



REPUBLIC OF KENYA



**Kundu v Kenya Wildlife Service & another (Cause 106 of 2017)
[2022] KEELRC 1735 (KLR) (26 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1735 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
CAUSE 106 OF 2017**

**JW KELI, J
MAY 26, 2022**

BETWEEN

ALLAN WANYAMA KUNDU CLAIMANT

AND

KENYA WILDLIFE SERVICE 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

JUDGMENT

Issue

Unfair and unlawful termination

1. The Claimant following dismissal from service by the 1st Respondent filed a claim dated 11th December 2017 and received in court on the 14th December, 2017 seeking the following reliefs:-
 - (a) A declaration that the termination of the Claimant's employment was wrong and unfair.
 - (b) Reinstatement of the Claimant and payment
 - (c) Payment of salary arrears with effect from 21/12/2015 until payment is full.
 - (d) Payment of 12 months salary for wrongful and unfair dismissal from employment in the sum of Kshs. 301,800/-
 - (e) In the alternative and without prejudice to prayers, b and c above, the Claimant be paid severance pay.
 - (f) Salary of 12 monthly in lieu of notice in the sum of Kshs.301,800/-.
 - (g) Annual leave allowance for two years in the sum of kshs.20,000/-



- (h) An order that the 1st Respondent do issue a certificate of service to the Claimant
 - (i) Costs of the suit
 - (j) Interest of court rates.
 - (k) Any other relief that the court may claim fit and just to grant
- 2. Together with the claim the Claimant filed his bundle of documents exhibits AWK 1 (a) 1(b) 2 (a) 2 (b) 3,4,5,6 and his witness statement dated 11th December 2017.
- 3. The 1st Respondent entered appearance and appointed M/S Roseline Odede & Company Advocates to represent it. The Respondent filed/response to claim dated 8.5.2019. I received in court on 11.5.2018. The Respondent in addition filed following documents: -
 - (a) 1st Respondent's witness statement of Jacob Lengandu Kizwana dated 25.9.2019.
 - (b) 1st Respondent's list of witnesses dated 13.8.2019,
 - (c) Witness statement of Enos Ochieng Nyang'or dated 2.7.2019
 - (d) Witness statement of Vincent Mahan Samoo dated 9.8.2019
 - (e) 1st Respondent's list of issues dated 7.8.2019
 - (f) 1st Respondent's bundle of documents dated 7.8.2019 together with the bundle of documents.
- 4. The 2nd Respondent, the Hon. Attorney General entered appearance and filed reply to the Memorandum of Claim dated 12th June 2018 and received in court on the 25th June 2018.
- 5. The Claimant filed further statement dated 15th August 2019 and received in court on the 26.9.2019, together with further list of documents dated 15.8.2019 and the bundle of documents.

The Hearing.

- 6. The court heard the Claimant's case on the 17th February, 2021 where the Claimant gave evidence on oath and adopted his written statement as evidence in chief, produced his documents as evidence and was cross examined by counsel for the 1st Respondent.
- 7. The Respondent called 3 witnesses of facts namely: -
 - Vincent Mahan Samoo DW1
 - Enos Ochieng DW2
 - Jacob Kizwania DW3
- 8. The Respondents witnesses testified on oath, adopted their written statements as evidence in Chief, DW1 produced documents filed by Respondent under list of documents dated 7.8.2019 and marked as exhibits 1-6. The 3 witnesses were cross examined by counsel for the Claimant. Both parties closed their cases same day.

The Undisputed facts

- 9. It was undisputed fact that the Claimant was a former employee of the 1st Respondent and was dismissed from employment after a lengthy hearing process upto appeal board.



The disputed facts.

10. It was disputed by the Claimant whether the lengthy disciplinary hearing which took place while he was still working was fair. The reasons for the dismissal were also in dispute.

The Claimant's Case in summary

11. The Claimant testified that he was employed on 4th August 2011 and confirmed to employment in 2012. He was charged with several counts of absconding duty, forging medical claims and recovering money using names of colleagues, he was summarily dismissed on 21st December 2015 and appeal. It took more than one year for the Director of the 1st Respondent to communicate the decision on the Claimant's appeal which appeal was dismissed on 2nd August 2017. The Claimant stated that the termination was unlawful and unfair.

1st Respondent's case

The 1st Respondent admits the Claimant was enlisted in service on 4th August, 2011, that stated that although commended for good work the Claimant went ahead to contravene rules and regulations of service by absenting himself from duty without leave or lawful cause, making false entries in the OB in terming the information was false, fraudulently stealing and receiving money by many false medical Claims using medical allocation of fellow colleagues. That before termination on basis of those offences the Claimant was subjected fair hearing and upon appealing the decision of the Presiding officer the Clause to dismiss him from service was upheld by the Kenya Wild Service Disciplinary Appeals Advisory Board.

Determination

Issues for determination

12. The court having considered the Claimant's case and the Respondent's case is of the considered opinion the issues placed by the parties for determination are as follows:-
 - (a) Whether the termination of employment of the Claimant by the 1st Respondent was lawful and fair.
 - (b) Whether the claimant is entitled to reliefs sought.

a. Whether the termination of the Employment of the Claimant by the 1st Respondent was lawful and fair.

13. It is a considered position of the court that for termination of employment to be said to be lawful it must comply with the requirements of Section 43 of the *Employment Act*.
Section 43 requires proof of reason for termination by the employer. Section 43(2) guides the court on the prove of reasons by providing as follows, "43(2) the reasons 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". The termination is unlawful if the reasons did not exist.
14. Section 45 further expounds on the reasons by providing as follows: -"(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 and capability or (ii) based on the operational requirements of the employer
 - (c) That the employment in termination is in accordance with fair procedure.”
- 15. The criteria of fair procedure is provided under Section 41 of the [Employment Act](#) and the court finds three ingredients are to be met under the namely:-
 - i. The employer, before the termination of employment ought explain to the employee in a language they understand, the reason the employer is considering termination.
 - ii. Secondly, the employee is entitled to have another employee or a shop floor union representative of his choice during this explanation.
 - iii. Thirdly, the employee and his representative must be afforded opportunity to be heard and the employer must consider their representation on the grounds in its finding.”
- 16. The law discloses 2 tests to be determined by the court to determine whether the termination of employment is lawful and fair.
 - (a) Substantive test. This concerns the questions as to whether the reasons for the termination of employment were valid and justified as prescribed under Section 43 and 45 (2) of the [Employment Act](#).
 - (b) Procedural test. This concerns the procedure followed by the employer before termination of employment contract as prescribed under Section 41 of the [Employment Act](#).

The Substantive test.

- 17. The reasons for the termination of the Employment of the Claimant have to be valid . The burden of proof of the reason for the termination lies with the employer under S. 43 (2) of [Employment Act](#) . The reasons for the 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.
- 18. The burden of proof of reasons for termination lay with the Respondent. The Respondent charged the Claimant with various offences under 4 charge sheet. The hearing proceedings and outcome whereof produced as follows:-
 - Count 1: The Claimant was accused that he left his place of work without permission for 5 (five) days on different dates contrary to Regulations (5) f. There were 3 witnesses called. The accused pleaded guilty and there is a record of the minutes of presentation by all. Judgment was entered that the Claimant was guilty. The Claimant was surcharged salary amounting to kshs. 2,750 and fine of one day. Decision signed on 10th July 2015.
 - Count 2: The Claimant was charged with offence that he uttered provocative words to his superior likely to cause disturbance contrary to Regulation 5 (W) . The Accused had 2 witnesses and employer 3 and their evidence is reflected in the minutes . On this count the Claimant was acquitted.



Count 3: The Claimant was accused that he made false entries in on official document which is to his knowledge false contrary to Regulations 5 (11) . After hearing witnesses of Claimant and Respondent the Claimant was found guilty and sentence of severe reprimand was imposed.

Count 4: The Claimant was accused that he made false accusation against his superior contrary to Regulations 5 (MM). Having heard the witnesses the Claimant was given benefit of doubt and acquitted.

19. The decision of the disciplinary was on 10th July 2015. The minutes are signed. The presiding officer was Silas Muriithi (Defence exhibits 2 and 3).
20. On the 21st December, 2015 the Respondent issued the Claimant with a letter of dismissal from the service signed by the Acting Director General E. N. Mwangi. The letter reiterated the counts and the findings consistent with the charge sheets. The letter refers to 6 counts but enumerates the 4 counts. The court reads the reference to 6 counts is misplaced in the letter and finds it is a clerical error. The letter states that:-

“Due to the seriousness of the offences committed in one case, the Presiding Officer due to his inadequate powers forwarded the proceedings to an empowered officer for sentencing. The empowered officer then sentenced you to dismissal on 6th November 2015. This letter therefore serves as a formal communication to you that you have been dismissed from the service with effect from 21st December 2015.”. The Claimant was reminded of his right to appeal within 7 days.
21. The Claimant in his statement attributes his woes to bad relations with superior who is stated threatened to shoot him and reported to Mweiga police station. The disciplinary proceedings downplayed the allegations even though there was evidence of gun having been pointed at the Claimant alleging the witness was a casual and did not understand how guns are handled. Other witness said they saw Mr Magena with the gun with Claimant screaming he wanted to shoot him. The issue was related to causing disturbance and Claimant was acquitted on the count.
22. The Claimant states in paragraph 10 of his statement that after the disciplinary hearing he thought all was well but received a dismissal letter on 24th December 2022 when coming from night shift and returning his rifle to the Armory.
23. In paragraph 11 the Claimant states that the Empowered officer wrote a performance assessment letter which was forwarded to the Director General that was strongly recommending his re-establishment to service to bring proven capability as has been exhibited remarkable change when working under good leadership (exhibit 2 (c) dated 18th January 2016). The court notes the said letter is written after letter of dismissal.
24. The Respondent’s witness Vincent Mahan Samoo relied on his witness statement dated 9th August, 2019 avers that on 16th November 2015, the 1st Respondent’s headquarters received the charge sheets and orderly room proceedings from their Aberdares Office in respect of the Claimant. It was verified that the accused/Claimant therein was subjected to the orderly Room proceedings as required under (Armed Wing) Disciplinary Code 1990. The Witness(Samoo) stated in Paragraph 5 of their statement that the Human Capital division ratified the decision and communicated the same to the Claimant vide 21st December 2015 (letter of dismissal from service) and informed him of right of appeal.
25. On appeal, the Claimant appeared before appeals board whose Minutes of the proceedings on 12th and May, 2016 were produced (Document No. 4 of the 1st Respondent’s list of documents dated



7th August, 2019). The presentations of the Claimant are recorded. The Appeals Board asked the Claimant questions. The Claimant denied he took money for Ochieng but admitted he took for Jacob. The Claimant admitted he forged medical documents to make a claim in the name of Jacob's wife and said he regretted the decision. (Page 26 Q.5 of the Appeal Board Minutes). The Appeal Board found due process had been followed in arriving at the decision for dismissal from service and no new evidence presented.

Decision on whether the reason for dismissal was lawful and fair

26. The court is guided by the law in making decision whether the reason was lawful and fair. Section 43 (2) of the *Employment Act* reads "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".
27. Section 45 4 (b) a termination of employment shall be unfair where it is found that in all circumstances of the case the employer did not act in accordance with justice and equity in terminating the employment of the employee. Section 45(2) (b) reads:-" reason for the termination is a fair reason related to the employees conduct, capability or compatibility or based on the operational requirements of the employer."
28. The Claimant submits that the failure to call the accountant to explain what transpired was unfair as he was the one making the payments. The court finds that does not affect the validity of the findings by the employer. The Claimant did not call the said accountant in court as a witness or summon him.
29. DW3 Jacob Langandu Kizwania recorded and adopted his witness statement dated 25th September 2019 where he denied the documents used by Claimant to undue claims allegedly on his behalf and stated the signatures therein were forged. The forgery was admitted by Claimant before Appeals Board of the Respondent. DW3 admitted to having received Kshs.6500 from the Claimant which he said was for his leave allowance. The transaction is dated 8th August 2014. The Court finds that the transfer of the cash for whatever reasons does not affect or diminish the reason for forgery which is a criminal offence and ground for summary dismissal under section 44 (4) (g) of the *Employment Act*.
30. The Claimant admitted to the forgery as recorded in the Appeal Advisory Board Minutes at page 26 when he stated "I admit that I forged the documents and I regret for the action I did". The reasons given for dismissal were established to exist during the Orderly Room proceedings. On appeal the Claimant admitted to forgery of medical claims. The court finds the reasons for dismissal of the Claimant to have been proved by the Respondent as required under section 43 and 45 (2) of the *Employment Act*.
31. The court determines that the reasons for dismissal of service of the Claimant were valid and lawful.

Procedural fairness test.

32. The Claimant submits that though procedure was adopted by the employer, the same was not done in accordance with the law thus denying the Claimant equity and justice because he was never heard fairly and the decision to terminate him was not well communicated. The buttress its submission the Claimant relies on the decision of *Moses Ochieng -vs- Unliver Kenya Ltd* 2018 eKLR where Justice D. K Marete cited with approval the case of *Gilbert Mariera Makori -vs- Equity Bank Ltd* 2016 and observed " Section 41 is very categorical on the procedure to be followed before an employee can be dismissed or terminated on grounds of misconduct, poor performance or physical incapacity. First the employer must explain to the employee in a language the employee understands the reasons for which the employer is contemplating the termination or the dismissal. This must be done in the presence of a witness of the employee's choice who must either (sic) .. a fellow workmate. After such explanation the



employer must hear the employee's representation and the representation of the person accompanying the employee to the hearing. The employer must then consider the representation made by and or on behalf of the employee before making the decision whether or not to dismiss or terminate services of the employee”

33. Further the Claimant relies on the decision of the court in *Mary Chemweno Kiptui -vs- Kenya Pipeline Company Ltd* (2014) eKLR where the court observed that Section 41 of the [Employment Act](#) is couched in mandatory terms . The court finds that two decisions of the court are correct in their interpretation of the provisions of Section 41 of the [Employment Act](#).
34. The Respondent submits that due process was followed by the Respondent in arriving at the decision to dismiss the Claimant and relies on the decision in *Emmanuel Mburia Njoha -vs Baragwi Farmers Cooperative Society Ltd* (2020) eKLR. Where the Claimant sued for unfair termination after he was dismissed for failing to remit the monies for fuel sales to the bank as was expected of him. He was given a show cause letter but he failed to show why he did not deposit the bank in the bank account. The court held that the Claimant was granted hearing as provided for by Section 41 of the [Employment Act](#) and that his dismissal was proper and lawful.
35. The court found that the Claimant was informed of the charges and called his witnesses at the disciplinary proceedings. The Claimant and his witnesses presentations are captured in the minutes. The Claimant was convicted of 2 counts and later issued with a letter of dismissal on the same reasons. The Claimant was heard on appeal and his dismissal upheld and the minutes were also produced where his presentations are captures.
36. The court finds and determines that there was compliance with the provisions of Section 41 of the [Employment Act](#) before dismissal of the Claimant for service. The court finds and determines the dismissal of the Claimant from the Service for the Respondent was lawful and fair.

Whether the Claimant is entitled to reliefs sought.

37. The Respondent submits that the Claimant is not entitled to reliefs sought and to buttress its position relies on the decision in [Francis Nyongesa Kwenyu -vs- Edoret Water 7 Sanitation Company Ltd](#) (2017) eKLR where it was held “ having lost on a case of unlawful termination, he become disentitled to the relief's sought”. The court agrees that compensation and payment in lieu of notice are not available upon finding of fair termination. The court considered other two claims being annual leave allowance for 2 years in the sum of kshs. 20,000/- and order for issuance of certificate of service. On leave allowance for 2 years, at cross – examination the Claimant said he was asking for the allowance because the case was extended and if reinstated he prays he be given allowance for 2 years. The court finds and determines that the grounds given of the case having extended is not a basis for payment of leave allowance. The claim is dismissed.
38. On the issue of certificate of service. The certificate of service is a statutory right of the employee. The Respondent to issue the certificate of service to the Claimant pursuant to Section 51 of the [Employment Act](#).

Conclusion and disposition

39. The Claim dated 11th December 2017 is dismissed for lack of merit. The Respondent is hereby ordered to issue the Claimant with his certificate of service under Section 51 of the [Employment Act](#) and process his terminal dues with immediate effect.
40. Each party to bear own costs in the suit.



JUDGMENT DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 26TH DAY OF MAY 2022.

J W KELI,

JUDGE.

IN THE PRESENCE OF :-

Court Assistant : Brenda Wesonga

Claimant :-

Respondent :-

