



**Muchiri v Netco Management Limited (Cause 233 of 2016)  
[2022] KEELRC 1204 (KLR) (27 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1204 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 233 OF 2016**

**SC RUTTO, J**

**MAY 27, 2022**

**BETWEEN**

**JACKSON MAINA MUCHIRI ..... CLAIMANT**

**AND**

**NETCO MANAGEMENT LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claim herein was instituted vide a memorandum of claim dated 18<sup>th</sup> February 2016 through which the claimant avers that he was employed by the respondent, as a station manager at Muranga Total Petrol Station. He further avers that his employment was terminated without notice following a report of robbery against him. That the respondent has failed to pay him terminal dues despite demand to that effect. To this end, he seeks several reliefs from this Court including; a declaration that his termination was unlawful, compensatory damages, notice pay, salary increment of 14% with effect from 1<sup>st</sup> May, 2013 to July, 2013, unpaid leave and service pay.
2. While the respondent does not oppose the fact that the claimant was in its service, it averred that it lost trust in him following the robbery incident of 6<sup>th</sup> August, 2010. That as such, it had reasonable grounds to suspect the claimant of gross misconduct and was desirous to commence a disciplinary process against him but he remained adamant hence was summarily dismissed.
3. The matter was heard on 20<sup>th</sup> December 2021 and each side presented oral evidence.

**Claimant's case**

4. The claimant testified in support of his case, and at the commencement of the hearing, he adopted his witness statement and bundle of documents, to constitute part of his evidence in chief. He also produced the said documents as exhibits before Court.



5. The claimant testified that his services were terminated by the respondent following a robbery incident. That he was arraigned in Court to face criminal charges and the respondent, who was the complainant, withdrew the case against him hence he was acquitted.
6. The claimant further told Court that prior to his termination, he was neither issued with a show cause letter nor invited to attend any disciplinary hearing to that effect. That further, all efforts to follow up on his dues were rendered futile. He asked the Court to allow his claim as prayed.

### **Respondent's case**

7. Ms. Faith Njoroge testified as RW1, on behalf of the respondent. She adopted her witness statement and the bundle of documents filed on behalf of the respondent, to constitute part of her evidence in chief. She also produced the said documents as the respondent's exhibits.
8. RW1 stated that she worked at the commercial department of the respondent and was in charge of management of staff. That the claimant was a station manager in Muranga.
9. She testified that on 6<sup>th</sup> August 2013, the claimant reported that he had been robbed at gunpoint and a sum of Kshs 400,000/= stolen from him. That as per the respondent's policy, he was required to call the G4S Security Services, to collect any money in excess of Kshs 200,000/= as was the case herein. That the claimant was not required to use public means while transporting such an amount of cash. That in the event the money was below the sum of Kshs 200,000/=, then he was required to use a taxi to transport the same.
10. RW1 further stated that the respondent reported the incident to the police and upon investigations, the claimant was charged with the offence of "stealing by servant". That it was on that basis that his employment was terminated as the respondent had lost trust in him. She maintained that the claimant was aware of the respondent's procedures as regards transportation of cash. It was her further testimony that prior to his termination, he was called and asked to give an explanation as regards the allegations at hand. That upon the claimant's dismissal, he was paid all his terminal dues.

### **Submissions**

11. It was submitted on behalf of the claimant, that prior to his dismissal, he was denied an opportunity to give his explanation as to the gross misconduct he was alleged to have committed. To support this position, reliance was placed on several authorities including *Janeth Chepkemoi Machira & another v Laikipia University* (2021) eKLR, *Jaffar Mohammed v Ready Consulatnt Limited* ELRC Cause No. 536 of 2014 and *Anthony Mwai Munyi v Computer Revolution Africa Limited* (2017) eKLR.
12. On its part, the respondent submitted that the claimant's dismissal was based on reasonable grounds and was solely upon loss of trust. That therefore, the respondent had genuine reasons to terminate the employment of the claimant. That his conduct had violated an essential facet of his employment, thus justifying his dismissal from employment. On this score, reliance was placed on the cases of *Naqvi Syed Omar v Paramount Bank Limited & another* (2015) eKLR, *Jacob Juma Makokha v Radar Security (K) Limited* (2018) eKLR, *Fred Onywoki Nyauntu v Mega Park (K) Limited* (2019) eKLR and *Kenya Revenue Authority v Rewel Waitihaka Gitahi & 2 others* (2019) eKLR.
13. It was the respondent's further submission that the claimant refused to use the internal processes and proceeded to insist that the criminal proceedings had exonerated him. The cases of *Andrew Githinji v the Attorney General & Another* (2016) eKLR and *Kenya Ports Authority v Fadhili Juma Kisuiwa* (2017) eKLR were cited in support of this position.



## Analysis and Determination

14. Having considered the pleadings, the evidence on record and the rival submissions, it is evident that this Court is being called to determine the following issues;
- i. Whether there was a valid and fair reason to warrant the claimant's termination from employment?
  - ii. Was the claimant subjected to a fair process prior to termination?
  - iii. What reliefs if any, avail to the claimant?

### Valid and fair reason?

15. Pursuant to Section 43(1) of the *Employment Act* (hereinafter the Act), an employer is required to prove the reason or reasons that resulted in the termination of an employee and in default thereof, such termination is deemed to have been unfair within the meaning of section 45. Alongside this provision, Section 45 (1) and (2) (a) and (b) of the *Act* provides as follows;
- (1) No employer shall terminate the employment of an employee unfairly.
  - (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...
16. What I have stipulated above is also known as substantive justification and the employer bears the evidential burden of proving that the reasons that resulted in an employee's termination are valid and fair.
17. In the instant case, the reasons leading to the claimant's termination was a robbery incident that occurred on 6<sup>th</sup> August, 2013, while he was on his way to bank the respondent's money. The reasons were communicated to the claimant through the letter of dismissal dated 20<sup>th</sup> August, 2013 as follows: -

“RE: Dismissal From Employment

We refer to the robbery of 6<sup>th</sup> August, 2013, whereby, on your way to the bank, thugs who were in vehicle KAY 792T, Toyota Corolla, came towards you at the bus stage of Mwihoti, at gun point, and went away with the envelope which contained 400,00 Kshs. Upon reporting the above incident at Muranga Police Station, it became apparent to them, that you could be the one, who could have stolen the money. They therefore, charged you in court for the same and gave the Company a police abstract stating clearly, that the theft was by servant. As Company policy, once an employee is charged of theft, we are left with no alternative than to dismiss the servant as per *Employment Act* 2007, Chapter 44, Section 4 (g).

You are therefore hereby dismissed from duty from today. The Company shall pay you, your salary up to the date of this letter, including your pending leave days, subject to any liabilities accrued to your staff account as well as statutory obligations...”



18. As per the above letter, it is apparent that the basis for the claimant's dismissal was the criminal charge that was brought against him by the police, following the robbery incident. The claimant denied being part of the robbery incident.
19. It is not disputed that the claimant was charged in relation to the robbery that resulted in the respondent losing the sum of money in question. It is also appreciated that at the point of his arrest and arraignment, the claimant was a suspect as no charges had been confirmed against him by the Court.
20. From the record, the criminal proceedings were terminated and the claimant acquitted on account of the word of one Mr. Hillary Mulu from the respondent company. An excerpt from the court proceedings of 18<sup>th</sup> February, 2014, state as follows;

“Complainant- my names are Hillary Kyalo Mulu. ID No .... I live in Komarock face (sic) four. I work for total company as the internal auditor. I know the accused person. He was the manager of one of our stations. He has been a manager for long time. It is not NETCO which brought him to court. The police arrested him when he came to report a robbery. The accused (sic) had not criminalised the accused. I wish to withdraw the case against the accused. We have no complaint against the accused.”
21. This corroborates the claimant's testimony that the respondent withdrew the charges against him. On the flipside, this position contradicts the testimony of RW1, who testified that she was not aware of the outcome of the criminal case.
22. In any event, the said Mr. Hillary Mulu, stated as follows in his email of 23<sup>rd</sup> August, 2013: -

“I visited Muranga TSS on 27.08.2013 to deliver an audit report to CID Police investigating the robbery that occurred on 6<sup>th</sup> August, 2013 at the station. The amount stolen was KES400,237.00. Police arrested the Station Manager and charged him with ‘theft by servant’. He was released on a bond of Kes 300,000 and the case will be heard on 18<sup>th</sup> September, 2013. Netco is treating the matter as a robbery and will not press any charges on the Station Manager and will seek to have him acquitted when the case comes for hearing.”
23. From the foregoing, it is apparent that the criminal proceedings did not go full circle at the behest of the respondent. There was therefore no confirmation of the criminal charges against the claimant through a conviction from court. Could it be that the respondent did not believe that the claimant was culpable? May be so. Otherwise it is not clear what made the respondent make an about turn and withdraw the criminal charges against him?
24. Coupled with the foregoing, there is no evidence or suggestion that the respondent undertook independent investigations besides the police, so as to ascertain whether indeed the claimant was to blame for the robbery incident.
25. At the end of the day, the respondent could not confirm whether the claimant was indeed part of the robbery or not.
26. In absence of a conviction or such other evidence incriminating the claimant in the robbery, it follows that the reasons that led to his termination, lack substance.
27. It is also notable that the allegations of negligence on the claimant's part only arose during the hearing in Court. However, there was no reference to the same in his letter of dismissal. This can only be termed as an afterthought on the part of the respondent.



28. Therefore, the sole reason for the claimant's dismissal was the criminal charges brought against him and which evidently, did not result in a conviction as they were terminated midstream.
29. The upshot of the foregoing, is that the respondent has failed to discharge its evidential burden by proving that the reasons for the claimant's dismissal were fair and valid.

### **Fair procedure?**

30. The claimant has alleged that he was not subjected to fair procedure prior to his termination. On the other hand, the respondent disagrees.
31. The relevant provision in this regard is Section 45 (2) (c) of the Act, which places the burden of proving fair procedure, on the employer.
32. The specific requirements of a fair process are stipulated under Section 41(1) of the Act and to this end, an employer is required to notify an employee of the intended termination. As such, the employee is to be notified of the reasons thereof in a language he or she understands and in the presence of another employee or a shop floor union representative.
33. In the instant case, the respondent in its defence averred that it was desirous to commence a disciplinary process against the claimant hence he was requested to show cause why he should not be dismissed in accordance with section 44(4) (g) of the Act. The respondent further stated that irrespective of its attempts to follow due process, the claimant remained adamant and insisted that the police investigations would be best placed to exonerate him and prove him innocent. That as such, the claimant squandered the opportunity to be subjected to a fair process by failing to adhere to its directives.
34. The respondent's assertions notwithstanding, it did not adduce any evidence to back up the same. There was no letter or such other communication asking the claimant to show cause why disciplinary action should not be taken against him. Similarly, there is no communication from the respondent's end, inviting the claimant to subject himself to a disciplinary process.
35. There is also no evidence by the respondent, that the claimant refused to be subjected to an internal disciplinary process.
36. Coupled with the foregoing, the claimant's letter of dismissal did not refer to any process that had been undertaken or was to be undertaken prior to his dismissal. Simply put, the respondent did not prove that it subjected the claimant to a fair process prior to terminating his employment.
37. In the case of Postal Corporation of Kenya vs Andrew K. Tanui [2019] eKLR, the learned Judges of the Court of Appeal had this to say as regards the process contemplated under section 41(1) of the Act: -

“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 grounds 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 grounds of termination is made;



(iv) hearing and considering any representations made by the employee and the person chosen by the employee...”

38. It is therefore evident that section 41 merely provides the minimum requirements to be complied with by an employer and the same are mandatory. Anything short of the same amounts to an unfair termination.
39. Applying the provisions of section 41(1) of *the Act* to the case herein, I am led to conclude that the claimant was not accorded a fair hearing prior to his dismissal from employment.
40. Ultimately and in light of the foregoing, I find that the claimant’s termination was neither fair nor lawful.

### **Reliefs**

41. Having found that the claimant was unfairly and unlawfully terminated, the Court awards him compensatory damages equivalent to six (6) months of his gross salary.
42. The claimant is further awarded one month’s salary in lieu notice pursuant to his contract of employment.
43. The claim for salary increment is denied as the claimant has not laid down basis for the same.
44. The claimant has also prayed for service pay. I will decline to award the same as I note from his pay slips that he was contributing towards the National Social Security Fund (NSSF). In light thereof, he falls within the ambit of the exclusions stipulated under section 35 (6) (d) of *the Act*.
45. The claim for accrued leave is also declined for lack of evidence to prove entitlement to the same.

### **Orders**

46. In the final analysis, I enter Judgment in favour of the claimant against the respondent as follows;
- (a) A declaration that the claimant’s termination by the respondent was unfair and unlawful.
  - (b) An award of compensatory damages in the sum of Kshs 127,200.00
  - (c) An award of one month’s salary in lieu of notice being the sum of Kshs 21,200.00.
  - (d) The total award is Kshs 148,400.00.
  - (e) Interest on the amount in (d) at Court rates from the date of Judgement till payment in full.
  - (f) The claimant shall have the costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27<sup>TH</sup> DAY OF MAY, 2022.**

.....

**STELLA RUTTO**

**JUDGE**

Appearance\*\*:

For the Claimant Ms. Khafafa

For the Respondent Ms. Obonyo

Court Assistant Barille Sora



## **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 had 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.

**STELLA RUTTO**

**JUDGE**

