



**Foxton v Pure Cycle Kenya Limited (Cause 30 of 2019)
[2022] KEELRC 1200 (KLR) (28 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1200 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 30 OF 2019
HS WASILWA, J
JUNE 28, 2022**

BETWEEN

JAMES FOXTON CLAIMANT

AND

PURE CYCLE KENYA LIMITED RESPONDENT

JUDGMENT

1. The Claimant herein filed a Memorandum of Claim dated 26th April, 2019 on even date through the firm of Manasses, Mwangi and Associates, claiming to have been unfairly terminated and to be compensated for the alleged unfair termination.
2. The summary of the Claimant's case is that he was employed by the Respondent as its General manager vide the letter of appointment dated 4th June, 2015. The terms of the said contract were inter alia that; the Claimant was to earn a base salary of USD 144,000 per annum, school fees for his children for 12 months of USD 36,000, House allowance of USD 1,000 per month, reimbursement of travel and entertainment expenses incurred by the Claimant while on duty, performance bonus and health insurance for him and his family at a limit of USD 5,000 per year. On separation, it was a term of the contract that a termination notice of three months be served or in the alternative 3 months' pay in lieu of notice
3. His key responsibility as per the agreement was to create a strategy for developing pure-circle operated mechanized farm growing stevia outside China and rapidly bringing that strategy into full operation. Additionally, that due to his duty, the Claimant was expected to travel out of the country 50% to 60% of the time.
4. Sometimes on the 16th May, 2016 the Claimant was promoted to be the vice president, Agricultural operations and now reporting directly to the Respondent's CEO. As the vice president, he was



- promoted to be a member of the Global Senior Leadership team of the Respondent and rewarded various financial benefits for his contributions to the Respondent's success.
5. The Claimant continued working for the Respondent and on the 3rd July, 2018, he received an email from the Vice President, Group Human Resource alleging that one of the Respondent's employees had made a formal complaint against him alleging verbal abuse and creating unhealthy working environment.
 6. On the 16th July, 2018 the Claimant was contacted through Zoom and in the platform was Rakesh Singha, the Respondent's Financial Officer and Gary Juncosa, the Respondent's Chief Operating officer. It was at that time that the Claimant learn that the agenda of the meeting was to discuss an alleged complaint raised on unaccounted expense claims, an issue which had never been raised either verbally or on writing prior to this meeting. Nevertheless, the Claimant forwarded via email the receipts in the bid to account for the said expenses after the Zoom meeting. He never received any response to the said email.
 7. Due to the two incidents raised by the Respondent, the Claimant became apprehensive that the Respondent was looking for ways and means to terminate his employment.
 8. Before the issue of unaccounted expenses was discussed with finality, the Claimant received another email on the 21st July, 2018 from the Group Human Resource, vice president forwarding a complaint by Nancy Cheron Cheriuyot, that the Claimant was verbally abusing employees and creating a hostile working environment. Disciplinary hearing was scheduled for 26th July, 2018.
 9. The Claimant avers that he was not furnished with further particular of how he created hostile working environment for other employees and copy of the said complaint.
 10. The meeting proceeded as scheduled on the 26th July, 2018 through Zoom and in utter shock the Claimant was summarily dismissed from employment by the Respondent Group Human Resource Vice president without affording him an opportunity to explain himself in the disciplinary hearing. Subsequently, the Claimant was directed to sign the mutual separation document which he declined.
 11. The Claimant therefore avers that his termination was unfair because he was not served with a notice to show cause, was never subjected to a disciplinary hearing, the Respondent failed to provided him with more particulars of the complaints made against him and failing to serve the Claimant with reason for the said termination.
 12. He prays for the following reliefs; -
 - i. A declaration that the Claimant's termination was unlawful and or procedurally unfair.
 - ii. 12-months salary as compensation for the unlawful termination (Inclusive of House allowance) USD 174,000.
 - iii. Three (3) Months' salary in lieu of Notice of USD 40,400.
 - iv. Children school fees for 12 months July, 2018 to June 2019 of USD 36,000.
 - v. Interest in (ii),(iii) and (iv) above at Court rates and the
 - vi. Costs of this Claim.
 13. The Respondent entered appearance and filed a statement of reply on the 10th March, 2020 admitting to employing the Claimant under the terms of service pleaded save for the fact that the payment of school fees was not part of the terms of employment.



14. The Respondent avers that the Claimant duties changed when he was promoted to be the vice president, Agricultural Operations and his office was based in Kenya. He denied that the Claimant travelled more than 50% of the time and instead avers that the Claimant was compensated for the limited times he was out of Kenya.
15. It is stated that the Claimant was employed as a General Manager on the 6th July, 2015 and promoted to be the Vice President Agricultural Operations on the 1st July, 2016 and its at that time that he was given school tuition of USD 36,000 per year for his children.
16. The Respondent states that the Claimant after being informed of the complaint by Nancy Cheronno was advised not to discuss the issue with either Nancy Cheronno, Kelvin Richards and Wesley Rotich.
17. Previously the Claimant had on the 29th June, 2018 send an email to Nancy Cheronno advising her that she will be reporting to him directly instead of the Kelvin Richards and the email was copied to Kevin Richard. In response to the email, Kevin Richard informed the Claimant and copied Wesley Rotich and Amber Dossey stating that the said Nancy Cheronno arrived from the residence of the Claimant crying and suggested the Human Resource officer deal with the issue.
18. Several emails were copied to the Claimant which were never answered. The Group Human Resource Manager wrote an email on the 20th July, 2018 forwarding the investigation report to the Claimant and proposing a meeting for the next Wednesday. In the said report it was revealed that the Claimant was shouting at employees and failing to tolerate questions from his subordinate regarding work and his comments to employees emerged as subtle threats on the employees' job security.
19. On the unaccounted expenses it was stated that the Claimant was unable to account for USD 73,774, cash withdrawals of USD 3007 and Cash expenditure of USD 2,654 which was used between September, 2016 and March 2018. Reminders were send to him via email on the 12.4.2017, 19.4.2017, 30.10.2017, 31.10.2017, 10.11.2017 and 17.7.2018 but no action wa taken by the Claimant.
20. It is averred that in the zoom meeting where the Group Human Resources Manager, vice president and chief financial officer were in attendance, the Claimant was required to account for unaccounted expenditure, which he failed to satisfactory account. The receipts and the expenses were not tallying, leading to his termination.
21. The Respondent maintain that the Claimant was terminated for failing to comply with lawful direction and misconducting himself in the course of performance of his duties.

Hearing.

22. The Claimant testified as CW-1 and adopted his witness statements dated 11.4.2019 and 10.5.2021 and produced the documents in his list of document dated 26.4.2019 as his exhibits.
23. Upon cross examination by Aim Advocate, the witness testified that he was promoted as the Vice President and head of agricultural operations from May, 2016 which was officially done in writing on 16th July, 2016. He avers that he was overseeing some of the agricultural operations as he was part of the Global team by virtue of his position. He stated that he was reporting to the CEO of the Respondent.
24. Upon further cross examination, he stated that he was employed by the Respondent and is not aware of any winding down proceedings. He maintained that he was not given fair hearing before the termination and the termination was therefore unfair in the circumstances. He stated that he was summoned to the meeting in which Rakesh and Gavi was in attendance and never informed of the agendas only to be ambushed to account for the expenditure and produce receipts, which receipts



- had been forwarded to Rakesh, the chief financial officer by Mr. Rotich, both electronic receipts and physical receipts. He also stated that in the meeting the issue of Nancy Cherono was never raised.
25. The witness further testified that there was no particular process in which expenditure was being approved. He added that initially the electronic process was used but the same collapsed and the employees resulted to manual processes. He stated that ideally the CEO was the one that ought to have signed his expenditure but the CEO never signed resulting to him accounting for his own expenses.
 26. He confirmed the issue of furnishing receipts were raised in several emails which he duly complied and provided the same for accounting purposes. He stated that he does not know why he was terminated though his termination letter indicated the reason for termination as verbal abuse, unhealthy working relationship and mismanagement.
 27. He avers that he was never informed of the agenda of these meeting prior and was always ambushed with questions as such the Zoom meeting cannot be termed as a disciplinary process proper. On the school fees issue the witness testified that the same was to be paid towards his children which fees he received.
 28. The Respondent called its logistic manager, Nancy Cherono as RW-1 who adopted her witness statement dated 20.4.2021.
 29. Upon cross examination by Njuguna Advocate, the witness testified that she works for pure cycle Africa Limited which was initially pure cycle Kenya Limited. She avers that the Claimant's issue began when he failed to account for USD 79,000 expenses as demonstrated by document 13 in the Respondent's list of documents. She testified that she requested the Claimant on various occasions to account for his expenses to no avail, forcing her to report the issue to the Group Financial Controller, Lyne, then the company took disciplinary action against him.
 30. Upon further cross examination, the witness stated that she is not part of he disciplinary committee. She avers that she is not aware of any mutual separation document and that she is only made aware of the Termination letter. She added that under the contract of employment between the Claimant and the Respondent, clause 7(c) states that the employer reserved the right to terminate the services of the Claimant without giving reasons.
 31. On re-examination, the witness testified that she was in charge of accounting expenses for the employees of pure cycle as such she was tasked with following up on the expenses and evidence thereof of the Claimant and when the Claimant failed to account she was mandated to escalate the issue to her supervisors.

Claimant's Submissions.

32. The Claimant submitted on two issue; whether the Claimant was unfairly terminated and whether the Claimant is entitled to the reliefs sought.
33. On the first issue, it was submitted that the termination was done abruptly in the meeting of 26th July, 2018 for alleged verbal abuse, creating unhealthy working environment and mismanagement of expenses. It was argued that the Claimant was not subjected to proper disciplinary process as envisioned under Section 41 of the *Employment Act*. Therefore, that the termination was unfair as per the provisions of section 45 of the *Employment Act*. To support his case the Claimant relied on the case of *Walter Ogal Anuro V Teachers Services Commission*[2013] eklr
34. On the reason given for the said termination, the Claimant submitted that on the first reason of verbal abuse and creating unhealth working environment, the issue was investigated by the Respondent's



Human Resource officer, Amber Dosset who found the allegation to be without merit as per the investigation report forwarded to him on the 21st July, 2018. On the second reason of termination being mismanagement of expenses, It was submitted that the Claimant fully accounted for his expenses and that there was no policy on how the said expenses were to be accounted for, in any case that the said money which the Respondent alleged not to have been accounted for were not tabled as evidence in this Court to ascertain their allegation therefore that, the reason that caused his termination was not justified.

35. It was submitted that the Claimant was not served with a notice to show cause or informed before hand of the agenda of the meeting that raised queries that led to his termination therefore that the termination did not meet the requirements of section 41 of the *Employment Act*. In support of this the Claimant relied on the case of *Hosea Akunga Ombwori V Bidco Oil Refineries Limited* [2017] eklr where the Court held that;

“To satisfy the requirements of section 41 of the *Employment Act*, an employer issues what is called in ordinary parlance a show cause. Such a letter or notice should outline the allegation or charges against the employee and also request him to respond within a reasonable time. The Notice also ought to inform the employee that disciplinary action which might lead to termination of employment is under consideration. In other words, the notice should be set out in clear terms”

36. Similarly, it was submitted that the termination of the Claimant’s services was against both procedural and substantive fairness as such the Claimant is entitled to the reliefs sought.

Respondent’s Submissions.

37. The Respondent submitted on three issue, whether the Claimant was unfairly terminated, whether the Claimant is entitled to the reliefs sought and who should bear costs of this claim.
38. On the first issue the Claimant submitted that section 44(3) of the *Employment Act* empowers the employer to summarily dismiss an employee on account of their conduct or on breach of their employment contract. It was argued that the Claimant’s termination was fair as per the provisions of section 43 and 45 of the *Employment Act*.
39. It was submitted that the reason for the termination of the Claimant’s services was for misappropriation of funds which evidence has demonstrated that the Respondent genuinely believe that that the Claimant was not prudent in his financial management especially in accounting for his own expenditure. It was argued that the evidence on record has demonstrated that the Claimant on various occasions failed or delayed in the submission of his expenditure receipts leaving loopholes in the financial books of the Respondent and in the end leading to loss.
40. The Respondent submitted that the reason for termination was therefore demonstrated as indicated in the termination letter dated 26th July, 2018.
41. On procedural fairness, it was submitted that the Claimant was notified of the allegation against him vide the email dated 3rd July, 2018 and 16th July, 2018, then the Claimant was granted time to respond to the issues raised in the said emails. Further that the Claimant was heard in the Zoom meeting dated 16th July, 2018 as per the communication channels of the Respondent company. It was also submitted that in all instances the Claimant was granted an opportunity to explain himself.
42. In conclusion, the Respondent argued that the termination was fair in the circumstances and urged this Court to dismiss the claim with costs.



43. I have examined the evidence and submissions of the parties herein and the issues for this Court's determination are as follows;
1. Whether the dismissal of Claimant was fair and justified.
 2. Whether the Claimant is entitled to the remedies sought.

Issue No. 1

44. The Claimant was dismissed vide a letter dated 26/7/2018 which indicated that he was being dismissed following 2 investigation reports one dealing with alleged verbal abuse and unhealthy work environment and the other about mismanagement of resources.
45. The Claimant has submitted that in respect of the 1st investigation report he was exonerated of any wrong doing and he produced the said report as Exh.JF 5.
46. I have gone through this investigation report. The report investigated 3 issues and the conclusion for each issue investigated shows that the Claimant talked to employees by raising his voice and in another incident he talked about employees salaries but may have intended it to be motivational but his subordinates perceived it differently and threatening.
47. In the last issue, the finding was that his behavior was more of an over-reliance on hierarchy or status but not one of race. In effect, the report exonerated him of accusations of verbal abuse and unhealthy work environment.
48. As concerns the 2nd investigation, the report was not placed before Court. However the issue concerns mismanagement of resources.
49. The Respondents aver that the Claimant failed to explain the whereabouts of certain funds and also failed to account for expenses he had incurred.
50. In order to establish whether indeed the Claimant misappropriated some funds, I have seen the communication between the Claimant and one Wesley and the Claimant was being asked to submit receipts for expenditure.
51. In one Email, the Claimant was asked to produce support documents for each provided for AGSIG. Wesley in the same Email admitted to receiving some scanned documents from the person the Claimant had sent. The Claimant produced Email dated 21/7/2018 subject matter Emailed receipts which contained 12 receipts.
52. It is not clear if the Respondents Raksh Sinha responded to this. Following the to and fro Emails above, the Respondents aver that they invited the Claimant to a disciplinary hearing on 26/9/2018.
53. There is however no letter that the Respondents produced before this Court to show that they invited the Claimant for a disciplinary hearing.
54. There is also no evidence that the Respondents sent the Claimant a Notice to Show Cause letter to explain why he should not be terminated for misconduct.
55. No prior notice was given to the Claimant of the Respondents intention to terminate him and no disciplinary hearing took place.
56. The Respondents aver they had a disciplinary hearing but have also not produced evidence that such a hearing took place – no minutes were exhibited.



57. If indeed the Claimant was guilty of misconduct as alleged by the Respondents, giving him an opportunity to explain himself would either have proved the allegation or exonerated the Claimants.
58. It is however clear that the Respondents ignored the key principle of a fair hearing and proceeded to dismiss the Claimant without any hearing and without establishing the validity of reasons for dismissal.
59. Section 45(2) of the Employment Act 2007 states as follows;

- “ 45. (1).....
- (2) A termination of employment 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
- (c) that the employment was terminated in accordance with fair procedure”.

60. Given that the Claimant was dismissed without establishment of the existence of valid reasons and without any fair hearing, I find the dismissal of the Claimant unfair and unjustified.

Issue No. 2 Remedies

61. Having found as above for the Claimant I find that he is entitled to remedies as follows;
1. 1 month salary in lieu of notice as per the Employment Act = 1,458,555/= = (14500 USD)
 2. 10 months salary as compensation for unlawful and unfair dismissal = 10 x 14500 USD
= 145,000 USD
TOTAL = 159,500 USD
Less statutory deductions
 3. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this Judgment.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 28TH DAY OF JUNE, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Njuguna for Claimant – present

No appearance for Respondent

Court Assistant - Fred

