



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwaniki v Vision Africa Sacco Limited (Cause 279 of 2018)  
[2022] KEELRC 4128 (KLR) (29 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4128 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
CAUSE 279 OF 2018  
HS WASILWA, J  
SEPTEMBER 29, 2022**

**BETWEEN**

**THOMAS BABU MWANIKI ..... CLAIMANT**

**AND**

**VISION AFRICA SACCO LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant instituted this suit vide a statement of claim dated 13<sup>th</sup> December, 2018 and filed in this Court on the 17<sup>th</sup> December, 2018. The Claimant alleges to have been terminated unfairly and seeks the following reliefs;
  - a. A declaration that the Claimant was unlawfully terminated.
  - b. Reinstatement or in the alternative payment of Kshs. 7,979,400 being the amount the Claimant would have earned for the 62 months leading into retirement.
  - c. Compensation of 12 months pursuant to section 49 of the *Employment Act*.
  - d. Costs and interest of this claim.
2. The summary of the claim is that the Claimant was employed by the Respondent on 3<sup>rd</sup> October, 2012 as a General manager earning a gross salary of Kshs 128,700 per month.
3. The Claimant alleged to have worked harmoniously for the Respondent till October, 2015, when he received a letter dated 15<sup>th</sup> October, 2015 ordering him to prepare a handing over report and proceed on his accrued leave of 69 days with immediate effect. The Claimant complied with the orders of the Respondent and proceed on the said leave.
4. While on leave, he received a phone call from the acting Managing Director, inviting him to a meeting on 22<sup>nd</sup> December, 2015 but he was not informed of the agenda of the said meeting. The meeting did



- not take place as scheduled and the Claimant was later called and informed that the said meeting will now be held on 30<sup>th</sup> December, 2015 and the agenda was to discuss his continued service with the Sacco. He attended the meeting but that nothing was resolved with regard to his service with the Respondent.
5. He states that on 11<sup>th</sup> January, 2016 or thereabouts, he met with the Respondent's chairperson who informally told him that the board had made a decision that he should tender his resignation since the Claimant was facing hostilities from a section of the board members and some delegates that were unhappy by the action taken on dismissal of staff members who had participated in an illegal strike and that the said action dented the image of the Respondent.
  6. Armed with this information, the Claimant indicated his willingness to resign vide the letter of 14<sup>th</sup> January, 2016, subject to some terms and conditions to be agreed upon by the parties. According to the Claimant, the move to resign was based on the information given to him by the chairman of the board and in the bid to amicably settle issues between him and the Respondent.
  7. The said resignation letter was not acted upon by the Respondent and on 19<sup>th</sup> January, 2016, the Claimant was served with an extension of leave letter, extending his leave by 13 more days. Upon lapse of the 13 days leave, the Claimant received another letter dated 30<sup>th</sup> January, 2016 terminating his services on the basis of alleged dismal performance.
  8. The Claimant states that, throughout his tenure in the Respondent's employ, his performance had never been questioned nor reviewed, therefore, the termination based on alleged poor performance was in violation of the Respondent's human resource policy and against the law that requires an employer to carry out performance appraisal before termination.
  9. The Respondent entered appearance on the 29<sup>th</sup> January, 2019 and filed a response to claim on the 19<sup>th</sup> February, 2019 denying the contents of the claim especially the allegation of unfair termination. It instead admitted to employing the Claimant as the General manager/ CEO on 3<sup>rd</sup> October, 2012 which appointment was ratified on 28<sup>th</sup> July, 2014. It is stated that, the letter provided for termination of the contract by either party upon one-month notice given.
  10. It is stated that the terms of service dated 20<sup>th</sup> March, 2015 were served upon the Claimant who accepted them without question.
  11. The Respondent states that the Claimant worked till 22<sup>nd</sup> June, 2015, when he was served with a warning letter on the basis of his dismal performance and poor inter-personal relationship with other staff members which led to a strike by employees on 4<sup>th</sup> May, 2015.
  12. It is stated that on 15<sup>th</sup> October, 2015, the Claimant voluntarily applied for the accrued leave of 69 days which was approved by the Human Resource manager. While on leave the Respondent invited the Claimant to a meeting which took place on 30<sup>th</sup> December, 2015, where the main discussion centered around Claimant's performance and service generally at the Respondent. It is stated that the Claimant was present in the meeting accompanied by a colleague named, Hiram K. Macharia. That he made his submissions and agreed to be bound by the decision of the board.
  13. The Respondent states that on 14<sup>th</sup> January, 2016, it received the Claimant's intention to tender his resignation, which was received before the board could make any decision on the deliberation of the meeting of 30<sup>th</sup> December, 2015. Subsequently, the board met on 28<sup>th</sup> January, 2016 and resolved to terminate the services of the Claimant. They then issued him with a one-month notice in accordance with Article 13.4 as read with Article 11.8 of the Respondent's Human Resource policy.
  14. It is the Respondent's case that, Article 11.12.2 of the Human resource manual provided for appeal, which Claimant failed to utilize.



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

15. The Claimant testified as CW-1 and adopted his statement dated 13/12/2018 and produced the 10 documents in the list dated 13/12/2018 as Claimant's exhibit 1-10 respectively. He added that there was no disciplinary committee formed to hear his case He stated that he could not appeal because it's the apex body being the board that terminated his services therefore there was no other body to hear the appeal. He testified that before the dismissal he was not subjected to any performance appraisals contrary to Section 12(6)(i) of the Human Resource policy. It was his testimony that three warning letter could secure a dismissal which was not the case herein as he had only received one warning letter.
16. Upon cross examination by Kanyi Advocate, the Claimant testified that the employment letter at clause 7 provide for termination of contract by either party giving notice of one month or salary in lieu. He admitted that there was a strike on 4<sup>th</sup> May, 2015 which lead to the closure of Gilgil and Naivasha Branch. He admitted receiving the warning letter of 22/6/2015 but that the said warning letter was an advice on performance. He testified that the strike was spontaneous and was not made aware. He also admitted that the meeting of 30<sup>th</sup> December, 2015 discussed his performance and continued service at the Respondent. He stated that the issue arose from the dismissal of some of the employees who participated in the outlawed strike. He stated the meeting did not raise a quorum of 5 as the meeting was only attended by Joseph and 3 other members. He also confirmed that the board sat on 28/1/2016 and resolved to discharge him of his duties. That upon termination he was given one-month salary, his January ,2016 pay only. That he was not paid service pay, neither was he issued with certificate of service. He maintained that he was not paid all his terminal benefits as captured in page 43 of the Human Resource Manual.

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

17. The chairman of the Respondent, Joseph Mugere Riungu, testified as RW-1 and adopted his witness statement dated 18/2/2019 then produced the eleven documents as Respondent's Exhibit 1-11 respectively. In addition, he testified that the Claimant was the CEO/General manager of the Respondent whose services were terminated after following due process. He stated that upon the termination, the Claimant was paid his terminal dues in full. He testified that the Claimant's appeal could have been head by sub-county cooperative officer as such the Claimant had an opportunity to appeal. He added that the Claimant was terminated for poor performance.
18. Upon cross examination by Njogu Advocate, RW-1 admitted that they did not subject the Claimant to performance appraisal. He testified that a disciplinary committee was constituted though the Claimant appeared before the Board on 30<sup>th</sup> December, 2015, which meeting was the disciplinary hearing meeting though the minutes produced does not indicate any disciplinary hearing. He stated further that the meeting had other agenda and the Claimant's performance was one of them. On where to appeal, the witness testified that the Claimant ought to have appealed to the Sub-County Cooperative officer, though the same was not indicated in the HR manual.
19. Hiram Kariuki Macharia, the Respondent's Chief Executive Officer (CEO) testified as RW-2. He adopted his statement of 18/12/2019. In addition, he testified that the Claimant was terminated after due process was followed. The reason for termination according to RW-2 was on poor performance and poor relations with staff. He stated that he was present in the board meeting of 30<sup>th</sup> December, 2015 as a colleague to the Claimant having been invited by the Claimant.
20. On cross examination by Njogu Advocate, the witness testified that he is the one that replaced the Claimant. That his role in the meeting of 30<sup>th</sup> December, 2015 was to take notes. He however admitted



that he did not have any documents to show the performance of the Claimant. He also stated that he was employed by the Respondent on 1/11/2015 and it's the Claimant that interviewed him.

### **Claimant's Submissions.**

21. The Claimant submitted on two issue; whether the Claimant's employment was wrongfully terminated and whether the Claimant is entitled to the reliefs sought.
22. On the first issue, it was submitted that for termination of an employee to pass the fairness test, it must be shown that both reason and procedure was proper. He relied on the case of *Walter Ogal Anuro V Teacher Service Commission* [2013] eKLR.
23. On substantive fairness, it was submitted that the dismissal letter of 30<sup>th</sup> January, 2016 indicated the reason for termination as due to dismal performance. However, that there was no evidence tabled before Court to demonstrate the alleged poor performance. It was argued further that contrary to provision of clause 11.6.1 and clause 13.2 of the Respondent's Human Resource policy, the Respondent did not carry out any performance appraisals as such the termination was unlawful. To support his case, the Claimant cited the case of *Peter Kamau Mwaura and another v National Bank of Kenya* [2020] eKLR where the Court cited the case of *Jane Samba Mukala V Oltukai Lodge Limited* [2010]KLR 225 and held that;

“Where poor performance is shown to be reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the *Employment Act*, 2007. The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance.”

24. On procedural fairness, it was submitted that section 41 of the *Employment Act* provides for the procedure to be followed before an employee's services are terminated. Contrary to the law, that the Respondent failed to constitute any disciplinary committee as provided for under clause 11.10(b) of the Respondent's Human Resource policy. It was argued further that the meeting of the board of 30<sup>th</sup> December, 2015 discussed various issue and the matter of the Claimant's discipline was mentioned in passing and not discussed as an agenda, therefore that the said Board meeting were not proper disciplinary hearing. Further that the fact that he was heard by the board did not leave him with any avenue to appeal, the Board being the apex disciplinary body. To support his claim, he relied on the case of *Mary Chemweno Kiptui V Kenya Pipeline Company Limited* [2014] eKLR where the Court held that;

“Section 41 of the *Employment Act* is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative or in the presence of a fellow employee of their own choice. The situation is dire where such an employee is terminated after such a flawed process without a hearing as such termination is ultimately unfair. The employee must be informed through a notice as to the charges and given a chance to submit a defence followed by a hearing in due cognizance of the fair hearing principles as well as natural justice tenets.”

25. In conclusion, it was submitted that the termination failed both substantive and procedural fairness test as such the reliefs ought to be allowed as prayed.



## Respondent's submissions.

26. The Respondent on the other hand submitted on three issues; whether there was valid reason to terminate the employment of the Claimant, whether due process was followed before the said dismissal and whether the Claimant is entitled to the reliefs sought.
27. On the first issue, it was submitted that the Claimant's services were terminated for dismal performance. It was argued that the warning letter pointed out to such performance which included; Poor interpersonal relationship with the staff, communication breakdown with the board, failure to set target, which was in breach of clause 5, 12 and 13 of the Claimant's job description. To support its case, they relied on the case of *Njeru V Agip (K) Ltd* [1986] KLR 480 where the Court opined that where an employee was habitually neglectful in performing his duties and had failed to perform those duties with due care and attention, then the Defendant had good grounds to dismiss him.
28. It was submitted further that the fact that a strike was carried out by the staff without the Claimant's knowledge was a clear indication that the Claimant had lost touch with his managerial skills and that there was communication breakdown between him and the staff. These reasons, according to the Respondent justified the termination of the Claimant's services.
29. On procedure followed, the Respondent submitted that it accorded the Claimant fair opportunity to defend himself in the meeting of 30<sup>th</sup> December, 2015 and termination letter issued to him on 28<sup>th</sup> January, 2016. Prior to the disciplinary hearing that the Claimant had been issued with a warning letter requiring him to give answers on key issues of concern that led to the strike on 4<sup>th</sup> May, 2015. Also that the Claimant was allowed to call a representative which he called Hiram Macharia. He therefore argued that the Claimant was subjected to due process and granted an opportunity to be heard as envisaged under the law and held in *Global Vehicles Kenya Limited V Lenana Road Motors* [2015] eKLR where the Court quoted the Court of appeal decision in *David Sironga Ole Tukai V. Francis Arap Muge & Others*, CA NO. 76 OF 2014, this Court expressed itself thus:

“It is well established in our jurisdiction that the Court will not grant a remedy, which has not been applied for, and that it will not determine issues, which the parties have not pleaded. In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other's case is as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense. The Court, on its part, is itself bound by the pleadings of the parties. The duty of the Court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The Court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and leads to denial of justice.”
30. It is the Respondent's argument that a summarily dismissal is dismissal where an employee's services are terminated without notice, while a termination which is preceded by notice is recognized in law



and not unfair as long as the employee is paid their terminal dues. He relied on the case of *Owaga V Transocean (U) Limited* [1990] KLR where the Court held that;

“Dismissal is a move a move by an employer or master terminating the services of an employee’s summarily or without notice. Termination of an employee’s services with due notice dos not ordinarily give rise to legal liabilities except as may be stipulated in the contract of employment where there is one or as provided by statute, where one exists in that regard. An employer may exercise the power to summarily dismissal without incurring any legal liabilities if an employee has been quilt of conduct of willful nature which amount to repudiation of the contract of service. If a plaintiff has been wrongfully dismissed from employment which was for a fixed term at a fixed salary, his loss must be precisely calculated and should be claimed as special damages.”

31. On the reliefs sought, it was submitted that the Claimant’s services were terminated for justifiable reason as such the reliefs sought are not payable and the Claimant should be dismissed with costs to the Respondent.
32. I have examined the evidence and submissions of the parties herein. It is in evidence that the Claimant was an employee of the Respondents from 3/10/2012 to October, 2015.
33. He was indeed invited to tender a resignation on 14/1/2016 and then terminated on 30/1/2016.
34. There is no indication that he was given an opportunity to be heard as provided for under Section 41 of the [Employment Act](#) 2007 which states as follows;

“41. Notification and hearing before termination on grounds of misconduct

- (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”.

35. As per the Respondent’s evidence, he was terminated for non-performance.
36. Section 41 of the [Employment Act](#) still envisages a hearing which in this case would entail demonstration that there were previous parameters of performance set for the Claimant and that the Claimant failed to live up to the expected performance and therefore is guilty of poor or non-performance.
37. There is indeed no evidence tabled before this Court on the expected targets set by the Respondent for Claimant to achieve nor evidence of how he actually performed.
38. This is in line with the decision of this Court in *Kamau Mwaura & Another VS NBK* (Supra).



39. Section 43 of the Employment Act 2007 states that;-

“43.Proof of reason for termination

- (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.”

40. Indeed it is the Respondent to demonstrate the validity of reasons for termination which they have not done.

41. The Claimant as indicated above was also not subjected to any fair disciplinary process.

42. It is therefore my finding that the Claimant’s termination was unfair and unjustified as provided for under Section 45 (2) of the Employment Act 2007 which 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”.
    1. The Claimant having been terminated unfairly and unjustly, I find for him and award him maximum compensation of 12 months salary in view of the fact that he was treated unfairly and his career cut short unceremoniously.
    2. This is equivalent to  $12 \times 128,700 = 1,544,400/=$   
Less statutory deductions
    3. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this Judgment.

**DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 29<sup>TH</sup> DAY OF SEPTEMBER, 2022.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**



In the presence of:

Kanyi Ngure for Respondent – present

Claimants – absent

Court Assistant - Fred

