



REPUBLIC OF KENYA



**Ali v Grain Industries Limited (Cause 3 of 2020)
[2022] KEELRC 1165 (KLR) (13 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1165 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 3 OF 2020
B ONGAYA, J
MAY 13, 2022**

BETWEEN

ISMAIL AHMED ALI CLAIMANT

AND

GRAIN INDUSTRIES LIMITED RESPONDENT

JUDGMENT

1. The claimant filed the statement of claim on January 29, 2020 through Jengo Associates Advocate. There is no dispute that the respondent employed the claimant as its Regional Sales Manager per the letter of employment dated November 20, 2016. The employment commenced on January 1, 2017 for a term of 5 years and at Kshs. 150, 000.00 per month in salary. Clause 9 on resignation stated thus, “Should you wish to resign from the Company you shall be required to serve a six (6) months’ notice or payment of an equivalent amount in lieu of such notice to the company.”
2. The claimant’s case is that the respondent unlawfully and unfairly terminated the contract of employment on August 20, 2019 and without offering any genuine reasons. Further the respondent did not follow due procedure and the termination was unlawful, unfair and malicious. The claimant pleads that the termination was in breach of sections 41, 44, 45, 46 and 47 of the *Employment Act, 2007*. He claimed against the respondent as follows:
 - a) Unpaid salary for July, August, and September at Kshs. 150, 000.00 per month thus Kshs. 450, 000.00.
 - b) Six months’ salary in lieu of notice Kshs. 900, 000.00.
 - c) 15 days of unpaid due annual leave Kshs. 75, 000.00.
 - d) 12 months’ salary compensation for unlawful termination at Kshs. 150, 000.00 thus Kshs. 1, 800, 000.00.



- e) Total claim Kshs. 3, 225, 000.00.
 - f) Certificate of service.
- The claimant prayed for judgment against the respondent for:
- a) Special damages of Kshs. 3, 225, 000.00.
 - b) Interest at court rates from the date of filing the suit.
 - c) Certificate of service.
 - d) Costs.
3. The respondent filed the statement of response to the claim on June 11, 2020 through Balala & Abed Advocates and on January 5, 2022 changed the advocates to Masila and Saeed Advocates. The respondent admitted employing the claimant as pleaded for the claimant. The respondent pleaded that the claimant was dismissed on account of loss of trust and confidence. Further, the respondent stated that the claimant was accorded fair hearing and due process was accorded per provisions of the Employment Act, 2007 but the claimant opted not to participate in the same. The respondent prayed that the statement of claim be dismissed with costs.
 4. The claimant filed a reply to the statement of response on August 18, 2020 and reiterated that judgment be entered in his favour per the statement of claim.
 5. The claimant testified to support his case and the respondent's witness (RW) was the respondent's Human Resource Manager one Bakari Bwetta. Final submissions were filed for the parties. The Court has considered all the material on record and makes findings as follows.
 6. To answer the 1st issue for determination, the Court has already found that there is no dispute that the parties were in a contract of service whose particulars are as pleaded for the claimant.
 7. To answer the 2nd issue, the evidence is that the contract of employment was terminated by the letter of summary dismissal dated August 15, 2019. The letter referred to the respondent's letter to the claimant dated August 15, 2019, the disciplinary hearing on August 19, 2019 and the respondent's discussions at that meeting whose outcome was being confirmed, the failure by the claimant to comply with multiple opportunities to attend disciplinary hearing, and the letter by the claimant's advocates dated August 27, 2019 indicating that the claimant would not attend disciplinary hearing which per the dismissal letter, further compounded the claimant's indifference throughout the disciplinary process and was inconsistent with the continuation of the claimant's contract of employment. The letter continued thus, "By virtue of your conduct, the Company (GIL) is inclined to conclude that you have fundamentally breached your obligations as an employee. Consequently, the management has adopted the disciplinary committee's recommendation to summarily dismiss you from service for loss of trust and confidence as provided for under your employment contract effective from August 19, 2019." The letter further stated that the claimant's terminal dues would be computed as follows:
 - a) Days worked up to 19.08.2019.
 - b) Leave days accrued as at 19.08.2019.
 - c) Any off days worked as at 19.08.2019.
 - d) Less statutory deduction applicable.
 8. The 3rd issue for determination is whether the termination was unfair, wrongful and unlawful as alleged for the claimant.



9. The claimant's evidence is that on July 9, 2019 at about 10.00am he was on duty in Nakuru when Benson Ochieng, the respondent's Head of Sales telephoned him and conveyed that the claimant's phone had been tracked and it had been discovered that the claimant had been in constant communication with Dola Directors of Kitui Millers who were the respondent's competitors in the market. The claimant testified that he replied Benson that he had not been in such communication. Benson also alleged that the claimant had taken Dola orders for sugar and Rice – yet Dola did not sell rice and sugar as far as the claimant was aware. The claimant thereafter appears to have telephoned RW and RW informed the claimant that it had been decided that the claimant goes back to the respondent's Mombasa office and leave the assigned official motor vehicle in Nakuru. It would appear that the claimant travelled to Mombasa as directed and by his evidence he met RW on July 10, 2019 and his testimony was that RW was not willing to listen to him but asked him to resign and the claimant declined to do so.
10. Material evidence and not in dispute at all is as follows. The respondent issued a letter to show-cause dated July 12, 2019 against the claimant. The claimant confirmed he received that letter. The allegations were that the claimant had posted Dola wheat flour brand in his WhatsApp profile and send an insubordination text message to respondent's CEO one Mr. Munir. The letter continued thus, "The Company finds you grossly negligent in your position being one of the senior staff in sales department, as Company Regional Sales Manager who is expected to uphold the company code of ethics under conflict of interest, of which its extract is well spelt out in clause 10 of your contract letter. This also demonstrated divided loyalty between your employer and competitor company." The letter stated that the claimant's behaviour contravened section 44 (d) and (g) of the *Employment Act, 2007*. The letter asked the claimant to submit his written defence showing why action should not be taken against him and to do so before 0500 hrs on July 15, 2019. The letter stated that the claimant would remain on suspension until after the management reviewed his defence. The claimant testified that he received the letter on same July 12, 2019 at 4.00pm but did not submit his written defence.
11. The respondent issued and the claimant testified that he received the letter dated 17.07.2019 inviting him to a disciplinary committee meeting on July 22, 2022 at 3.00pm to discuss the charge in the show cause letter of July 12, 2022. The letter requested the claimant to be accompanied by a fellow colleague or any person he trusted as his witness at the meeting. The claimant testified that he did not attend the meeting.
12. It appears the meeting was postponed due to the claimant's absence and the respondent rescheduled the meeting to July 23, 2019 at 3.00pm and again reminded the claimant to be accompanied by a person of his choice or colleague to witness proceedings – as per letter of 2nd reminder dated July 22, 2019. The claimant testified that he received the letter but did not attend the hearing because his only trusted person was his lawyer and whom he wanted to be present and he did not prefer a co-worker such as his son who was also in the respondent's employment.
13. The respondent issued a 3rd reminder letter dated August 15, 2019 rescheduling the disciplinary hearing to August 19, 2019 at 10.00am upon same terms as earlier letter of July 22, 2019. The claimant received the letter but did not attend as was scheduled. His testimony was that he had denied allegations as levelled by Benson and he had already been removed from the respondent's staff system such as staff WhatsApp group, intranet, and check-in biometric system. Further on July 10, 2019 he had denied all the allegations but RW had refused to listen to him and instead asked him to resign. In the process, the claimant testified that he had written an SMS to the CEO Mr. Munir Thabit on July 10, 2019 at 13.08 hrs thus, "Assalamu aleikum Asante Sana Bwana Munir Uminitumia vyakutosha lakini hakuna neon Mungu Yuko. Yote niliofanya huyaoni wasikiza fitina ndogo. Sisemi mengi Mungu atanilipia. Mimi narudi lakini. Sijikukuona Rizki yatoka Kwa Allah. Shukran Sana."



14. The claimant did not attend the disciplinary hearing on August 19, 2019 as was scheduled. The meeting proceeded as per the minutes exhibited for the respondent. The minutes show the preliminaries of those present in the panel, the agenda and on charges is stated thus, "In light of Mr. Ismail blatant refusal to attend the disciplinary meeting to answer to the charges preferred herein it was noted and concluded that the disciplinary committee had established reasonable grounds to believe that the said actions of insubordination and conflict of interest were indeed committed by the accused." The panel then recommended summary dismissal of the claimant. The letter of summary dismissal issued on August 20, 2019.
15. The claimant's advocates had written to the respondent the letter dated August 2, 2019 stating that in the show cause letter the respondent had already found the claimant grossly negligent and whose effect was that the disciplinary process would not be fair but would amount to trying to sanitize an already predetermined and unfair process. The advocates further requested for better particulars of the allegations including:
 - a) Particulars of the conflict of interest, place, time date and people involved in advancing the alleged perpetuation of conflict of interest.
 - b) Particulars of divided loyalty between the client and the competitor.
 - c) Date, time and day when the claimant's WhatsApp profile had Dola wheat flour brand including an extract of the same.
 - d) Particulars of the alleged insubordination of the company CEO.
16. The letter stated that the respondent provides the particulars soonest to enable the claimant to respond promptly and substantively to the allegations. The advocates' letter also demanded payment of withheld salary during the suspension period.
17. The respondent had replied the advocates' letter by the letter dated August 7, 2019 to the effect that the issues were respondent's internal disciplinary matters against the claimant falling outside legal representation per the *Advocates Act*; it amounted to gross misconduct for the claimant to reveal the on-going disciplinary process to third parties, his advocates; no determination had been made against the claimant dismissing him but the claimant had refused to subject himself to the genuine disciplinary process; and the advocates to advise the claimant to attend the disciplinary hearing per the letter to show cause and invitations to do so already communicated to the claimant. Further, if the claimant failed to attend, stern action would be taken against him.
18. By letter dated August 27, 2019 the advocates had replied the respondent's letter of August 7, 2019 stating that the claimant would not attend the disciplinary hearing in view of the respondent's design to sanitize its preconceived decision and that the claimant would take it that he had been constructively terminated and move to court accordingly.
19. The Court has considered the flow of events. RW testified thus, "I see paragraph 3 of the show cause letter. It says claimant had been found in gross negligence as sales officer. It made a finding of gross negligence. He was found grossly negligent per the show cause letter. Letter of August 2, 2019 by the claimant's Advocates was received. I confirm letter by Advocates states claimant requested for particulars of allegations. They were never provided to him. I confirm as much. I confirm notice to show cause of July 12, 2019. Claimant was to give a written defence. Claimant was entitled to particulars of allegations so as to defend himself. Defence was to be in writing. Particulars were necessary to defend himself but I say not always. By not giving particulars we made it impossible not to defend himself."



20. By that evidence and as submitted for the claimant, RW has confirmed that the claimant requested for particulars of the allegations to enable him to reply the allegations in the show cause letter but the respondent failed to provide the particulars. RW has also confirmed that the wording in the letter to show cause made a predetermination that the claimant had been found grossly negligent even prior to the purported written defence and disciplinary hearing. The Court returns that it cannot therefore be found that the procedure applied by the respondent to terminate the claimant was fair as envisaged in section 45 (2) (c) of the Employment Act, 2007. As submitted and urged for the claimant, while purporting to invoke notice and disciplinary hearing per section 41 of the Act, RW has confirmed that the letter to show cause had already found the claimant culpable of gross negligence and the Court finds the claimant's lamentation as valid that the invoked procedure was merely calculated to sanitize a pre-determined disciplinary action against the claimant, namely dismissal. The letter to show cause had already imposed a suspension and it was practically without pay, confirming the claimant's fears of a predetermined adverse action through a pretended disciplinary process. The Court therefore finds that the claimant has established that the procedure leading to his termination was unfair.
21. While making that finding, the Court finds that there was nothing unlawful or undermining the respondent's prerogative to exercise disciplinary powers over the claimant when the claimant's advocates wrote requesting the respondent to provide particulars of the allegations.
22. The Court has considered RW's testimony correcting the respondent's otherwise unjustified hostility to the claimant's appointment of an advocate to act in that administrative disciplinary process by issuing the correspondence that was exchanged and when RW testified in cross-examination thus, "When served the notice to show cause, his advocates wrote asking for particulars. On August 7, 2019 we say his seeking legal advice was an act of gross misconduct and breach of contract per paragraph 3. I wrote that paragraph. I retract. By seeking legal advice, it did not amount to a breach of contract or gross misconduct."
23. The Court, on the issue of legal representation (during administrative processes and proceedings) cites its opinion in the judgment in Republic -Versus- Arnold Karani Njiru, Fund Account Manager, Laikipia East Constituency Fund and 10 Others Ex-parte Amin Mohammed Ali [2015]eKLR, thus,
- "While making that finding, the court holds that in a democratic civilised society, the right to legal representation during administrative decision making is desirable and in absence of any identifiable bar it is a crucial component of fair hearing which cannot be defeated in absence of clear statutory qualification. In the present case, there was no such statutory qualification and the court holds that the applicant was entitled to appear at the hearing together with his advocate especially in view of the gravity and consequence of the allegations that had been levelled against the applicant by the respondents. In this case, the respondents did not advance any ground that would have made legal representation inimical and the court finds that the respondents having allowed and not objected to the applicant attending the hearing with his advocate, the respondents were thereby bound to allow the advocate to effectively participate in the proceedings. It was desirable that the respondents exercised their discretion in favour of allowing the advocate to attend but by resisting the advocate's participation in the proceedings, the court finds that the applicant's legitimate expectation to the legal representation was thereby thwarted and the proceedings, taking into account the other defects stated in this judgment, fell short of the fair hearing the applicant was entitled to."
24. In the instant case, the claimant did not seek to attend the disciplinary hearing accompanied by his advocate but only appointed his advocate to issue the demand letters as was done and there was absolutely nothing wrong in so appointing the advocate to act. Further, the respondent had



already advised the claimant to attend the hearing accompanied by a colleague (as envisaged in section 41 of the *Employment Act*) or such other person the claimant trusted to be a witness of the disciplinary proceedings – and having advised on such other trusted person, the Court considers that the respondent was accordingly bound and it would be out of the terms of the invitation letter for the disciplinary hearing if, the claimant attended accompanied by the advocate and the respondent were to object on account that the advocate would be a stranger to the otherwise internal disciplinary hearing.

25. Turning to the reasons for the termination, the Court finds that as urged for the claimant, the reasons in the summary dismissal letter were clearly at a substantial or significant variance from the reasons in the letter to show-cause. The reasons in the letter of summary dismissal were that the claimant had severally failed to attend the disciplinary hearing, the letter by the claimant’s advocates dated August 27, 2019 stating that the claimant would not attend hearing for lack of provision of particulars of the allegations was inconsistent with the continuation of the claimant’s contract of employment, and fundamental breach of his obligations as an employee. The letter to show cause had on the other hand alleged conflict of interest and insubordination by sending a text message to the CEO and posting on his WhatsApp profile a Dola wheat brand. In re-examination, RW testified thus, “From letter of August 20, 2019, the reason for termination was loss of trust and confidence based on allegation that he was selling products of respondent’s main competitor.” The Court finds that evidence contradictory to the show cause letter and the purported letter of termination dated August 20, 2019. In view of such contradictory evidence, the Court returns that the respondent has failed to show that the reason for termination existed and was valid as at the time of termination per section 43 of the Act. The Court further finds that the claimant raised a valid grievance when by his advocates’ letters, he requested for particulars of the allegations and instead the respondent failed to resolve the grievance and the claimant further raised a grievance that he would not attend the disciplinary hearing - and the respondent imposed the letters raising the grievances as part of the reason for termination. By imposing dismissal based on such valid grievances, the Court finds that the termination was unfair per section 46 (h) of the Act which provides that it does not constitute a fair reason for dismissal or imposition of disciplinary penalty on account of an employee’s initiation or proposed initiation of a complaint or other legal proceedings against his employer except where the complaint is shown to be irresponsible and without foundation. To that extent the Court finds that the reasons for termination was unfair and unlawful.
26. The Court further finds that the respondent has therefore failed to satisfy its burden under section 47(5) of the Act of justifying the grounds for the termination of the claimant’s employment. Further the respondent has failed to show that as at termination, there existed valid or genuine reasons to dismiss the claimant as envisaged in section 43 of the Act. In particular, RW testified that indeed, no explanation or particulars of fundamental breaches were stated in the termination letter. RW further testified thus, “The witnesses who told me that claimant sold competitor’s products are not in Court and their statements are not in Court. Names of people who gave me the information not disclosed at all.” He had also testified thus, “I have no evidence that he was selling competitor’s goods. I have no evidence in Court that he promoted competitor’s products on WhatsApp. Meeting was held on August 19, 2019. I see Agenda. It proceeded in terms of decision making but no witnesses or evidence was considered. Respondent made allegations. It had evidence. It was not before decision making panel because claimant was absent. Claimant was not there. Thus no evidence was taken or evaluated. The complainant was the respondent through Human Resource Manager, myself, (RW). One member of the panel was myself. I was member of the Committee.” By that testimony by RW the Court finds that both at the disciplinary hearing and in Court, the respondent has failed to justify the reasons for termination and has failed to show that as at termination, the purported reasons for termination existed as fair, genuine or valid.



27. To answer the 3rd issue for determination the Court returns that the summary dismissal was unfair, unlawful and unjustified both in procedure and substance,
28. The 4th issue for determination is whether the claimant is entitled to 12 months' salaries in compensation under section 49 of the Act. It is submitted and established for the claimant that the term contract was for 60 months and he had served for only about 30 months so that he had 30 months of unexpired tenure and which the Court has considered as the measure of the claimant's otherwise lost earnings. The Court has considered the aggravating factor that the claimant was partly dismissed on account of unlawful and unfair reason namely, floating through his advocates the grievance of having not been provided particulars of the allegations. The Court has further considered the aggravating factor that while the letter of summary dismissal was dated August 20, 2019 and taking effect on August 19, 2019, it was actually served belatedly through the claimant's lawyer on September 17, 2019. The Court has considered the respondent's submission that the claimant did not respond to the letter to show –cause promptly but the claimant subsequently raised a concern that the letter to show-cause appeared to predetermine his culpability and he had not been provided particulars of the allegations. The Court has also considered the SMS the claimant has exhibited and which he wrote to the respondent's CEO suggesting he was leaving to God his otherwise valid denials to the allegations as had been orally levelled against him on July 10, 2019 and suggesting he would not meet the CEO. The claimant's contribution to his predicament is, in the circumstances, fixed at 25% and, he is awarded 9 months' salaries in compensation making Kshs. 1, 350, 000.00.
29. The 5th issue for determination is whether the claimant is entitled to the other remedies as prayed for. The Court finds as follows:
- a) The claimant and RW confirmed in their respective testimonies that under clause 9 of the contract the termination notice was 6 months. The Court awards the claimant Kshs. 900, 000.00 in lieu of the notice of termination as prayed for. The Court reckons that the doctrine of reciprocity in contracts applies and section 35(2) of the Act expressly makes section 35(1) inapplicable where the contract of service has provided for a greater termination period of the notice of termination than was envisaged in section 35(1) of the Act.
 - b) The claimant's last day at work was July 12, 2019 (date of suspension) and dismissal was effective 19.08.2019. For July 2019 he is awarded Kshs. 150, 000.00 in outstanding salary. For 19 days in August he is awarded 19/31 x 150, 000 making Kshs. 91, 935.50. The sum for outstanding salary is therefore Kshs. 241, 935.50. The Court finds that the claimant has made no justification for pay beyond the effective date of the unfair summary dismissal including September 2019 as was claimed and prayed for. While making that finding the Court has considered that the parties had no agreement on suspension of the claimant without pay. Thus the Court upholds and follows the holding in *Grace Gacheru Muriithi –Versus- Kenya Literature Bureau* (2012) eKLR, thus, "The court considers that an employee on interdiction or suspension has a legitimate expectation that at the end of the disciplinary process he or she will be paid by the employer all the dues if the employee is exculpated. Conversely, if the employee is proved to have engaged in the misconduct as alleged and at the end of the disciplinary process the employee has not exculpated himself or herself, the court considers that the employee would not be entitled to carry a legitimate expectation to be paid for the period of suspension or interdiction. Thus, the court holds that whether an employee will be paid during the period of interdiction or suspension will depend upon the outcome of the disciplinary proceedings. It would be unfair labour practice to deny an employee payment during the period of interdiction or suspension if at the end of the disciplinary process the employee is found innocent. Similarly, it would be unfair labour practice for the employer to



be required to pay an employee, during the suspension or interdiction period if at the end of the disciplinary process the employee is found culpable. Accordingly, the court finds paragraph 6.2.4 of the respondent's Terms and Conditions of Service to be unfair labour practice to the extent that the provisions deny the employees payment even in instances where they exculpate themselves at the end of the disciplinary process. To that extent, the provision offends Sub-Articles 41(1) of *the Constitution*; it is unconstitutional."

- c) The summary dismissal letter provided for payment of accrued leave days and in absence of any contrary evidence and submission, on a balance of probability, the claimant is awarded Kshs. 75, 000.00 for leave days as prayed for.
 - d) The claimant is entitled to a certificate of service per section 51 of the Act.
 - e) As the claimant has succeeded in his claims, he is awarded costs of the suit.
30. In conclusion judgment is hereby entered for the claimant against the respondent for:
- 1) Payment of the sum of Kshs. 2, 808, 871.00 (less PAYE) by July 1, 2022 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.
 - 2) The respondent to deliver the claimant's certificate of service per section 51 of the Act by May 31, 2022.
 - 3) The respondent to pay the claimant's costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 13TH MAY, 2022.

BYRAM ONGAYA

JUDGE

