



**Mudongoi v Mudete Factory Tea Growers Co-operative Savings and Credit Society Limited (Cause 27 of 2017) [2022] KEELRC 1576 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1576 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA  
CAUSE 27 OF 2017**

**JW KELI, J**

**JULY 28, 2022**

**FORMERLY KISUMU ELR CAUSE NO.320 OF 2017**

**BETWEEN**

**JOYVET MINAYO MUDONGOI ..... CLAIMANT**

**AND**

**MUDETE FACTORY TEA GROWERS CO-OPERATIVE SAVINGS AND  
CREDIT SOCIETY LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant filed a claim against the Respondent dated 4<sup>th</sup> July, 2017 and filed in court on the 13<sup>th</sup> July, 2017 seeking the following reliefs:-
  - a. A declaration that the purported dismissal/ termination of the Claimant offends *the Constitution* of Kenya ,2010 and particularly Articles 27, 41, 47 and 50 thereof, the *Employment Act*, 2007 and fair labour practices and consequently unlawful, unfair, constructive and wrongful and that the Claimant is entitled to the most appropriate redress.
  - b. An order for compensation in damages for unfair, wrongful and or unlawful termination of employment to the tune of Kshs. 422,641.25.
  - c. An order for compensation in damages for employment discrimination and loss of pregnancy to be assessed by the Honourable Court.
  - d. Costs of the claim herein
  - e. Interest on (b)(c) and (d) hereinabove.



2. In addition to the claim, the Claimant filed list of witness and Claimant's witness statement of the claimant, list of documents all dated 4<sup>th</sup> July, 2017. The Claimant together with claim the bundle of documents.
3. The Respondent entered appearance and filed statement of defence on 24<sup>th</sup> July, 2017 received in Court on the 24<sup>th</sup> July, 2017 together with lists of documents and the bundle of documents. The Respondent further filed in Court its witness statement of Antony Bitinyu dated 24<sup>th</sup> July, 2017 received in court on even date.
4. The Claimant's case was heard on the 24<sup>th</sup> July, 2019 by Justice N. Nduma where the Claimant was the only witness fact and testified on oath adopting her written statement dated 4<sup>th</sup> July, 2017 as her evidence in chief and was cross- examined on her evidence and the court will rely on the record.
5. The defence case was heard by the court on the 10<sup>th</sup> March 2022 with one witness of fact, Antony Bitinyu Suiyonzonzo, testifying on oath, who adopted his witness statement filed in court on the 24<sup>th</sup> July 2018, produced the Respondent's document as exhibits in the case and was cross- examined by the Claimant's counsel.
6. After the defence hearing, parties asked to file written submissions. The Claimant 's written submissions drawn by Nyikuli, Shifwoka & Company Advocates were received in court on 26<sup>th</sup> April 2022. The Respondent's written submissions were not in the court file as at time of writing the decision. The court finds that the Respondent did not file submissions.

#### **Claimant's case**

7. The Claimant's case is that she was employed as savings clerk by the Respondent in the year 2012 on probationary basis and later confirmed to permanent and pensionable basis. That she was diligent and loyal in service and twice noted errors in the operational system that reflected erroneous balances after transactions. That she reported the errors to the head of department as well as to the ICT systems administrator who had the requisite rights to effect errors. That she did not know how the errors were affected. That on the 7<sup>th</sup> March 2016 she noted the cash teller had transferred Kshs.100,000/- which did not reflect in the teller but was posted as a loss. This was reported to the head of department and to the acting supervisor.
8. On the 10<sup>th</sup> march 2016 while at work at the Mudete branch she was handed a letter of suspension from work. That she was later arrested and, on the 26<sup>th</sup> April 2016, arraigned before Kakamega Chief Magistrate vide Criminal Case No. 1494 of 2016 to take plea on charge of stealing by servant. That she has since sought for statements, reports and documents in relation to the same despite a court order in vain. Nothing was communicated to her on the disciplinary process and she was not paid salary since then.
9. Much later in the month of December 2016 she learnt that her position had been advertised and replacement hired hence she stood constructively dismissed.
10. That as a result of the foregoing unfair treatment, harassment and pressure she lost her pregnancy and seeks for compensation for unfair termination, compensation in general damages for discrimination, unequal treatment and loss of pregnancy in the events leading to the said termination. Her demand letter to the employer had been ignored.
11. The Claimant produced documents marked as exhibits "JMMI -JMM10" under her witness statement dated 4<sup>th</sup> July 2017 which statement she adopted as her evidence in chief at the hearing.



## **The Respondent's case**

12. The Claim is opposed vide statement of defence filed on the 24<sup>th</sup> July 2018 and witness statement of Antony Bitinyu. The Respondent admits the Claimant was their employee and in March 2016 was involved in issues of indiscipline and was vide letter dated 15<sup>th</sup> April 2016 suspended. Investigations were done and the Board reached a decision to proceed with disciplinary action. On the 13<sup>th</sup> March, 2017 a letter was written to the Claimant inviting her to appear before the board on the 21<sup>st</sup> March 2017 to explain herself. The letter was sent by registered post on the 21<sup>st</sup> March, 2017. The Claimant did not turn up. That on 22<sup>nd</sup> March, 2017 another letter was sent to the Claimant to appear before the disciplinary committee on the 11<sup>th</sup> April 2017. It was sent to the Claimant vide registered post on the 22<sup>nd</sup> March, 2017. Again the Claimant did not turn up. Having failed to turn up for the hearing of their case the board decided to dismiss the Claimant from service vide meeting held on the 28<sup>th</sup> June 2017. That the dismissal was communicated to the Claimant vide letter dated 29<sup>th</sup> June 2017 and sent by way of registered post to the Claimant on the 30<sup>th</sup> June 2017.

## **Determination**

### **Issues for determination.**

13. The Claimant in his claim identified the following issues in the claim:-
- a. Unlawful/unfair/wrongful/constructive termination from employment
  - b. Discrimination/unfair labour practices
  - c. Compensation in general damages
14. The Respondent did not identify issues for determination and did not file written submissions.
15. The court from the pleadings and evidence produced by the parties finds the issues placed by the Parties before the court for determination in the dispute as follows:-
- a. Whether there were valid reasons termination of the employment of the Claimant
  - b. Whether there was discrimination.
  - c. Whether the termination of the employment was procedurally fair.
  - d. Whether the Claimant is entitled to reliefs sought.

### **Whether there were valid reasons termination of the employment of the Claimant.**

#### **The relevant law**

16. Section 43 of the *Employment Act* addresses proof of termination as follows:-
- “(a) In any claim arising out of termination of 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.



- (b) The reasons or reasons for termination of contract are the matters that the employer at the time of termination of the contract genuinely believe to exist and which caused the employer to terminate the services of the employee.”
17. Section 44 (4) of the [Employment Act](#) provides for justifiable and lawful grounds for dismissal from employment, inter alia if:-
- (a) Without leave or other lawful cause, an employee absents himself from the place appointed for the performance of work,
  - (b) During working hours, by becoming or being intoxicated and employee renders himself unwilling or incapable to perform his work properly,
  - (c) An employee willfully neglects to perform any work which it was his duty to perform or if he carelessly and improperly performs any work which was his duty under his contract to have performed.....”
18. Section 45 (2) of the [Employment Act](#) provides that a termination of Employment by an employer is unfair if the employer fails to prove:-
- a. The reason for the termination is a fair reason:-
    - i. Related to the employees conduct, capacity or compatibility or
    - ii. Based on the operational requirements of the employer.
19. Section 46 of the [Employment Act](#) provides for reasons that do not constitute fair reasons for dismissal.
20. Section 47(5) of the [Employment Act](#) provides for burden of proof in claims for wrongful dismissal as follows:
- “(5) For any complaint of unfair termination of Employment or wrongful dismissal the burden of proving that unfair termination of Employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds of the termination of employment or wrongful dismissal shall rest on the employer.”
21. The Claimant’s case was that as the savings clerk she twice noted errors in the operational system that reflected erroneous balances after transactions and reported to head of department and ICT systems operator (JMM3 AND 4 being copies of the reported system errors) that she was vide letter dated 10<sup>th</sup> march 2016 suspended from work(JMM5). She was arrested, interrogated and on 26<sup>th</sup> April 2016 arraigned before Kakamega Chief Magistrate Vide Cr. Case No. 1494 of 2016 to take plea on alleged charge of stealing by servant. That she has since sought statements, reports and documents in relation to the case in vain despite a court order to provide the same(JMM6). That nothing was communicated about her disciplinary nor was she paid any salary. That in December she learnt her position had been advertised and replacement hired(JMM7 copy of the advert) and concluded she was constructively dismissed as the reasons for suspension were not disclosed or the investigations, she was not called to show cause or for disciplinary , had been replaced by a person who continues to discharge are duties and has not earned salary since March 2016.Her advocate issued demand letter dated 13<sup>th</sup> December 2016 alleging constructive dismissal.
22. The Respondent to prove the reasons for dismissal at the hearing produced the notice to show dated 13<sup>th</sup> March 2017(exhibit 1), notice of show cause reminder dated 22<sup>nd</sup> March 2017(exhibit 2) and



summary dismissal letter dated 29<sup>th</sup> June 2017 (exhibit 3) which RW told the court gave the reasons for dismissal. The letter states the reasons to be:-

- a. Carelessly and improperly performing your duty
  - b. Involving yourself in personal financial dealings with clients and converting society's money into personal use without authority
  - c. Having been suspected to commit a criminal offence to the substantial detriment of the society
  - d. Insubordination
  - e. Your action led to loss of fidelity bond.
23. The Claimant told the court in her written statement that she was arrested, interrogated and on 26<sup>th</sup> April 2016 arraigned before Kakamega Chief Magistrate Vide Cr. Case No. 1494 of 2016 to take plea on alleged charge of stealing by servant.
24. The court finds that the Respondent proved the reasons for termination of the employment on a balance of probability as per the requirement of section 43 of the Employment. The Claimant was also dismissed from employment for reasons related to her duties.
25. The court finds that the Respondent proved the reason or reasons for termination of employment of the Claimant were valid.

#### **Whether there was discrimination**

26. In paragraph 20 of her claim the Claimant alleges discrimination in the termination contrary to both article 27 of *the Constitution* of Kenya and section 5 of the *Employment Act* as well as general damages for loss of pregnancy. The particulars of the claim for discrimination are not given. In the statement similar allegation without particulars is given.
27. During the hearing of the Claimant's case no evidence was led on the alleged discrimination. It is trite law that he who alleges must prove. In a case of discrimination allegation, it is mandatory to plead with precision the particulars of the infringement as per the test in *Anarita Karimi vs Republic (No.1)* (1979) 1 KLR 154 defined as follows:- 'We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.'
28. The test was not met in the instant claim. The claimant did not prove the claim for discrimination.
29. On the claim for loss of pregnancy again no evidence was produced to that effect. This court having not heard the witness gave benefit of doubt to the Claimant and referred to the documents under her witness statement. The Claimant referred to JMM8 as evidence of loss of pregnancy. The court proceedings do not indicate that she produced the documents or even referred to the issue. The said exhibit JMM8 being letter dated 24<sup>th</sup> June 2016 is a report of caesarean section performed on the Claimant due pre eclampsia ,toxemia and outcome was a live female infant who the letter indicated was in the new born unit. This is an emotive issue and the allegation by the Claimant could as well be true but not as per the evidence filed in court. However, the court only acts on evidence. The demand letter did not make such a claim. The court then finds there was no prove of the allegations.



### **c. Whether the termination of the employment was procedurally fair**

30. The Claimant told the court she received the show cause letters late alleging they were sent to post box which belonged to her late father. During cross examination it is recorded she told the court her postal address was 1112 Maragoli. This was the same address the employer sent the letters to. The Claimant told the court she did not respond. She admitted receiving the dismissal letter and told the court that she did not write to employer as there was no need having been on suspension for more than a year.
30. On re-examination the Claimant told the court she had been replaced and that the invitation to show cause was after her replacement.
31. The Respondent produced the 2 show cause letters and dismissal letter. Prior to dismissal, RW told the court the claimant did not appear even after second show cause letter on the 11<sup>th</sup> April 2017 hence the committee did not sit and referred the case to the board. RW produced prove of postage of the show cause letters sent to address given to employer by Claimant, 1112 Maragoli and the dismissal letter (exhibit 6 a,b,c).
32. During cross-examination RW confirmed the Claimant's case had been pending since 2017, he told the court they did attach evidence on the letters, confirmed the agenda of the committee was disciplinary, they indicated the issues in notice of 22<sup>nd</sup> March 2017, did not give list of witnesses, confirmed that the suspension was indefinite and no salary was paid to the Claimant, confirmed they did advertise other positions but only the Claimant had been suspended, the advertised positions were filled before 17<sup>th</sup> May 2017 when they had already received a letter from the advocate dated 13<sup>th</sup> December 2016, confirmed the show cause letters and letter of dismissal was issued after the position had been filled.
33. Under Article 47 of *the Constitution* of Kenya administrative action should be fair and expeditious. Article 47 provides as follows:
  - “1. “Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”
34. The Court finds that the Claimant has been subjected to administrative process that is neither fair nor expeditious. She was not given any information concerning the outcome of the disciplinary process for almost a year and it is apparent the letter of 13<sup>th</sup> December 2016 by her Advocates kick started the disciplinary hearing process.
35. This Court has time and again stated that it will not interfere with internal disciplinary processes of the parties where the process is fair. However, the Court would meddle where the process is unfair and out of course and geared towards breaching of the law and even the rights of the employee. This is the case in the instant claim.
36. Suspension of more than 6 months has been found by this court in several cases to be unfair and to make it worse this was for more than 1 year without salary. The court has so found in among other case, in *Evelyn Anyango Obondo v Kenya Revenue Authority* [2017] eKLR and *Chrispin Otieno Pudo & 6 others v Kisumu County Public Service Board & another* [2017] eKLR. The court therefore finds that the process in place in termination of the employment of the Claimant was flawed and obviously offends proper labour process.
37. The Claimant has since been dismissed from service and evidence was led that she was replaced before the dismissal.



38. The court finds and determines that the termination process of the employment of the Claimant was unfair. Further, the court finds there was constructive dismissal.

**Whether the claimant's is entitled to reliefs sought On prayer for damages for unlawful, wrongful, unfair, constructive dismissal.**

39. The court find unfairness in the termination process. Considering the claimant was on suspension without pay for more than 1 year, the employer violated provisions of Article 47 on fair administrative action and compensation to the claimant becomes due. The pending criminal case did not stay the disciplinary proceedings. The court taking into consideration the period of service and the agony suffered waiting of the disciplinary process without salary finds that this is a case deserving of compensation the equivalent of 12 months salary for violation of constitutional rights under Article 47 of *the Constitution*. This is justified as reinstatement to service is not available and the outright violation of constitutional rights of fair hearing and administrative action. The Claimant produced her per payslip which indicates her salary gross salary at Kshs. 27,842.75/- (exhibit JJM2). Compensation is awarded at Kshs. 334,113/-

**Notice Pay**

40. Notice pay is not payable as the court found there was justified reason for the suspension and dismissal.

**One Month pay in lieu of leave**

41. No evidence was led to lay basis of the claim which only appears in the prayers. The same is not proved.

**Salary for month of March 2016.**

42. The Claimant led evidence that while at work station on the 10<sup>th</sup> March 2016 she received suspension letter from employment. The court is satisfied she laid basis of her claim. The burden shifted to employer who did not provide evidence of any salary payment upon suspension of employee. The court grants salary of 10 days worked in May 2016. Kshs. 27,842.75/-x 10/31=Kshs 8981.53

**Cost of demand letter**

43. This is not payable and is disallowed

**Conclusion And Disposition.**

44. The court having found unfairness in the disciplinary process and violation of the right to fair administrative action enters judgment for the Claimant against the Respondent as follows:-

- a. Compensation pay for unfair treatment at Kshs. 334,113/-
- b. Unpaid salary for 10 days worked in March 2016 thus Ksh. 27,842.75/-x 10/31=Kshs 8981.53. The Claimant is awarded salary for 10 days amounting to Kshs. 8,981.53/- (above a and b subject to statutory deductions)
- c. Interest at court rates effective date of judgment.
- d. Costs of the claim.

45. It is so ordered.



DATED, SIGNED AND DELIVERED THIS 28<sup>TH</sup> DAY OF JULY, 2022 IN OPEN COURT AT BUNGOMA.

J. W. KELI,

JUDGE

**In the presence of:-**

Court Assistant -Brenda Wesonga

For Claimant:- Absent

For Respondent: - Absent

