



**Wanjiku v Maridadi Flowers Limited (Cause 184 of 2014)
[2022] KEELRC 1326 (KLR) (14 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1326 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 184 OF 2014
HS WASILWA, J
JULY 14, 2022**

BETWEEN

JOSEPH M THERI WANJIKU CLAIMANT

AND

MARIDADI FLOWERS LIMITED RESPONDENT

JUDGMENT

1. Joseph Matheri wanjiku filed an Amended Memorandum of Claim dated 8th May, 2017 suing Maridadi Flowers Limited for unfair termination. He avers that he was employed by the Respondent on 14th September, 2004 as a sprayer and moved up the ranks to the position of supervisor earning a gross salary of Kshs 18, 328.
2. *Vide* a letter dated 9th May, 2013, the Claimant services were terminated on allegations of malpractices, theft, and criminal offences, which offenses, according to the Claimant, were never established by the Respondent to warrant the dismissal.
3. The Claimant avers that the termination was unfair for failing to adhere to the procedures provided for under the law and failing to pay his terminal dues upon the said termination.
4. He prays to be awarded Gratuity of Kshs 112,411.73, 12-month salary compensation for the unfair termination of Kshs 219,936, one-month salary in lieu of Notice Kshs 18, 328, Wages for 9 days worked in May, 2013 of Kshs 5,498.40, travelling allowance of Kshs 2,300, 64 Pending leave days of Kshs. 26,662, April salary of Kshs 18, 328 and a House allowance of Kshs 540 all adding up to Kshs 404,003.73
5. His relief as per the Amended claim were as follows; -
 - a) To be paid terminal dues amounting to Kshs 404,003.73 as particularized under paragraph 10 of the Amended claim.



- b) General damages for breach of contract based on loss of expected earnings for the remaining term of contract.
 - c) Any other relief that the Court may deem fit to grant.
 - d) Costs of the claim and interest thereon.
6. In response to the claim, the Respondent filed a Memorandum of defence on the 30th July, 2014 admitting to employing the Claimant in 2004 though as a general worker and on permanent basis on the 14th September, 2004 and as a supervisor on the 1st September, 2009.
7. The circumstances leading to the termination of the Claimant, according to the Respondent, are that on the 22nd April, 2013, the Claimant as is the norm was tasked with supervising spraying at the farm, where he was first to ensure all chemicals taken from the store, mixed in the mixing areas and used in the farm thereafter the cans and containers destroyed. On the contrary the Claimant in cahoots with other staff stole 3 containers of chemicals.
8. The theft according to the Respondent was carried out by the Claimant and given to his junior staff Ezekiel who gave them to Wabwile to keep them for the Claimant, as the Claimant was off duty.
9. It is averred that the Claimant being a supervisor ought to have ensured all the rules and regulations of the company are followed to the letter. He added that the act of stealing or being suspected of stealing attracts summary termination as provided for under section 44(4) of the Employment.
10. Nonetheless, that the Claimant was suspended for two weeks and a disciplinary hearing was convened for 9th May, 2013 where the Claimant was found culpable and since the management could no longer trust him, his services were terminated. Being that he was summarily terminated he Claimant was not entitled to gratuity pay and any of the reliefs sought in the Amended claim.

Claimant's case.

11. The Claimant testified as CW-1 and adopted his witness statement dated 9th June, 2014 which reiterated the contents of the claim. He also produced the documents as appearing in the list dated 9th November, 2013.
12. Upon cross examination by Okoth Advocates, he testified that he was a supervisor in the mixing area together with three others and were under another supervisor. He stated that on the date of the alleged theft, he was on off duty and Ezekiel an alleged accomplice was in charge. He avers that he was summoned by the Respondent's Manger and informed that there was an incident and was to report back to work immediately. Upon arrival, he was asked to hand over his phone to the security personnel present for investigation. Afterward he was instructed to go back home. On the 9th May, 2013 he was summoned by the director and informed that some pesticides had been stolen and found in the mixing areas where he was in charge of.
13. On further cross examination, the witness testified that he tried calling Ezekiel on the April 22, 2013 but could not reach him. He stated that he was later suspended before the hearing and subsequently terminated.

Respondent's case.

14. The Respondent's Human Resource manager, Ms. Joyce Kuria, testified as RW-1. She adopted her witness statement dated 3rd February, 2022 which also reiterated the response to claim herein.



15. Upon cross examination, the witness testified that she was not present when the incident occurred, she avers that the chemicals were found in possession of Callistus Wambwile who confessed that the Claimant through Ezekiel had asked him to keep them for him. She testified further that the Claimant tendered his resignation when this issue was raised however the resignation was not accepted since the Claimant was still under investigations. She then contends that the Claimant was paid his terminal dues though he refused to sign the documents showing the said payments.

Claimant's Submissions.

16. It was submitted for the Claimant that the termination was unfair for the reason that the termination was based on theft that was never proved either in a Court of law or in the disciplinary meeting. It was argued that the Respondent failed to annex the minute of the meeting that allegedly held the Claimant culpable and also failed to adduce evidence of the said theft by calling the key witnesses being Ezekiel and Callistus Wambwile to testify either in the disciplinary hearing or in this Court to affirm the reason for the termination. It is therefore argued that the reason for termination was never established. To support his case the Claimant cited the case of *Silas Owiti Oluoch & Another v Fidelity Commercial Bank Limited* [2017] eKLR where the Court held that;-

“ Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal....”.

17. From this subsection, the enumeration of any matter or decision of an employer to dismiss an employee summarily shall not preclude an employer or employee from disputing the said facts or proving them and an employer who alleges criminal acts must demonstrate their commission. In this the Claimant relied on the case of *Nicholas Otinyu Muruka v Equity Bank Limited* Nairobi ELRC case No. 25 of 2013; Hon. Justice Mbaru held that an employer in cases of summary dismissal must demonstrate reasonable and sufficient grounds that link an employee to acts of gross misconduct warranting summary dismissal. She states thus:

“ Mere suspicion is not enough. There must be reasonable and sufficient grounds. Otherwise if employers are allowed to hold mere suspicions, they would use these simple reasons to harass, intimidate and/or harass their employees for no just cause. Even where an employer has a just cause as to apply the provisions of Section 44(4)(g), the same must comply with the provisions of Section 41 and 43 of *Employment Act*. If the reasons for termination are not proved to amount to gross misconduct, then the application of Section 41 of the *Act* will apply. Thus, disputes of summary dismissal will always be subjected to the test of Section 41 of the *Act* whenever employees dispute and claim that the circumstances of the case did not give themselves to reasons of gross misconduct”.

18. The Claimant submitted that before the termination, he had tendered his resignation due to humiliation subjected to him based on allegation of theft which was never substantiated. He argued that the resignation was constructively motivated by the Respondent which was tantamount to constructive termination. In this he relied on the case of *Coca Cola East and Central Africa Limited v Maria Kagai Ligaga*.



19. The Claimant in conclusion urged this Court to allow the claim as prayed as he has proved his case to the required standard.

Respondent's Submissions.

20. The Respondent submitted from the onset that section 44(4) of the *Employment Act* empowers it to summarily terminate the services of an employee when the said employee inter alia commits a criminal offense or is suspected to have committed the said criminal offense. Accordingly, that the Claimant had been suspected together with other fellow employees to have stolen chemicals from the Respondent as such liable for summary dismissal.
21. Despite being empowered by the act to summarily terminate the services of he Claimant, the Respondent subjected the Claimant to disciplinary hearing before the termination as such the termination was justified and done in accordance with the law. To support their argument, the Respondent relied in the case of *Mary Chemweno Kiptui V Kenya Pipeline Company Limited* [2014] eklr where the Court held that;

“Invariably therefore, before an employer can exercise their right to terminate the contract of an employee, there must be valid reason or reasons that touch on grounds of misconduct, poor performance or physical incapacity. Once this is established the employee must be issued with a notice, given a chance to be heard and then a sanction decided by the Respondent based on the representation made by the affected employee. It is now established best practice to allow for an appeal to such an employee within the internal disputes resolution mechanism and with due application of the provisions of section 5(7) (c) of the *Employment Act*. Where this procedure is followed an employer would have addressed the procedural requirements outlined under section 41 and any challenge that an employee may have would be with regard to substantive issues only.”

22. It was argued further that the Claimant was first suspended on the 25th April, 2013 to pave way for investigation then invited for disciplinary hearing scheduled for 9th May, 2013 where he was accorded an opportunity to be heard and explain himself and finally terminated when he could not satisfactory give a proper explanation.
23. The Respondent in conclusion urged this Court to dismiss the claim and hold that the termination was justified in the circumstances.
24. I have examined all evidence and submissions of the parties herein. From the evidence of the Claimant the events leading to his termination were committed when he was off duty.
25. The Respondents in their evidence also indicated that indeed the Claimant was off duty but had carried out the theft of the containers who gave to his juniors Wabwile and Ezekiel to keep them for him.
26. The events led to suspension of the Claimant for 2 weeks and a disciplinary hearing was convened on 9th May, 2013 and the Claimant was found culpable.
27. The Respondents produced minutes of the disciplinary hearing held on 9th May, 2013 in Maridadi office in which the witness Ezekiel indicated that the Claimant had called them and asked him to give the 3 containers to Wabwile who was to keep for him till the next day.
28. The minutes were signed by these witnesses but the Claimant refused to sign.



29. On 26th April 2013, the Claimant had written a letter of resignation which was received by the Respondents but the Respondents declined to accept his resignation indicating that he was amongst the people under investigation.
30. The Claimant had chosen to resign after being suspended on 25th April, 2015.
31. What comes out is that during the disciplinary hearing, the 2 witnesses who were purportedly called by the Claimant to keep the containers for the Claimant were called as witnesses.
32. They testified in the Claimant's presence reiterating this fact. The Claimant had also decided to resign before this date which resignation was rejected by the Respondents.
33. In my view the Respondents had a valid reason to warrant dismissal of the Claimant which reason was established during the disciplinary hearing.
34. Minutes of the disciplinary hearing to which the Claimant was subjected to were also produced in Court as exhibit showing that the Claimant was also given an opportunity to be heard.
35. 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”.

36. Given that the Respondent had valid reason to dismiss the Claimant and also subjected him to a disciplinary hearing which was fair, I find that the dismissal of the Claimant was fair and justified.
37. The claim for compensation for unfair termination cannot stand and is dismissed.
38. The same applies to the claim for payment of 1 month's salary in lieu of notice and gratuity payment as provided for under the CBA.
39. The Claimant is however entitled to payment of his terminal dues which I award him as follows:-
 1. Service pay equivalent to 15 days pay for each completed year of service
 $= \frac{1}{2} \times 18,328 \times 8 = 36,656/=$
 2. Wages for 9 days worked in May 2013
 $= \frac{9}{30} \times 18,328 = 5,498/=$
 3. Pending leave of 64 days = 26,662/= as prayed



4. April 2013 salary = 18,328/=

Total = 87,144.40

Less statutory deduction

5. There will be no order of costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 14TH DAY OF JULY, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mandela for Claimant – present

Respondents in person – absent

Court Assistant - Fred

