



**Manyasa v Oriental Mills Limited (Cause 1147 of 2017)  
[2022] KEELRC 3855 (KLR) (29 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3855 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1147 OF 2017  
SC RUTTO, J  
JULY 29, 2022**

**BETWEEN**

**EDWIN RAPHAEL MANYASA ..... CLAIMANT**

**AND**

**ORIENTAL MILLS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant avers that he was employed by the respondent as an accountant sometimes on 1<sup>st</sup> February, 2012 and was dismissed on 2<sup>nd</sup> March, 2017 by word of mouth. He terms his termination as untimely, unlawful and unjustified. Consequently, the claimant seeks against the respondent the sum of Kshs 856,566.00 being notice pay, salary for March, 2017, compensation for loss of earnings, service gratuity and annual leave.
2. The claim was opposed with the respondent stating that the claimant's services were terminated on 31<sup>st</sup> May, 2017 following due procedure. The respondent avers that the claimant refused to collect his show cause letter from the courier service provider and which was also transmitted through his email address. That the claimant was contacted on several occasions but he refused to respond to the respondent's officers' calls and frustrated its efforts of service of various letters. Accordingly, the respondent has asked the Court to dismiss the claim with costs.
3. The matter proceeded for part hearing on 10<sup>th</sup> August, 2021 when the claimant presented and closed his case. The respondent had an opportunity to present its case on 8<sup>th</sup> March, 2022 when trial closed.

**Claimant's case**

4. The claimant testified in support of his case and at the outset, adopted his witness statement and documents filed in support of his claim, to constitute his evidence in chief. The said documents were also produced as his exhibits before Court. He testified that he joined the respondent company as an



auditor when it was in the process of migrating systems. That he was promoted to the position of an accountant after the person who was holding that position at the time, resigned. He told Court that his work entailed reconciling accounts, consolidating the books of accounts and reporting on the financial status of the company.

5. That on 2<sup>nd</sup> March, 2017, while he was at work, one Mr. Kisaka and Mr. Paresh went to his office and informed him that there had been misrepresentation in the invoicing of a customer. That thereafter, police were called and he was arrested and booked at Embakasi Police Station. That he was later bailed out and allowed to go home.
6. It was his further testimony that the General Manager by the name Mr. Amit sent him a message and asked him not to report to work until further notice. He testified that he was later terminated on 2<sup>nd</sup> March, 2017 and was not heard prior to the said termination. The claimant further stated that on 15<sup>th</sup> March, 2017, there was a disciplinary hearing but he did not attend the same as he was not aware that it had been scheduled. He stated in further testimony that he never collected his suspension letter or show cause letter and only came to learn of the same through his Advocate.
7. The claimant further denied receiving salary for the months of February to May, 2017. It was his further testimony that the criminal case against him was dismissed by the prosecution as the charge of theft was not proved against him. In closing his evidence in chief, he asked the Court to allow his claim as prayed.

#### **Respondent's case**

8. The respondent called oral evidence through Mr. Japhether Kisaka who testified as RW1. He identified himself as Finance and Administration Manager of the respondent. RW1 adopted his witness statement and bundle of documents filed on behalf of the respondent to constitute his evidence in chief. It was his testimony that the claimant was not terminated unprocedurally. He stated that the claimant was suspended on 6<sup>th</sup> March, 2017 when the respondent detected fraud in the accounts department. That on conducting a preliminary review on the accounts, the Managing Director noted the following anomalies amongst others; cheques and cash deposits entered in the cash book had no pay in slips and did not appear in the bank statements; invoices were deleted from the customer's ledger accounts; invoices were manipulated resulting to differences in aggregates; and invoices were physically altered after being generated.
9. It was his further testimony that the claimant was informed of the allegations against him. That the claimant failed to collect his letter of suspension. That as such, the same was sent through Modern Coast Courier Limited and his mobile number which was in use at the time, was indicated therein. That attached to the suspension letter, was a preliminary report of the investigations. That the letter was not collected by the claimant from the courier. That as such, the respondent followed up by sending the letter through the email which was being used by the claimant at the time.
10. That subsequently on 8<sup>th</sup> April, 2017, the respondent received a letter from the claimant's advocates hence it felt that it could communicate with him through the said advocates.
11. It was the testimony of RW1 that it sent the suspension and show cause letter through the claimant's Advocates through G4S. That thereafter, the respondent had a sitting where it was ascertained that the bank reconciliation statement showed cheques in the cash book which had not been received. That this was the basis of the fraud as the cheques were fictitious as customer's accounts had been altered. He further testified that the issue of invoicing was within the claimant's mandate.
12. RW1 further told Court that he had attempted to call the claimant severally on phone and written emails but he had refused to respond to the same hence making it very difficult for the respondent to



communicate with him from 6<sup>th</sup> March, 2017. He summed up his testimony by reiterating that the respondent followed due process in terminating the claimant's employment hence urged the Court to dismiss the claim with costs.

### Submissions

13. It was the claimant's submission that his termination was procedurally unfair hence the respondent had failed the fairness test. That the suspension letter was written as an afterthought after the respondent had received the demand letter from his advocates. It was further submitted that the email address used by the respondent to send the suspension letter did not belong to the claimant. In support of its arguments, the claimant placed reliance on the case of *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR, *Nicholus Muasya Kyula v Farmchem Limited* (2012) eKLR and *Anthony Mkala Chitavi v Malindi Water & Sewerage Co. Limited* Cause No. 64 of 2012.
14. On its part, the respondent submitted that it complied with fair procedure and accorded the claimant a chance to defend himself but he chose to ignore the same. That the claimant failed to attend the preliminary meeting of 10<sup>th</sup> April, 2017 that was postponed to 27<sup>th</sup> April, 2017 as well as the disciplinary hearing of 15<sup>th</sup> May, 2017. That therefore, the claimant squandered his chance to be heard. To buttress its submissions, the respondent invited the Court to consider the determination in *Jared Aimba v Fina Bank Ltd Industrial* Cause No. 525 (N) of 2009 and *Matthew Lucy Cherusa v Poverelle Sisters of Belgamo t/a Blessed Louis Palazzalo Heath Centre* (2013) eKLR.

### Analysis and determination

15. Flowing from the pleadings on record, the evidentiary material placed before me, as well as the opposing submissions, the Court isolates the following issues for determination: -
  - a. Whether the claimant's termination was fair and lawful?
  - b. Is the claimant entitled to the reliefs sought?

### Whether the claimant's termination was fair and lawful?

16. The guiding light in the determination of this issue is sections 41, 43 and 45 of the *Employment Act* (Act). Section 43(1) places the burden of proving the reasons for termination on an employer and failure to do so, such termination is rendered unfair. Further, in terms of section 43 (2), such reasons resulting in an employee's termination must be matters the employer genuinely believed to exist at the time.
17. In addition, section 45 (2) of the Act, renders a termination of employment as unfair where the employer fails to prove that the reason for the termination is valid, fair and relates to the employee's conduct, capacity or compatibility; or based on its operational requirements.
18. What I have enumerated above constitutes the first limb towards proving substantive fairness in cases of termination of employment.
19. The second limb is in respect of procedural fairness and is provided for under Sections 45 (2)(c) and 41 of the *Employment Act*. Whereas the general requirements for fair procedure is provided for under section 45(2) (c), the specific requirements are to be found under section 41 of the Act. In this regard, an employer is required to notify an employee of the reasons it is considering terminating his or her services. Such reasons ought to be communicated in a language the employee understands and in the presence of another employee or a shop floor union representative.



20. In the instant case, the claimant was terminated on account of malpractices in the respondent's account's department. The claimant's letter of termination which is dated 31<sup>st</sup> March, 2017, stipulates the reasons for his termination. The same is couched as follows: -

“Re: Termination

The above matter refers.

In view of several malpractices at the accounts offices were invited you for a disciplinary meeting on the 27<sup>th</sup> April, 2017 and subsequently deferred it to the 15<sup>TH</sup> May, 2017 at your Advocates request, to demonstrate why you should not be dismissed from service but despite our invitations you failed to attend the disciplinary committee meetings. The disciplinary Committee sat and proceeded with meeting of 15<sup>th</sup> May, 2017 and noted the following malpractice: -

1. Manipulation of Invoices – Invoice values were reduced so as to reduce some specific customer outstanding balances due.
2. A number of payments not received from the customers (not reflecting in our bank statement) were posted into the customer's account to reduce their outstanding balance.
3. A one sided deletion of entries. i.e. Invoice appearing on the sales invoice side but deleted from the customer's account.
4. Some Invoices were amended such that the same invoice reads a different name on the sales Invoice side from the actual customer statement.
5. The monthly VAT submitted to Kenya Revenue Authority was on the basis of the undervalued invoices leading to underpayment of VAT which will attract hefty penalties.
6. Duplicate copies of Invoices missing from respective files.

The letter serves to confirm the company's decision to terminate you from employment on account of knowingly and failing to perform the duties bestowed upon you in accordance to *Employment Act*, 2007. We regret to inform you that your services are dismissed with immediate effect. Please return all company property that is in your possession to the Accounts Department for clearance.

Yours faithfully,

For: Oriental Mills Limited

J.M. Kisaka”

21. The claimant contends that the respondent did not prove any reasons to warrant his termination. The respondent through the testimony of RW1 states that the cheques and cash deposits entered in the cash book had no pay in slips and did not appear in the bank statements, that invoices were deleted from the customers' ledger accounts, invoices were manipulated resulting in differences in aggregates and invoices were physically altered after being generated.
22. To prove its case, the respondent exhibited a bank reconciliation statement as well as a tabulation showing differences in invoice amounts in respect of various customers. A careful perusal of the bank



- reconciliation statement indicates that some cheques were received but did not reflect in the bank statement. The tabulation of the invoices indicates that there were invoice differences in respect of some customers. This included differences in the VAT amounts.
23. It was the respondent's case that the cheques and cash deposits entered in the cash book did not appear in the bank statements and that invoices had been manipulated resulting in differences in aggregates.
  24. In his testimony in chief, the claimant admitted being responsible for reconciliation. As regards the invoices, RW1 testified that invoicing fell under the claimant's mandate. On this issue, the claimant in his testimony chief, refuted being responsible for invoice preparation. In cross-examination, he stated that his work in this regard entailed looking at the invoices presented to the clients and counterchecking and consolidating with what was in the system. Nonetheless, he admitted that he could detect anomalies from the system.
  25. Bearing in mind the foregoing issues that came up during the trial as well as the evidence exhibited by the respondent and further taking into account the reasons for the claimant's termination, it is evident that the anomalies in respect of bank reconciliation and invoicing fell within the claimant's duties. Why do I say so?
  26. First, the claimant admitted being responsible for bank reconciliation. In this regard, the bank reconciliation statements exhibited by the respondent shows glaring anomalies as some cheques were received but not reflected in the bank statement. Second, he admitted that he was in charge of counterchecking the invoices presented with what was reflected in the system. Evidently, from the tabulation exhibited by the respondent in that regard, there are several entries showing differences in invoice amounts. How did he fail to detect the same?
  27. Indeed, a careful perusal of the claimant's letter of termination indicate that the real reason for his termination was "knowingly or willingly failing to perform the duties bestowed upon him".
  28. From the evidence presented, it is apparent that the claimant had failed to perform his duties of reconciliation and counterchecking of invoices as expected of him by his employer.
  29. It is also noteworthy that Section 43(2) of the Act provides that the reason or reasons for termination of an employee are matters that the employer at the time of termination genuinely believed to exist, and which caused the employer to terminate the services of the employee.
  30. It is therefore apparent that upon noting the anomalies in the bank reconciliation and invoicing and taking into account the claimant's duties and responsibilities, the respondent had reason to believe that he had a case to answer in that regard.
  31. It is instructive to note that the respondent's burden of proof in this regard is on a balance of probabilities and not beyond reasonable doubt. Such was the holding by the Court of Appeal in the case of *Kenya Revenue Authority v Reuel Waithaka Gitabi & 2 others* [2019] eKLR, thus: -

"The standard of proof is on a balance of probability, not beyond reasonable doubt, and all the employer is required to prove are the reasons that it "genuinely believed to exist," causing it to terminate the employee's services. That is a partly subjective test."
  32. As such, I find that the respondent has established on a balance of probabilities that it had a valid reason to commence disciplinary proceedings against the claimant and which could ultimately, lead to termination of his employment.



33. The totality of the foregoing is that I find that the respondent has discharged its evidential burden under sections 43 (1) and 45 (2) (a) and (b) of the Act.
34. As to the second limb of procedural fairness, the parties have taken diametrically opposite positions on the issue. Indeed, this was the most contested issue and the parties chose to focus on the same extensively as compared to the first limb.
35. On record is a suspension letter and show cause letter which the claimant denies receiving. Whereas the respondent has maintained that it made several unsuccessful attempts to accord the claimant a chance to be heard, the claimant has refuted these assertions.
36. The respondent stated that it called the claimant to receive his letter of suspension but he failed to appear and collect the same. The respondent further avers that it sent the letter of suspension through Modern Cast Courier Services Ltd. It is notable that during cross examination the claimant admitted that the number appearing on the courier package, was his. However, during re-exam, he stated that he wasn't using the same by then and that it was being used for purposes for business. Nonetheless, he did not entirely deny that the mobile number belonged to him. Besides, he did not raise this issue in rebuttal through his reply to the response to claim.
37. The respondent further exhibited a copy of a printed email, it purportedly sent to the claimant forwarding the show cause and suspension letters. It is notable that the claimant disowned the email address used in his submissions but not in its reply to the response to claim. He only stated in response that he was no longer an employee of the respondent by the time the email was sent. What's more, he did not deny the said email address during the trial. I therefore take the denial at the submission stage, as an afterthought.
38. The respondent has further exhibited correspondence with the claimant's advocates through which it avers to have forwarded his show cause and suspension letter, after he had refused to pick their calls and/or attend its offices to collect the said letters.
39. In this regard, it avers that the claimant failed to attend the scheduled disciplinary meeting. The claimant's response in his reply to the response to the claim was that by then, he had been terminated and he had instructed his advocates. Nonetheless, he did not deny that his advocates were contacted by the respondent and that they received the show cause letter and suspension letters from the respondent on his behalf.
40. To evidence service on the claimant's advocates, the respondent exhibited a copy of a courier service delivery sheet from G4S indicating that the said advocates received a document from the respondent on 10<sup>th</sup> May, 2017. On record, is a show cause letter dated 8<sup>th</sup> November 2017 addressed to the claimant through his advocates. There was no indication or even suggestion that the claimant's advocates did not receive the show cause letter from the respondent. Coupled with the foregoing, there is an email print out from the respondent to the claimant's advocates forwarding the letters it had purportedly sent him through the courier service provider.
41. It bears to note that the show cause letter spelled out the issues the claimant was required to highlight during the disciplinary hearing scheduled for 15<sup>th</sup> May, 2017. Through the same letter, it is apparent that the claimant was advised of the hearing date and advised to bring along a colleague to the said disciplinary meeting. As it turned out the claimant did not attend the disciplinary meeting hence his dismissal.



42. The claimant maintains that by the time the respondent was contacting his advocates, he had already been terminated and the respondent was covering its tracks. Other than that, he does give a plausible reason for his refusal to respond to the show cause letter nor appear for the disciplinary hearing.
43. What manifests from the foregoing is that the respondent attempted to comply with the provisions of section 41 of the Act but the claimant was not cooperative. He deliberately snubbed the process initiated by the respondent in its attempt to comply with the requirements of fair hearing.
44. In light of the foregoing, the respondent cannot be faulted for failing to comply with the requirements of procedural fairness. Assuming that it is true that the respondent commenced the process after the claimant had engaged its advocate, still, that was not a reason to snub the process. Indeed, section 49(4) (l) of the Act expects an employee to mitigate his or her losses. In this regard, the Court in determining the appropriate remedies to be awarded on account of wrongful dismissal and unfair termination ought to consider amongst other factors;

“ any failure by the employee to reasonably mitigate the losses...”

45. In this case, the claimant failed to mitigate his losses by appearing and defending himself before the disciplinary panel convened by the respondent.
46. Ultimately, I find that the respondent has proved on a balance of probabilities that it complied with the requirements of substantive and procedural fairness hence the claimant’s termination was neither unfair nor unlawful.

#### **Reliefs?**

47. As the Court has found that the claimant’s termination was not fair and lawful, the reliefs in regards to notice pay and compensatory damages do not avail.
48. However, the respondent failed to prove that the salary was paid to the claimant during the period he was on suspension. In this regard, the claimant’s pay slips, as exhibited, cannot serve as proof of payment. It was prudent that the respondent provides proof of actual payment of the salary to the claimant, for instance through a bank transfer. On this score, I will reiterate the determination in [\*Joseph Ouko Lwambe vs Royal Garment Industries EPZ Limited\*](#) [2018] eKLR where the Court held that: -

“The question then follows is the payslip conclusive evidence of payment of salary” In my view the answer is no. The Payslip is a document prepared by the Respondent Company indicating the amount payable as salary for work done on a given period. There is no evidence as to whether the Claimant received the salary and the fact that there is a payslip for October, 2013 builds a lot of doubt as to whether the same is a true reflection of what transpired. I opine that the Claimant’s claim for unpaid salary be allowed in the circumstances.

49. Accordingly, in absence of evidence to prove actual payment, I find that the claimant is entitled to salary for the three months period he was on suspension.
50. Against this background, I dismiss the claim with no orders as to costs save for the order on payment of salary during the suspension period.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29<sup>TH</sup> DAY OF JULY 2022.**

.....



**STELLA RUTTO**

**JUDGE**

Appearance:

For the Claimant Ms. Mideva

For the Respondent Mr. Chenge

Court Assistant Barille Sora

Order

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court had been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**STELLA RUTTO**

**JUDGE**

