, 2017 which generally rehashes the contents of the statement of claim.

Claimant's Evidence

16. The Claimant adopted the statement dated 31st August, 2012 which rehashes the contents of the statement of claim. However, on cross-examination the Claimant confirmed that he did not receive a notice or fair hearing but received and acknowledged receipt of the notice to show cause on 17th March, 2017 and dismissal letter on the same day after the disciplinary committee meeting. CW1 stated that the proceedings were unfair because the managers present were the accusers that the hearing was unfair.
17. That the notice to show cause stated that the Claimant could be accompanied by a colleague. CW1 testified that he was not offered any settlement by the company since the amount was charged on Lucy Mandela and did not involve his terminal dues in the negotiations but authored the letter dated 14th June, 2017 addressed to the Respondent.
18. The witness admitted that he handled the Kenya Pipeline Account as well as Agra and collected the amount due. It was CW1's testimony that Mandela was a travel consultant to issue tickets and forward them to finance for payment. That he only handled cash in respect of the Agra account and denied having exchanged accounts.
19. CW1 denied that he and Mandela were investigated or charged by the police or that he was summoned to write a statement.
20. On re-examination, CW1 testified that he was not accorded time to prepare and members of the committee were the accusers and employees of the company. That the proceedings were a sham as the decision had already been made.



21. It is the Claimant's evidence that there was no statement of account showing that any money was lost and was not paid after termination.
22. Finally, CW1 denied having agreed to pay any monies to the company.

Respondent's evidence

23. RW1 Irene Mbule Kitheka adopted the witness statement and confirmed that the Respondent conducted a forensic audit and alleges that the Respondent lost Kshs.361,890 but had no audit report to prove the costs.
24. That she had no accounting knowledge and joined the Respondent in 2018.
25. The witness confirmed that members of the disciplinary committee were the Managing Director, Finance Manager and the Human Resource Manager and all were part of the management and the accusers.
26. The witness further confirmed that although the notice to show cause and the dismissal letter were dated 17th March 2017, she believed that the Claimant was given time to respond to the issues raised.
27. That the Claimants salary was Kshs.116,886/= as at the date of termination having raised from Kshs.70,000/= in 6 years.
28. That the Claimant had neither been suspended or interdicted. The witness testified that the Claimant was not paid as he had not cleared with the Respondent. That he only returned the staff identity card.
29. Finally, the witnesses denied knowledge that the Claimant was offered a trip to South Africa in 2013.
30. On re-examination, the witness testified that the Kshs.361,890/= was the corporate account loss.
31. That the Claimant's salary increment was annual. It affected all staff and was performance based.
32. Finally, it was RW1's testimony that had the Claimant cleared, he would here been paid for the 17 days in March 2017 and any leave days due less liabilities.
33. That the Claimant owed the Respondent money but did not disclose the amount owed.

Claimant's Submissions

34. The Claimant identifies two issues for determination
 - i. Whether the Claimant was unfairly dismissed;
 - ii. Whether the Claimant is entitled to the reliefs sought.
35. On the first issue, the Claimant relies on section 41 of the *Employment Act* 2007 to urge that the Claimant was not accorded advance notice of the reason(s) for termination.
36. That the warning letters were based on unrealistic targets beyond the Claimants control.
37. The submissions make reference to the appraisal standard employed by the Respondent which was not testified about or contested by the Claimant in evidence.
38. It is submitted that the Claimant was hurriedly dismissed because the decision had already been made since members of the disciplinary committee were the accusers and he had to respond to the notice to show cause in a hurry.



39. It is further submitted that the Claimant was a diligent employee as well as a top performer and had been honoured with a trip to South Africa in 2013 and his salary increased.
40. It is the Claimant's submissions that the allegation that the Respondent had lost money was untrue as no counter claim was filed or audited accounts provided as evidence of the loss.
41. It is further submitted that the allegations that the Claimant colluded with Lucy Mandela was false as she was not called to testify.
42. That the Claimant did not handle cash as he was not a cashier and no money was lost.
43. Reliance is made on Section 45(3), (4) and (5) of the *Employment Act* to urge that the Claimant is entitled to damages for unfair termination of employment. It is the Claimant's submission that he had a track record and is not a criminal as alleged by the Respondent.
44. The decision in *Peter Kamau Mwaura and National Bank of Kenya* (2020) eKLR is relied upon to reinforce the submission.
45. Surprisingly, the Claimant submits that the sum of Kshs.1,402,632/= claimed is his terminal benefits for having

worked for 6 years.

46. In addition, it is submitted that the Respondent owed the claimant 4 eave days and extra time put to market the brand name. The last two items were neither pleaded nor proved.
47. The portion of submissions on the reliefs sought was not filed.

Respondent's Submissions

48. By 17th May, 2022, when the Court retired to write this judgement the Respondents had not filed it submissions.

Analysis and Determination

49. The issues for determination are whether –
 - i. The termination of the Claimant's employment was fair;
 - ii. The Claimant is entitled to the reliefs sought.
50. On the first issue, it is not in dispute that the Respondent employed the Claimant on 5th February, 2010 as a Credit Controller on a 3 years' renewable contract at Kshs. 70,000 per month. The contract was performance based and Training Bond bidding. Official working hours were 8.00 am to 5.00 pm except for Saturdays 8.30 am to 12.30 pm and alternate Saturday off at the discretion of management. The contract of employment was terminable by one (1) months' notice by either party or payment in lieu of notice.
51. The Claimant had a leave entitlement of 25 days per year. Based on the documents on record the Claimant received a warning letter on 13th February, 2016 on below par performance and a final warning on 19th April, 2016. By a document entitled "statement" dated 14th February 2017, the Claimant explains MPESA transactions that allegedly took place in 2015 between himself and one Lucy Mandela, a colleague.
52. The document makes no reference to the amount involved or contents of the letter on note that demanded the explanation. The "statement" shows that Lucy Mandela and the Claimant were friends.



53. On 17th March, 2017, the Claimant received a show cause letter. The letter stated in part “As per your discussion on Friday, 10th March 2017 with our forensic auditor, and your discussions with various other officers of the company, you have been variously and adversely mentioned in the on-going fraud investigation in the company where the company lost millions of KES....”
54. The letter requested the Claimant to do a letter to demonstrate why disciplinary action should not be taken against him for the above allegations and there after meet a committee to explain why disciplinary action should not be taken. The letter intimated that the Claimant could be accompanied by a colleague of his choice.
55. The Claimant responded denying the allegations, terming them as false, untrue and misleading. That no evidence had been adduced to substantiate the allegations.
56. Minutes of the disciplinary hearing dated 17th March, 2017 and on record as is the dismissal letter dated 17th March, 2017.
57. Sections 41, 43, 44 and 47(5) of the *Employment Act* provide the basic infrastructure on termination and dismissal from employment. These provisions prescribe the substantive and procedural precepts of termination. Under the provisions for a termination of employment to pass muster, the employer must demonstrate that the termination or dismissal was substantively justifiable and procedurally fair.
58. In *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR the Court of Appeal stated as follows:

“There can be no doubt that the Act which was enacted in 2007 places heavy 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.”
59. The Court is guided by the sentiments.

Reason for Termination

60. The reason cited for termination of the Claimant’s employment herein is that the Claimant was adversely mentioned and evidence discovered in an on-going fraud investigation and that he had failed to explicate himself from culpability. The letter states as follows in part:

“Fraud, intention to cause fraud, abetting fraud and breach of company rules, regulation and procedures is totally against the company policy amounting to gross misconduct.”
61. The notice to show cause dated 17th March, 2017 uses the words “...you have been variously and adversely mentioned in the ongoing fraud investigation...”
62. Instructively, both the notice to show cause and the termination letter are dated, were issued and received by the Claimant on the same day, 17th March 2017.
63. As early as 14th February, 2017, the Claimant had been called upon to explain some MPESA transactions between him and a colleague and tendered an explanation. However, it does appear that the Respondent at one point engaged a forensic auditor to unravel the mess, if any.



64. The Claimant admitted that he handled the Kenya Pipeline Company (KPC) Account as well as that of AGRA. Although he denied handling cash in respect of the KPC Account, he admitted on cross-examination that he handled cash in respect of the AGRA Account contrary to the submission that he did not handle cash as he was not a cashier.
65. Finally, on the reason(s) for termination of employment, the show cause letter makes reference to discussions between the Claimant and the forensic auditor and other officers of the company in an ongoing fraud investigation in the company. The Claimant was not only aware of the investigations but had been in discussion with officers of the company and the forensic auditor, facts he did not deny.
66. 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 termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee.
67. Taken as a whole, the evidence on record demonstrate the Respondent had a genuine reason to terminate the Claimant's employment. It genuinely believed that the Claimant was involved in the alleged fraud.
68. Accordingly, it is the finding of the Court that the Respondent has on balance of probabilities established that it had a valid and fair reason to terminate the Claimant's employment on 17th March, 2017.
69. The Respondent's decision would appear vindicated by the Claimant "without prejudice" letter dated 14th June, 2017 by which he accepts the offer to negotiate with the Respondent on application of terminal dues.
70. The Claimant led no evidence that he owed the Respondent any monies yet he is proposing to pay any excess by way of instalments.
71. The Respondent denied the Court the opportunity to appreciate the proposed arrangement by not filing the offer it had made to the Claimant.

Procedure

72. Section 41 of the *Employment Act* sets out the procedural principles to be complied with by the Respondent for a terminal/dismissal from employment to pass muster.
73. In *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR the Court of Appeal expressed itself as follows –

“It is our further view that section 41 provides the minimum standards of a fair procedure that an employer ought to comply with...

Four elements must thus be discernible for the procedure to pass muster:-

- i. An explanation of the ground of termination in a language understood by the employee.
- ii. The reason for which the employer is considering termination.
- iii. Entitlement of an employee to the presence of another employee of his choice when the explanation of the grounds of termination is made.



- iv. Hearing and considering any representations made by the employee and the person chosen by the employee.”

74. The Court is bound by these sentiments.

75. Section 45(2) of the Employment Act provides that –

A termination of employment by an employer is unfair if the employer fails to prove:

- a. ...
- b. ...
- c. That the employment was terminated in accordance with fair procedure.

76. In addition, Section 45(4) provides that –

A termination of employment shall be unfair for purposes of this part where –

- a.
- b. It is found that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.

77. The Claimant submits that on 17th March, 2017, he was issued with a notice to show cause which not only required a response but directed the Claimant to meet a disciplinary committee to explain why disciplinary action should not be taken against him.

78. The Claimant responded in writing and appeared before the committee. A dismissal letter was issued after the meeting.

79. The Claimant faults the procedure on two grounds

- i. He was not given time to prepare his defence or rebuttal.
- ii. Composition of the disciplinary committee.

80. Although RW1 confirmed on cross-examination that the notice to show cause, dismissal letter and minutes of the disciplinary hearing bore the same date, he still maintained that he believed the Claimant was given time to prepare and respond to the issues raised. The Claimant was emphatic that “I was not given time to prepare”. The Court in agreement with the Claimant’s submissions that he was forced to respond to the notice to show cause on the spot in total disregard of the tenets of fair hearing which require a reasonable duration to do so. The speed at which the entire process was concluded leaves little doubt that the outcome as a foregone conclusion. It is therefore not surprising that the Claimant appeared before the committee alone.

81. The crux of the matter is whether the Claimant was accorded reasonable time to prepare for and respond to the allegations made against him.

82. Overall, the Respondent appear to have been in a hurry to get rid on the Claimant. It is inconceivable why he was not accorded at least one day before facing his accusers. The response on record appear to have been written on the spur of the moment as opposed to a reasoned response. The precepts of natural justice as well as equity dictate that a party be accorded time to prepare for his defence and face his accusers to respond to the accusations.

83. In the instant case, the Respondent appear to have rushed through the process mechanically for purposes of compliance with the provisions of the Employment Act as opposed to giving the Claimant



a meaningful fair hearing. Minutes of the disciplinary hearing are reflective of the generally one sided nature of the proceedings.

84. As regards the members of the committee, the Claimant alleges that all were his colleagues and accusers. RW1 confirmed on cross-examination, that the committee members were Hamisi Hassan, Managing Director, Isabel Wairimu, Chief Accountant and Tabitha Mbura Njagi, General Manager Human Resource and Transport Operations. The Managing Director and the Claimant did not sign the minutes. According to the Claimant, the disciplinary committee could not have been fair since the management raised the complaint and members of the same management were the decision makers. They were his accusers. Could they have been deemed to have acted impartially or in an unbiased manner? The Court is not persuaded they would be.
85. On a preponderance of the evidence, the Court is satisfied that the Claimant has on a balance of probabilities demonstrated that the Respondent did not comply with the provisions of Section 41 of the *Employment Act*. The manner in which the Claimant's employment was terminated did not pass muster.
86. It is the finding of the Court that the termination of the Claimant employment by the Respondent on 17th March, 2017 was procedurally flawed and thus unlawful within the meaning of section 45 of the *Employment Act*.
87. As regards reliefs, the Claimant prays for 2 months compensation exclusively. Although he testified that he was not paid anything after termination, he neither pleaded nor proved other entitlements including leave days if he had any pending or payment for the days worked in March 2017.
88. Having found that termination of the Claimant's employment contract by the Respondent was unfair within the meaning of section 45 of the *Employment Act*, the Claimant is entitled to compensation in accordance with the provisions of Section 49(1)(c) of the *Employment Act* subject to observance of the provisions of Section 49(4) of the *Act*.
89. In determining the quantum of compensation, the Court had taken into consideration the following: -
 - i. The Claimant was employee of the Respondent for about 6 years and 11 months.
 - ii. The Claimant's salary rose from Kshs.70,000/= per month to Kshs.116,886/= during his employment by the Respondent.
 - iii. The Claimant had two (2) previous warnings based on his performance.
 - iv. The Claimant did not appeal the decision by management to dismiss him from employment.
 - v. The Claimant substantially contributed to the termination of employment.
90. In the circumstances, the Court is satisfied that the equivalent of the (2) months' salary is fair Kshs.233,772/=.
91. In conclusion, judgement is entered for the Claimant against the Respondent for Kshs.233,772/= with costs.
92. Costs at Court rate from the date hereof till payment in full.
93. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 30TH DAY OF MAY 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

