



**Maina v Ocean Agriculture (E.A.) Limited (Cause 46 of 2017)  
[2022] KEELRC 3846 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3846 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 46 OF 2017  
L NDOLO, J  
JULY 28, 2022**

**BETWEEN**

**GICHUHI PETER MAINA ..... CLAIMANT**

**AND**

**OCEAN AGRICULTURE (E.A.) LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The issue in controversy in this case is the termination of the Claimant's employment by the Respondent. The Claimant states his case in a Memorandum of Claim dated and filed on court on January 12, 2017. The Respondent filed a Memorandum of Reply on February 28, 2017.
2. At the trial, the Claimant testified on his own behalf and the Respondent called its Managing Director, Joseph Verwiel. Both parties further filed written submissions.

**The Claimant's Case**

3. The Claimant states that he was employed by the Respondent as a Driver in October 2012. He adds that he earned a monthly salary of Kshs. 34,689.
4. The Claimant worked for the Respondent until June 17, 2016, when his employment was terminated.
5. The Claimant terms the termination of his employment as unlawful and unfair. He contends that he was not afforded an opportunity to be heard.
6. He further claims that during the entire period of his employment with the Respondent, he was not paid house allowance and was not allowed to go on leave.
7. The Claimant's claim against the Respondent is as follows:



- a) Terminal dues amounting to Kshs. 554,691;
- b) Service pay for each completed year of service;
- c) General damages for wrongful termination;
- d) Reinstatement without loss of benefits;
- e) Costs plus interest.

### **The Respondent's Case**

8. In its Memorandum of Reply dated February 23, 2017 and filed in court on February 28, 2017, the Respondent admits having employed the Claimant as a Driver from August 1, 2010 at an entry gross salary of Kshs. 22,000 which was increased to Kshs. 34,689 as at the time of termination.
9. Regarding the circumstances leading to the termination, the Respondent states that the Claimant, together with one Eliud Odhiambo Ago, who was employed as a Conductor, were given the responsibility of delivering goods to the Respondent's clients. The Respondent adds that it was a prerequisite that all goods be accompanied by correct documentation, such as delivery notes and invoices.
10. The Respondent avers that on June 16, 2016, the Claimant was found in possession of goods belonging to the Respondent's client, Equinox Flowers Ltd, without proper documentation.
11. The Respondent claims that the said client, Equinox Flowers Ltd, had suspected that there was a scam involving the Respondent's Driver and Conductor and the Respondent's Storeman and had duly advised the Respondent on June 14, 2016.
12. The Respondent further claims that the said client arranged for a spot check on the delivery truck. The Respondent states that upon examination, the Claimant was found with excess stock of over one metric tonne in the truck. The Claimant is said to have been unable to properly explain or justify the excess stock which was on the truck.
13. The Respondent avers that the Claimant at first claimed that the excess goods belonged to another client but later called the Respondent's office in charge of issuing the relevant documentation in an attempt to procure a false delivery note for the excess stock. The Respondent accuses the Claimant and his Conductor of fraudulently altering the delivery note for the next client on the delivery schedule.
14. The Respondent claims to have launched an investigation into the incident, which revealed that the Claimant had illegally and without authority taken goods belonging to the Respondent's client, in collusion with the client's storeman.
15. The Respondent contends that it followed due process, allowing the Claimant and his conductor to explain themselves the following day, as a result of which the Claimant put down his explanation in a written statement on 17<sup>th</sup> June 2016 but thereafter fled the premises and refused to return for further notification and hearing proceedings.
16. The Respondent claims that four people in its office, tried to call the Claimant back to the office to attend hearing proceedings under the *Employment Act* but the Claimant refused to do so.
17. The Respondent avers that it reported the matter to the District Labour Officer and adds that the Claimant refused to collect his dues as calculated by the Labour Officer, which the Respondent claims to have been paid to the Labour Officer on June 22, 2016.



18. The Respondent contends that as a result of the Claimant's actions, it suffered loss and damage as the Respondent had to compensate its client for the loss of goods. The Respondent further claims to have suffered loss of business as a result of the Claimant's actions.

### **Findings and Determination**

19. There are two (2) issues for determination in this case:
- a) Whether the Claimant has made out a case of unlawful termination of employment;
  - b) Whether the Claimant is entitled to the remedies sought.

### **Unlawful Termination?**

20. On 17<sup>th</sup> June 2016, the Respondent wrote to the Claimant as follows:

“Dear Peter

Re: Summary Dismissal For not Following the Company Delivery Procedures, Altering Delivery Notes Fraudulently, and Carrying Excess unexplained stock without any Documentation

Yesterday you were stopped at the gate of Equinox having just finished making your delivery. The client has reported they found excess stock in the back of your truck that was not supported by any delivery notes, and that you had tampered with delivery note number 30293 for Tambuzi Ltd as admitted by Eliud Ago your turnboy during our meeting this morning. The client's investigation is ongoing.

You as the driver of the vehicle have a duty and responsibility to ensure that all cargo you carry has the correct supporting documentation, this is the law. The fact that you had excess products in the truck that did not have any documentation, that were not drawn from the company main store, and that you were unable to adequately explain where the products came from, would strongly suggest you were engaging in illegal activity.

Your actions have brought this entire company's good name into disrepute and threaten the livelihood of every other employee of Ocean. There could be serious consequences for the company should the client decide to press charges against us and we would suffer irreparable damage and loss of business should other farms hear such things have happened and lose trust in us.

This incident, irrespective of how you have tried to explain it, is a clear breach of fidelity, company procedures, and the law. The company simply cannot accept such behaviour from an employee.

You are therefore as provided by law summarily dismissed for gross misconduct, without notice or benefits. You are due a balance of 33 leave days which will be paid together with your June salary directly into your bank account by the companies (sic) payroll provider.

The Shs. 5,000.00 imprest issued to you for incident/emergency expenses for the truck that you have not returned to the company will be deducted from your final dues as provided for under section 17 of your employment contract.

Sincerely

(signed)



Trevor Sherwin  
General Manager”

21. This letter accuses the Claimant of ferrying undocumented stock in his assigned truck and tampering with a delivery note. In support of its case, the Respondent produced a handwritten letter dated June 17, 2016 allegedly written by the Claimant as an admission and apology regarding the said accusation.
22. The Claimant denied having authored this letter. However, in his testimony before the Court, he admitted having carried excess goods in his assigned truck. This testimony tallied with the Respondent’s accusation against the Claimant.
23. Section 43 of the [Employment Act](#) provides as follows:
  43.
    - (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
    - (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.
24. It has now well settled that the burden placed on an employer by the foregoing provision is to demonstrate a valid reason that would cause a reasonable employer to terminate employment (see [Reuben Ikatwa & 17 others v Commanding Officer British Army Training Unit Kenya & another](#) [2017] eKLR and [Gilbert Michael Maigacho v Coast Development Authority](#) [2021] eKLR).
25. By his own admission, the Claimant was found in possession of excess stock that was not accompanied by the requisite documentation. This in my view, was a valid reason for termination of his employment as required by Section 43 of the [Employment Act](#).
26. The next question to ask is whether in effecting the termination, the Respondent complied with due procedure. That procedure is found in Section 41 which provides as follows:
  - (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 this 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.
27. In its decision in [Cooperative Bank of Kenya Limited v Yator](#) [2021] KECA 95 (KLR) the Court of Appeal held that:

“...even where an employee has committed gross acts of misconduct, which acts warrant summary dismissal, the law requires that before such sanction is undertaken, an employer



must ensure fairness to the employee by allowing the employee to give his defence. Where the employer is unable to hear the employee in defence, such must only be in exceptional circumstances which the employer must demonstrate.”

28. The Appellate Court went further to place the burden of proving that employment has been terminated in accordance with fair procedure on the employer.
29. In the present case, the Respondent states that the Claimant walked away before he could be placed on his defence. There was however no evidence to back the Respondent’s averment in this regard. None of the persons who were said to have called the Claimant were called as witnesses. The Respondent therefore failed to establish any special circumstances absolving it from the obligation to hear the Claimant before making the decision to dismiss him.
30. In the premises, I find and hold that the Claimant’s dismissal was unfair for want of procedural fairness and he is entitled to compensation.

### **Remedies**

31. Flowing from the foregoing findings, I award the Claimant three (3) months’ salary in compensation. In arriving at this award, I have taken into account the Claimant’s length of service, his contribution to the termination and the Respondent’s failure to accord him an opportunity to defend himself.
32. I further award the Claimant one (1) month’s salary in lieu of notice.
33. Having been a contributing member of the National Social Security Fund (NSSF) the Claimant is not entitled to service pay.
34. Finally, I enter judgment in favour of the Claimant in the following terms:
  - a) 3 months’ salary in compensation.....Kshs. 104,067
  - b) 1 month’s salary in lieu of notice.....34,689
  - Total.....138,756
35. This amount will attract interest at court rates from the date of judgment until payment in full.
36. The Claimant will have the costs of the case.
37. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 28<sup>TH</sup> DAY OF JULY 2022.**

**LINNET NDOLO**

**JUDGE**

Appearance:

Miss Karanja for the Claimant

Mrs. Quadros for the Respondent

