



Isaac (Suing as the administrator of the Estate of Edmund Wasike Olweyo) v National Cereals and Produce Board (Cause 377 of 2017) [2022] KEELRC 1414 (KLR) (29 June 2022) (Judgment)

Neutral citation: [2022] KEELRC 1414 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 377 OF 2017**

**S RADIDO, J
JUNE 29, 2022**

BETWEEN

**AMINA ISAAC CLAIMANT
SUING AS THE ADMINISTRATOR OF THE ESTATE OF EDMUND WASIKE
OLWEYO**

AND

NATIONAL CEREALS AND PRODUCE BOARD RESPONDENT

JUDGMENT

1. The Cause was heard on 11 July 2019 and 10 March 2022. Edmund Wasike Olweyo (the Claimant) and the Regional Manager, Head of Human Resource and Regional Auditor with the National Cereals and Produce Board (the Respondent) testified.
2. The Claimant filed his submissions on 28 June 2022 (should have been filed/served by 20 May 2022), and the Respondent on 27 June 2022 (should have been filed/served by 17 June 2022).
3. The substantive Claimant passed away after testifying, and on 24 November 2020, the Court granted leave for him to be substituted with the administrator of his estate.
4. The administrator filed an Amended Memorandum of Claim on 14 December 2020 (the same should have been filed and served on or before 11 December 2020).
5. The Court has considered the pleadings, evidence, and submissions and has identified the Issues for determination as examined hereunder.



Unfair termination of employment

Procedural fairness

6. Section 35(1)(c) of the *Employment Act*, 2007 envisages the employer issuing a written notice of termination of employment, whilst section 41 of the Act requires the employer to allow the employee to make representations before termination of the employment contract.
7. On 15 May 2015, the Respondent's Internal Auditor forwarded an audit report to the Managing Director and it fingered the Claimant.
8. Consequently, the Respondent suspended the Claimant through a letter dated 28 May 2015. The suspension letter also requested the Claimant to show cause why disciplinary action should not be taken against him. The letter set out the allegation against the Claimant.
9. On 24 September 2015, the Claimant appeared before the Respondent's Human Resource Advisory Committee, which recommended dismissal.
10. The Claimant was notified of dismissal through a letter dated 28 September 2015.
11. The Claimant appealed, but the Respondent rejected the appeal and upheld the dismissal.
12. The Claimant challenged the dismissal on the grounds that he was not heard before the decision and that he had been acquitted of a criminal charge arising from the same facts.
13. The Claimant was informed of the allegations to confront in the suspension letter. He was requested to make a written response. He was later invited to attend an oral hearing which he did. His appeal was also considered.
14. The Court finds that the Respondent complied with the elements of procedural fairness as contemplated in law.
15. Regarding the acquittal, the Court is of the view and finds that it was immaterial to the disciplinary process as the standards of proof are different, and the objectives of the two processes are also not similar.

Substantive fairness

16. Sections 43, 45 and 47(5) of the *Employment Act*, 2007 require the employer to not only prove but prove as valid and fair the reasons for a dismissal of an employee.
17. The employer is required to justify the dismissal after the employee has shown that an unfair termination of employment occurred.
18. The allegation against the Claimant was authorising the release of 260 bags of NPK fertiliser worth Kshs 878,280/- without verifying a bank deposit (slip) contrary to the procedures in place.
19. To discharge the burden of providing the reasons, the Respondent called 3 witnesses.
20. The Regional Auditor testified that the Claimant, a cashier, had authorised release of the bags of fertiliser without confirming with the bank that the banking slips presented by a customer were genuine or that the funds had been received at the bank as required by the operating procedures in place.



21. According to the witness, the Claimant had raised sales orders without confirming the authenticity of the banking slips.
22. The witness further testified that the Claimant had been trained on internet banking and that he could use the internet banking to authenticate the payments.
23. The Claimant in his defence during the disciplinary hearing had asserted that he was not able to confirm with the bank whether the funds had been received because he had no authority to communicate with the bank.
24. The Claimant did not deny that he had been trained to use the internet banking interface. He did not deny that the operating procedures required the authentication of bank slips/receipt of funds in the Respondent's bank account before authorising the release of the fertiliser.
25. The Claimant acted recklessly and dishonestly in issuing sales orders and authorising the release of the fertiliser without bothering to find out if the funds had been deposited into the Respondent's bank account as indicated in the banking slips.
26. The Court is satisfied and finds that the Respondent has established valid and fair reasons to dismiss the Claimant.

Lost income to retirement

27. The Claimant prayed for Kshs 4,320,000/- said to be the remuneration he would have earned had he worked until retirement.
28. However, he did not lay an evidential, legal, or contractual foundation for this head of the claim, and it is for dismissal.

Service pay

29. The copy of the Claimant's pay slip produced in Court indicates that he was a contributor to the National Social Security Fund as well as a provident fund.
30. By virtue of section 35(5) and (6) of the *Employment Act*, 2007, he is not entitled to service pay.

Counterclaim

31. The Respondent counterclaimed against the Claimant for Kshs 878,280- the value of the fertiliser which was released on the strength of fake banking slips which the Claimant did not verify.
32. The Claimant did not conduct due diligence on the authenticity of the banking slips he relied on to authorise the release of the fertiliser. Consequently, the Respondent suffered a loss, as evidenced in the audit report produced in Court.
33. The Court will allow the Counterclaim.

Conclusion and Orders

The Memorandum of Claim

34. The Court finds that the Claimant's dismissal was fair, and the Cause is dismissed with no order on costs considering that he passed away before the determination of the suit.



The Counterclaim

35. The Court enters judgment for the Respondent in the sum of Kshs 878,280/-.

36. The Court makes no order on costs on the Counterclaim considering the Claimant is deceased.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 29TH DAY OF JUNE 2022.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Claimant Ben Aduol Nyanga & Co. Advocates

For Respondent Kounah & Co. Advocates

Court Assistant Chrispo Aura

