



REPUBLIC OF KENYA



**Wambua v Kenol Kobil Limited (Cause 2331 of 2017)
[2022] KEELRC 1729 (KLR) (19 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1729 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2331 OF 2017**

L NDOLO, J

MAY 19, 2022

BETWEEN

JANEY MWENDE WAMBUA CLAIMANT

AND

KENOL KOBIL LIMITED RESPONDENT

JUDGMENT

Introduction

1. At the time I heard this case, the named respondent who at the material time was the claimant's employer, Kenol Kobil Limited, had been succeeded by Rubis Energy Kenya Limited. The issue of assignment of employment contract obligations is not a matter in dispute. For purposes of this judgment therefore, the name of the Respondent will be retained as Kenol Kobil Kenya Limited.
2. The claimant, Janey Mwendu Wambua was employed by the respondent on October 2, 2000. She worked until May 9, 2017 when she was dismissed, on allegations of gross misconduct.
3. The claimant subsequently sued the respondent, seeking relief for unlawful and unfair termination of employment, plus payment of terminal dues. Her claim is contained in a statement of claim dated November 15, 2017 and filed in court on November 22, 2017. The respondent filed a memorandum of defence on January 8, 2018 to which the claimant responded on January 23, 2018.
4. At the trial, the claimant testified on her own behalf and the respondent called its Human Resource Manager, Caroline Kamau and Group Audit and Compliance Manager, John Ndung'u. Thereafter, the parties filed written submissions.

The Claimant's Case

5. The claimant entered the respondent's establishment as a sales representative trainee in October 2000. She progressively climbed up the ladder to the position of LPG Manager as at October 2016.



6. The claimant worked for the respondent until May 9, 2017 when she was summarily dismissed. At the time of dismissal, the claimant's monthly salary stood at Kshs. 214,000.
7. The claimant avers that after her dismissal, the respondent proceeded to take possession of her Motor Vehicle Registration Number KCD 952U, without any right or justification.
8. The claimant claims that at the beginning of the year 2017, the respondent Company, in a bid to cut costs, initiated a scheme of getting rid of the older and long serving employees and replacing them with younger managers, who earned less than what the Company was spending on the senior long serving employees, like the claimant.
9. The claimant's case is that her dismissal was wrongful and unfair for the following reasons:
 - a. The claimant was not at any time during her employment, informed of any breach of rules of procedure, prior to the summary dismissal letter of 9th May 2017;
 - b. The claimant was not given a valid reason for her dismissal;
 - c. The claimant was not given a chance to defend herself on the allegations levelled against her;
 - d. The respondent did not issue the claimant with a certificate of service despite the claimant having worked for over 17 years;
 - e. The respondent had since 2013, been engaging in unorthodox ways of cutting down costs by reducing the number of employees, mostly high salaried employees and managers.
10. The claimant now seeks the following remedies:
 - a. A declaration that her dismissal was wrongful and unfair;
 - b. An order for aggravated damages;
 - c. Kshs. 2,568,000 being 12 months' salary in compensation;
 - d. Kshs. 2,728,500 being severance pay;
 - e. Kshs. 428,000 being 2 months' salary in lieu of notice;
 - f. Kshs. 278,000 being leave pay for 26 days;
 - g. Kshs. 214,000 being salary for the month of April 2017;
 - h. An order directing the Respondent to release Motor Vehicle Registration Number KCD 952U together with its original Logbook to the Claimant or in the alternative, compensation for the value of the Motor Vehicle;
 - i. Certificate of Service;
 - j. Costs plus interest.

The Respondent's Case

11. In its memorandum of defence dated and filed in court on January 8, 2018, the respondent denies that the claimant was unlawfully dismissed from her employment and states as follows:
 - a. The claimant was dismissed on grounds of gross misconduct arising from her breach of the respondent's code of conduct;



- b. The claimant's dismissal was procedural and fair and was carried out in accordance with the applicable laws and the respondent's human resources policy (HR Policy);
 - c. The claimant's dismissal on grounds of gross misconduct was justified and warranted in the circumstances.
12. The respondent concedes that the claimant was employed as a sales representative Trainee on October 2, 2000 and that she rose through the ranks to the position of LPG Manager.
13. The respondent states that on March 27, 2009, the claimant signed a conflict of interest statement/policy committing herself not to engage in any activities which would in any way, either directly or indirectly, amount to conflict of interest and adversely affect the respondent or any of its subsidiaries or affiliates.
14. The respondent avers that it carried out an internal audit for the period between January 2015 and April 2017, which revealed that the claimant had engaged in a series of transactions which were in breach of the respondents internal rules and procedures. The respondent accuses the claimant of:
 - a. Appointing an individual closely related to her at the Eastlands Service Station (Kayole) without informing or seeking approval of the Respondent, contrary to Clause XI (D) (3) of the HR Policy and the Respondent's Conflict of Interest Policy;
 - b. Opening and maintaining accounts without security deposits at the Eastlands Service Station between August 2015 and November 2015, contrary to the Dealership Licence Agreement between the Respondent and the Eastlands Service Station (formerly known as Kenol Hurlingham Station) and Kenol Kayole Service Station between February 2015 and August 2016; and
 - c. Allowing the Eastlands Service Station, Kenol Hurlingham Station and Kenol Kayole Service Station to exceed their credit limits without security deposits and bank guarantees.
15. The respondent states that based on the findings of the audit report, the claimant was invited to a disciplinary hearing on April 26, 2017 where she was required to show cause why disciplinary action should not be taken against her for gross misconduct in accordance with Clause V(F) of the HR Policy. The claimant is said to have attended the meeting but failed to provide any satisfactory reasons for her conduct. as a result, the respondent issued the claimant with a dismissal letter.
16. The respondent asserts that its decision to dismiss the claimant was solely premised on her gross misconduct and that the decision was justified and warranted in the circumstances. The respondent adds that the claimant was notified of the allegations raised against her at the disciplinary hearing held on April 26, 2017 and that she was given an opportunity to be heard but failed to satisfactorily defend herself.
17. With regard to Motor Vehicle Registration Number KCD 952U, the Respondent maintains that it acted within its legal and contractual rights in repossessing the said Motor Vehicle Registration. The Respondent avers that in 2015, the Claimant approached the Respondent expressing her desire to purchase a motor vehicle for her personal use and seeking a car loan in that regard.
18. The Respondent further avers that pursuant to Clause XI(J) of the HR Policy, the Respondent provided the claimant with a car loan of Kshs. 1,700,000 by issuing two payment vouchers to Smart Autos Limited on 6th August 2015 for Kshs. 900,000 and Kshs. 800,000.



19. The respondent states that Clause XI(J) of the HR Policy provided that the car loan would be paid over a period of 5 years. The Respondent adds that the Claimant failed to repay the full loan amount, thereby necessitating the Respondent to repossess and sell the Motor Vehicle to recoup the outstanding car loan amount.
20. The respondent denies the claimant's entire claim and puts her to strict proof.
21. The respondent claims to have communicated its willingness to pay the claimant her terminal dues upon clearance, which included:
 - a. An ex gratia payment in lieu of notice (1 month).....Kshs. 211,068.49
 - b. Pay for days worked up to the effective date.....281,424.66
 - c. Pro-rata leave allowance.....175,046.14
 - Total.....667,539.29
22. The respondent states that the claimant failed to clear and adds that the claimant's certificate of service has been ready for collection at its offices.

Findings and Determination

23. There are two (2) issues for determination in this case:
 - a. Whether the Claimant's dismissal was lawful and fair;
 - b. whether the Claimant is entitled to the remedies sought.

The Dismissal

24. The Claimant's dismissal was communicated by letter dated 4th May 2017 stating as follows:

“Dear Ms. Wambua,

Summary Dismissal

Management has taken note of a series of breaches of rules and procedures through a special Internal Audit done for the period January 2015 to April 2017 for the credit section the report showed grave concerns.

In line with the Company's code of conduct that clearly states that employees should carry out business with Honesty and Integrity in all aspects of their dealings; your actions amount to gross professional negligence contrary to the Employment Act No. 11 of 2007 44(4).

- i. The operations of Eastlands Service Station (Kayole) is operated by an individual closely related to yourself without disclosing the same to the management. This is contrary to the conflict of interest statement policy of KenolKobil Limited.
- ii. You opened and maintained accounts without a security deposit contrary to the requirements of the Dealership License Agreement between KenolKobil and Eastlands Service Station, formerly Kenol Hurlingham stations in the period August 2015-November 2015 and Kenol Kayole Service Station in the period February 2015-August 2016.



- iii. You specifically allowed Eastlands Service Stations, Kenol Hurlighum and Kenol Kayole to operate exceeding their credit limits without security deposit and bank guarantees.

You were invited for a disciplinary hearing on 26th April 2017 to defend the above raised allegations, which you failed to answer satisfactorily to the allegations instead it turned out to be rude in your baseless defense.

In the circumstances therefore, the management was left with no alternative other than to Summarily Dismiss You from your employment with this organization which we hereby do, forthwith, effective 10th May 2017.

You are therefore required to hand in your company I.D Card, Car Keys and the Medical cards for yourself and family.

All the moneys that may be owed by you to the company will be calculated and deducted from your final dues.

Yours faithfully,

(signed)

David Ohana

Group Managing Director”

25. This letter cites ‘gross professional negligence’ as the reason for the claimant’s dismissal. in particular, the claimant is accused of breaching the respondents conflict of interest policy by giving preferential treatment to a service station namely; Eastlands Service Station (Kayole) which, according to the respondent, was operated by an individual closely related to the claimant.

26. Section 45 of the [Employment Act](#) provides as follows:

45.

- (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; and
 - iii. that the employment was terminated in accordance with fair procedure.

27. Regarding the requirement for a fair reason for termination of employment, Section 43 of the Act obligates the employer to establish a valid reason that would cause a reasonable employer to terminate employer. This is what is ordinarily referred to as ‘the range of reasonable responses test.’

28. In the final submissions filed on behalf of the Respondent, reference was made to the decision in [CFC Stanbic Bank Limited v Danson Mwashako](#) [2015] eKLR where the Court of Appeal adopted the



following definition of ‘the range of reasonable responses test’ as captured in the *Halsbury’s Laws of England*, 4th Edition, Vol. 16(1B) para 642:

“...In adjudicating on the reasonableness of the employer’s conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee’s conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if it falls outside the band it is unfair.”

29. I must add that the establishment of a valid reason for terminating employment is achieved at the shop floor where the employee is given adequate opportunity to respond to the accusations against them by making representations in rebuttal. This is the essence of section 41 of the *Employment Act* which provides:

41.

- (1) Subject to section 42(1) an employer shall, before terminating the employment of an employee on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during the explanation.
- (2) 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.

30. In *Kenya Plantation & Agricultural Workers Union v Finlays Horticulture Kenya Ltd* [2015] eKLR it was held that the procedural fairness dictates of section 41 of the *Employment Act* are an essential ingredient of fair labour practices.

31. The Claimant denied all the charges levelled against her and added that she was not given an opportunity to defend herself, prior to the dismissal. In her reply to the memorandum of defence dated January 22, 2018 and filed in court on January 23, 2018, she states that the only meeting she attended was one called by the Managing Director on April 26, 2017, where she was grilled and asked questions about the Marketing Manager. She asserts that she was not in any way, the subject of the said meeting.

32. The Claimant disowned minutes produced by the respondent as a record of the meeting of April 26, 2017. Significantly, these minutes which were filed on the day the matter came up for hearing on November 9, 2021, were not signed by the Claimant. In fact, the minutes were signed by only one



person, John Githiomi yet, the attendance list showed five (5) persons. No explanation was given as to why the other recorded participants did not sign the minutes. What is more, the respondent chose not to call Githiomi as a witness and the court was therefore unable to verify the authenticity of these minutes.

33. The Respondent's first witness, Caroline Kamau who admittedly, was not part of the process leading to the Claimant's dismissal, confirmed that the Claimant was not issued with a show cause letter prior to the dismissal. Kamau further confirmed that there was no evidence of the Claimant having received prior notice of the charges levelled against her.

34. In its decision in *Rebecca Ann Maina & 2 others v Jomo Kenyatta University of Agriculture and Technology* [2014] eKLR this Court stated the following:

“...in order for an employee to respond to allegations made against them, the charges must be clear and the employee must be afforded sufficient time to prepare their defence. The employee is also entitled to documents in the possession of the employer which would assist them in preparing their defence. The employee is further entitled to call witnesses to buttress their defence.”

35. The respondent's second witness, John Ndung'u who conducted the audit that allegedly led to the claimant's dismissal, told the court that the claimant was not involved in the audit and that the audit report was not availed to her. How then, was the claimant expected to respond to the charges levelled against her?

36. In the case of *Josephat Nyakundi Omweri v K-Rep Bank Ltd* [2015] eKLR Radido J stated the following:

“...an audit or investigation within the employment relationship is to gather the facts to establish whether there are grounds for a disciplinary action and after the facts have been established the employer should inform the employee of the allegations or facts and give the employee time to make a response.”

37. In the present case, the Respondent kept both the investigations and the outcome to itself, much like some secret weapon to be used at whim. The claimant was thus not given an opportunity to respond to the allegations, which were only disclosed in the letter of summary dismissal.

38. Moreover, it is evident that the respondent, in its haste to get rid of the claimant, not only violated the law but also breached its own internal procedure rules by starting at the top. If indeed, there were genuine issues regarding the claimant's conduct, a disciplinary process would have begun at the lower level, in accordance with the respondent's human resource policy which states:

F. It is desirable that any case of disciplinary action which may lead to involuntary termination or dismissal be preceded by an inquiry into all the relevant circumstances at which the employee involved may fully acquaint with the charges against him and be fully heard in his defence. The Responsible Supervisor or other inquiry person appointed for the purpose, shall hear and record particulars of the charge and defense and shall make a recommendation to the next higher level management. If practicable, the Human Resources Manager should be present at such inquiry. Upon receipt of the recommendations of the inquiry person, Management shall decide the actions to be taken and the employee will be advised accordingly.



39. If the Respondent's record is to be believed, the claimant's case was handled by the top management, including the group managing director, right from the start. This was clearly contrary to the above stated internal disciplinary process.
40. On the whole, I find and hold that the allegations levelled against the Claimant were not proved as required by section 43 of the *Employment Act*. I further find and hold that in effecting the claimant's dismissal, the respondent violated the procedural fairness requirements set by section 41 of the act and also breached its own internal disciplinary rules. The resultant dismissal was consequently substantively and procedurally unfair.

Remedies

41. I therefore award the claimant twelve (12) months' salary in compensation. In arriving at this award, I have considered the claimant's long service plus the respondent's unlawful and callous conduct in the dismissal transaction.
42. I further award the claimant one (1) month's salary in lieu of notice as provided in her letter of appointment.
43. In the absence of leave records to the contrary, the claim for leave pay succeeds and is allowed. The claim for unpaid salary is admitted and is payable.
44. I will now deal with the issue of Motor Vehicle Registration Number KCD 952U. From the evidence on record, this Motor Vehicle was paid for by the Respondent but was registered in the name of the claimant. The respondent states that the purchase price of the motor vehicle was in the form of a loan to the claimant. In advancing this argument, the respondent sought to rely on a Car Loan Application Form dated August 6, 2015, an incomplete Loan Agreement and an unregistered Chattels Mortgage. On her part, the claimant maintains that the Motor Vehicle was a benefit to her. She points out that no deductions were ever made from her salary on account of the purchase price of the Motor Vehicle.
45. I have looked at the documents produced by the parties with respect to the subject Motor Vehicle and find that there was no valid loan agreement between the claimant and the respondent. I further find that the Chattels Mortgage, being unregistered, was null and void.
46. The only conclusion to make in the circumstances is that ownership of Motor Vehicle Registration Number KCD 952U had fully accrued to the claimant as a benefit, without any liability on her part. The Respondent's action of repossessing and/or detaining the Motor Vehicle was therefore unlawful.
47. The court takes judicial notice that with the passage of time the subject Motor Vehicle has depreciated in value. The just order to make under this head therefore is that the Respondent shall pay to the claimant the full value of the Motor Vehicle as at the date the Respondent repossessed the Motor Vehicle from the claimant.
48. No basis was established for the claims for aggravated damages and severance pay, which therefore fail and are disallowed.
49. Ultimately, I enter judgment in favour of the claimant as follows:
 - a. 12 months' salary in compensation.....Kshs.2,568,000
 - b. 1 month's salary in lieu of notice.....214,000
 - c. Leave pay for 26 days (214,000/30*26).....185,467
 - d. Outstanding salary.....281,425



Total.....3,248,892

50. This amount will attract interest at court rates from the date of judgment until payment in full.
51. The Respondent is further directed to pay to the claimant the full value of Motor Vehicle Registration Number KCD 952U as at the date the Respondent repossessed the Motor Vehicle from the claimant.
52. The claimant is also entitled to a certificate of service plus the costs of the case.
53. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF MAY 2022

LINNET NDOLO

JUDGE

Appearance:

Mr. Change for the Claimant

Miss Onyango for the Respondent

