



REPUBLIC OF KENYA



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**Muiruri v Githunguri Dairy Farmers Co-operative Society Limited (Cause 474 of 2017) [2022] KEELRC 1231 (KLR) (20 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1231 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE 474 OF 2017**  
**JK GAKERI, J**  
**JULY 20, 2022**

**BETWEEN**

**SAMUEL KINYANJUI MUIRURI ..... CLAIMANT**

**AND**

**GITHUNGURI DAIRY FARMERS CO-OPERATIVE SOCIETY LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant initiated the claim by a memorandum of claim filed on 10<sup>th</sup> March, 2017 alleging that he had been unlawfully dismissed by the respondent and prays for:-
  - i. A declaration that the termination of the Claimant's employment was unfair, devoid of procedure and unlawful.
  - ii. Terminal dues (July 25) pay Kshs.70,057/=
  - iii. One month's salary in lieu of notice Kshs.82,795/=
  - iv. Service gratuity Kshs.334,364/=
  - v. 12 months compensation Kshs.637,188/=
  - vi. General and exemplary damages
  - vii. Costs of this suit
  - viii. Interest on (v), (vi) and (vii)  
Total Kshs.1,124,404/=



### **The Claimant's case is pleaded as follows;**

2. The respondent appointed the Claimant a Milk Grader by letter dated 12<sup>th</sup> October, 2007 and was confirmed as a Quality Milk Inspector by letter dated 21<sup>st</sup> July, 2008 after completion of a three month probationary period.
3. That by letter dated 30<sup>th</sup> June, 2015, the respondent suspended the Claimant from employment allegedly for insubordination by refusing to write a statement when the grader in-charge informed him of an incident which took place on 22<sup>nd</sup> June, 2015.
4. The Claimant avers that he was notified of the board meeting on 22<sup>nd</sup> July, 2015 by a phone call and presented himself. That he was informed that the board wanted to discuss performance and leadership issues as well as the insubordination.
5. It is the claimant's averment after the meeting, a summary dismissal letter was issued.
6. It is the Claimant's case that he was never informed about the nature of the incident in question or the person who issued the instructions and how.

### **Respondent's Case**

7. The respondent admits that it employed the Claimant on 12<sup>th</sup> October, 2007 as a Milk Grader.
8. That the Claimant was suspended on 30<sup>th</sup> June, 2015 because he had deliberately withheld useful information within his docket which would have shed light on an incident that occurred on 24<sup>th</sup> June, 2015 which was detrimental to the operations of the respondent and occasioned great loss.
9. It is the respondent's averment that the Claimant had been instructed by the then security officer to write a statement on the incident but declined to do so.
10. That the refusal to do so amounted to insubordination.
11. It is further averred that the meeting of 20<sup>th</sup> July, 2015 discussed the Claimant's failure to perform his duties.
12. That the Claimant was afforded a hearing on 20<sup>th</sup> July, 2015 but failed to provide a satisfactory reason as to why he did not write a statement on the incident.
13. It is the respondent's case that it acted lawfully and procedurally.
14. Finally, on the particulars of negligence or breach of duty, it is averred that the Claimant failed and/or refused to comply with clear instructions.
15. The respondent prays for the dismissal of the suit with costs.

### **Claimant's Evidence**

16. The Claimant's statement replicates the contents of the statement of claim.
17. On cross-examination, the Claimant stated that his duties did not include collection of milk. That he supervised over 150 employees and the alleged Mr. Muchiri was one of them. The witness denied having been requested to write a statement by anyone. He testified that he did not witness the alleged incident nor was he aware of the theft of milk at the Kiambaa Cooling Plant.
18. It is the Claimant's evidence that he learnt of the theft from the suspension letter issued by the respondent.



19. The claimant testified that he was invited to the board meeting by a telephone call and was aware of the allegations against him. That he was queried about the incident and it was a short meeting and he signed the minutes and was dismissed thereafter.
20. The witness confirmed that his gross salary was Kshs.50,000/= per month and further confirmed that the tabulations on the memorandum of claim were erroneous.
21. CWI further confirms that he received Kshs.290,131/= from the Provident Fund and was a member of the NSSF and was still a member.
22. Finally, the witness confirmed to the court that he was a diligent employee, was promoted by the respondent and has no warning letter for the 8 years he served the respondent.
23. On re-examination, CWI testified that performance bonus was reversed after it had been forwarded to the bank.

### **Respondent's Evidence**

24. RWI, Rose Mbaire, told the court that on 22<sup>nd</sup> June, 2015, a taxi driver was found in possession of the respondent's milk at the Kambaa Cooling Centre and the Claimant was requested to conduct investigations and report to the Head of Department for remedial action but did not do so.
25. That David Muchiri and Kelvin Ndereba Kirai complied.
26. RWI further testified that the Claimant was paid final dues of Kshs.115,182.88 comprising;
  - Leave days
  - One month salary Kshs.50,000/=
  - Days when on suspension 84.9
27. The witness testified that the Claimant was also paid Kshs.290,131.45 from the Provident Fund with the employer retaining a balance of Kshs.95,537.49 until the attainment of the age of 50.
28. On cross-examination, RWI confirmed that the Claimant was not requested to write a statement by a written notice and the invitor did not testify. That the Claimant was in-charge of Quality Control. The witness stated that the duties of the Claimant set out in the written statement were not exhaustive.
29. It was her testimony that in the case of theft, security would investigate and prepare a report but there was none in court. That further investigation was necessary but the Claimant did not write a statement.
30. The witness revealed that during the board meeting on 22<sup>nd</sup> July, 2015, the Claimant's juniors were also in attendance.
31. The witness admitted that she had minutes of the board meeting but they were not filed in court.
32. RWI also confirmed that the Claimant had not been advised to be accompanied by a colleague of his choice. The witness denied having reversed the bonus stating that it was a financial issue dealt with by Accounts and Finance and she was unaware of the reversal.

### **Claimant's Submissions**

33. The Claimant identifies four issues for discussion; whether the claimant had committed any offence in his employment relationship with the respondent, notification of the incident of misconduct, breach of *Employment Act* by the respondent and entitlement to the reliefs sought;



34. As regards the commission of an offence in the course of employment, it is submitted that the respondent failed to establish the insubordination alleged as the letter by one David Muchiri is uncorroborated and the giver of the alleged instructions did not testify in court. Moreover, Mr. David Muchiri was the Claimant's junior.
35. It is submitted that RWI's testimony confirmed that the Claimant was only responsible for the quality of milk and had not been accused of theft of milk.
36. As to whether the respondent informed the Claimant of any incident of misconduct, it is the Claimant's submission that the Claimant received no communication regarding any misconduct on his part.
37. As regards breach of the *Employment Act*, 2007, it is the Claimant's submissions that the provisions of Section 43 of the Act were not complied with as the respondent did not demonstrate that it had a valid reason to terminate the Claimant's employment. That the suspension and dismissal letters were vague referring to a milk incident without the Claimant's role in the incident.
38. It is submitted that the discussions of the meeting held on 22<sup>nd</sup> July, 2015 remain a mystery as the minutes were not produced if they were taken.
39. Reliance is made on the provisions of Section 43(1) of the Act to urge that the respondent had not proved the reason or reasons for the Claimant's dismissal on 22<sup>nd</sup> July, 2015.
40. It is urged that the provisions of Section 41 of the Act were not complied with as the Claimant had not been notified of and was not accompanied by a colleague at the meeting.
41. The decision in *Jackline Migare Kitunzi & another V Junior Hearts Academy* (2022) eKLR is relied upon to reinforce the submission.
42. As regards reliefs sought, it is submitted that except for the error in computation of the Claimant's salary, the Claimant stood by his claim against the respondent.
43. The Claim for gratuity was also withdrawn since the Claimant was a member of the NSSF.

### **Respondent's Submission**

44. The Respondent isolates three issues for determination namely;
  - i. Whether the respondent terminated the Claimant from employment unfairly.
  - ii. Whether the respondent acted unprocedurally and unlawfully.
  - iii. Costs.
45. As regards the 1<sup>st</sup> issue, it is submitted that the respondent terminated the Claimant's employment procedurally and lawfully. It is urged that the claimant was informed of the allegations and given an opportunity to be heard but gave unsatisfactory reasons for not having recorded a statement. The provisions of Section 44(4)(c)(e) and (g) of the *Employment Act* are relied upon to urge that the respondent had a valid reason to terminate the claimant's employment.
46. The decision in *Alphone Maghanga Mwachanya V Operations (680) Ltd* (2013) eKLR is relied upon for the proposition that the employer must explain to the employee the reasons why termination of employment was being considered in a language understood by the employee.
47. It is further submitted that after termination of employment, the Claimant was paid his final dues.



48. That the prayer for Kshs.82,795/= as the Claimant's salary as opposed to Kshs.50,000/= was erroneous and he could not claim for 12 months compensation as he was lawfully terminated from employment.
49. It is further urged that the Claimant is not entitled to gratuity and did not prove on a balance of probability his entitlement to general and/or exemplary damages.

### **Analysis and determination**

50. The issues that commend themselves for determination are;
  - i. Whether termination of the Claimant's employment was fair.
  - ii. Effect of the retirement entitlement form.
  - iii. Whether the Claimant is entitled to the reliefs sought.
51. As to whether termination of the Claimant's employment was fair, the starting point is the Employment Act which prescribe the substantive and procedural requirements to be complied with for a termination of employment to pass muster.
52. Section 45(2) of the Employment is explicit on the requirements as follows;
  - i. Valid and fair reason for the termination relating to the employees
  - ii. Conduct, capacity, incompatibility or operational requirements of the employer;
  - iii. Termination was in accordance with fair procedure.
53. Section 43(1) of the Act on other hand prescribe the respective burden of proof on the employer and employee.
54. In a similar vein, Section 41 of the Act prescribes the mandatory process to be complied with.
55. The foregoing and other provisions of the Employment Act prescribe the substantive and procedural attributes of a fair termination. For a termination of employment to pass muster, it must be substantively justifiable and procedurally fair. See Walter Ogal Anuro V Teachers Service Commission (2013) eKLR, Naima Khamisi V Oxford University Press (EA) Ltd (2017) and Jenny Luesby V Standard Crop Ltd (2017) eKLR among others.
56. I will now proceed to apply the foregoing provisions and propositions of law to the facts of this case.

### **Reasons for Termination/dismissal**

57. There is no dispute that the Claimant was suspended by letter dated 30<sup>th</sup> June, 2015, allegedly on the ground that he declined or refused to write a statement regarding an alleged incident on 22<sup>nd</sup> June, 2015 at the Kiamba Cooling plant having been informed about it by the Milk Grader in-charge which according to the respondent signified high level of insubordination.
58. The provisions of Section 44(4) (c) and (e) erroneously cited as (d) and (g) of the Employment Act are relied upon.
59. What followed was a telephone call to the Claimant to attend a board meeting on 22<sup>nd</sup> July, 2015. The letter makes no specific allegation. Although the respondent produced an invitation letter dated 22<sup>nd</sup>



July, 2015, it did not lead evidence that it was served upon the Claimant. A summary dismissal followed by letter dated 22<sup>nd</sup> July, 2015. The letter stated as follows;

“ . . . you did not offer satisfactory explanation why you neglected/failed to perform your duties as per laid down procedures and reasons why you declined to write a statement to shed light to an incident that occurred on 22<sup>nd</sup> June, 2015 at Kambaa Cooler Centre . . . ”

60. From the evidence on record, it is unclear what happened at the Kambaa Cooling Centre and what the Claimant was expected to do as the one in-charge of Quality assurance. RWI confirmed on cross-examination that in cases of theft the security department would investigate and prepare a report but none was availed in court.

**Secondly, it is unclear what procedures the Claimant violated.**

61. Section 44(4) of the *Employment Act* provides;

a. . . .

b. . . .

c. An employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract to have performed carefully and properly.

d. . . .

e. An employee knowingly fails or refuses to obey a lawful and proper command which it was within the scope of his duty to obey issued by his employer or a person placed in authority over him by his employer.

62. The Claimant testified that he was unaware of the alleged incident at the Kambaa Cooler Centre until he was notified by his senior, one of the directors.

63. The respondent has not adduced evidence of who instructed or demanded that the Claimant takes certain steps as far as theft of milk at the Kambaa cooler centre, if that was the case.

64. The respondent tendered no evidence that the letters by David Muchiri dated 6<sup>th</sup> July, 2015 and the undated letter of Kevin Ndereba Kirai were forwarded to the Claimant or the board. Mr. David Muchiri's letter was written on 6<sup>th</sup> July, 2017, 15 days after the alleged incident. Noteworthy, David Muchiri did not testify.

65. Finally, Mr. David Muchiri was the Claimant's supervisee not supervisor. He was not in a position of authority over the Claimant.

66. For the foregoing reasons, it is the finding of the court that the respondent has on a balance of probability failed to show that it had a fair and valid reason to terminate the Claimant's employment on 22<sup>nd</sup> July, 2015.

**Procedure**

67. Section 41 of the *Employment Act*, provides the mandatory process an employer must comply with for a termination of employment or dismissal to pass muster as explained by the Court of Appeal in *Pius Machafu Isindu V Lavington Security Guards Ltd* (2017) eKLR.



68. The constituents of Section 41 were itemised by the Court of Appeal in *Postal Corporation of Kenya V Andrew K. Tanui* (2019) eKLR as follows;

“Four elements must be discernible for the procedure to pass muster:-

- i. an explanation of the grounds of termination in a language understood by the employee;
- ii. the reason for which the employer is considering termination
- iii. entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made
- iv. hearing and considering any representations made by the employee and the person chosen by the employee.”

69. The court is bound and guided by these sentiments.

70. In this case, the letter inviting the Claimant for the board meeting dated 16<sup>th</sup> July, 2015 consists of two sentences and contains no allegations against the Claimant. The letter was never delivered to the Claimant and the date of the meeting changed from 23<sup>rd</sup> July, 2015 to 22<sup>nd</sup> July, 2015.

71. The Claimant was notified of the meeting by a phone call. He testified that he was aware of the allegations against him and attended the short meeting which according to him addressed performance issues although he was also questioned about the alleged incident at Kambaa.

72. Puzzlingly, Claimant’s juniors attended the board meeting with the Claimant.

73. Significantly, although RWI testified that minutes of the board meeting were available, they were not filed.

74. It is unclear what happened at the meeting, who led evidence, what the Claimant stated, deliberations by the Board and the decision made.

75. Needless to emphasize, the letter dated 16<sup>th</sup> July, 2015 does not meet the threshold prescribed by Section 41 of the *Employment Act*.

76. Other than not setting out the allegations the Claimant was facing, the letter did not notify the Claimant of his entitlement to be accompanied by a fellow employee.

77. Finally, the letter invites the Claimant to appear before the board as opposed to a disciplinary committee.

78. The court is in agreement with the Claimant’s counsel submissions that the invitation letter did not require the Claimant to do anything.

79. The decision in *Jackline Migare Kitunzi & another V Junior Hearts Academy* (Supra) as aptly captures the circumstances as follows;

“The *Employment Act*, for example introduced and prescribed minimum terms which the parties must consider as they contract. It established the concept of fair hearing and placed a duty on an employer to give reasons before dismissing or terminating the services of an employee. These developments are a stark departure from the traditional power of the



employer to terminate or dismiss at will as demonstrated in the earlier decisions of the courts.”

80. In the instant case, it is unclear whether the Claimant was heard and whether his representations at the board meeting were considered.
81. For the above stated reasons, the court is satisfied that the respondent’s conduct which culminated in the dismissal of the Claimant from employment did not meet the threshold prescribed by law. The dismissal was procedurally flawed.
82. As regards the effect of the entitlements form, neither of the parties addressed the issue in evidence or in their submissions and for sustainable reasons. The document dated 24<sup>th</sup> July, 2015 was signed by the Claimant but was not signed by the other parties to the proposed agreement and is therefore incomplete and of no consequence to the Claimants case.
83. As to whether the Claimant is entitled to the reliefs sought, the court proceeds as follows;
- a. Having found that the Claimant’s dismissal from employment had neither a justification nor compliance with the prescribed procedural precepts a declaration is hereby issued that the dismissal was unfair and unlawful.
  - b. Terminal dues (July 2015) Kshs.70,057/=
84. The Claimant tendered no evidence that he was not paid for the days he was on suspension in July, 2015. Neither the written statement nor the oral evidence led in court allude to this fact.

More significantly, the entitlement form dated 24<sup>th</sup> July, 2015 which the Claimant signed shows that the days worked while on suspension were included in the computation.

The prayer is declined.

### **c. One month salary in lieu of notice and compensation**

85. Having found that the Claimant’s termination from employment was unfair, the Claimant becomes entitled to the reliefs prescribed by Section 49(1) of the Employment Act, 2007 which include the 12 months compensation.
86. In determining the quantum of compensation, the court has taken the following into consideration;
- i. The Claimant was an employee of the respondent from 12<sup>th</sup> October, 2007 to 22<sup>nd</sup> July, 2015 a duration of 7 years and 9 months.
  - ii. The Claimant’s evidence which the respondent did not controvert is that he had no disciplinary issue for the entire duration having risen from a Milk Grader to the position of Quality Assurance and Extension Supervisor. This signifies diligence on the part of the Claimant.
  - iii. There is no indication that the Claimant wished to continue in the employment of the respondent. He did not appeal the decision of the board meeting made on 22<sup>nd</sup> July, 2015.
87. In the circumstances, the Claimant is awarded Kshs.50,000/= as salary in lieu of notice and the equivalent of 6 month’s salary which the court considers fair Kshs.300,000/=.



**(d) Service gratuity Kshs.334,364/=**

88. This prayer is unsustainable since the Claimant was and testified that he still is a member of the NSSF and had been a member of the respondent's Provident Fund. Relatedly, the Claimant indicated in his submissions that the prayer had been withdrawn.
89. In the final analysis, Judgement is entered for the Claimant against the respondent in the following term;
- a) One month's salary in lieu of notice Kshs.50,000/=.
  - b) Equivalent of 6 months compensation, Kshs.300,000/=.
  - c) Cost of this suit.
  - d) Interests at Court rates from date of judgement till payment in full.
90. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 20<sup>TH</sup> DAY OF JULY 2022**

**DR. JACOB GAKERI**

**JUDGE**

**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 has 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.

**DR. JACOB GAKERI**

**JUDGE**

