



Nyaga v Kiewa Group Limited (Employment and Labour Relations Claim E012 of 2020) [2022] KEELRC 4098 (KLR) (28 September 2022) (Judgment)

Neutral citation: [2022] KEELRC 4098 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
EMPLOYMENT AND LABOUR RELATIONS CLAIM E012 OF 2020
DKN MARETE, J
SEPTEMBER 28, 2022**

BETWEEN

JOSEPH GITONGA NYAGA CLAIMANT

AND

KIEWA GROUP LIMITED RESPONDENT

JUDGMENT

1. This matter was originated by way of an amended memorandum of claim amended on February 13, 2021. It does not display any issue in dispute on its face.
2. The respondent in a memorandum of response, counter claim and set-off dated February 17, 2021 denies the claim and prays that the same be dismissed with costs. She also raises a counter claim in the process.
3. The claimant's case is that he is a distinguished certified professional accountant with vast years of experience in principles and skills of financial management.

His further case is as follows;

4. The claimant joined the respondent on May 5, 2015 vide a contract dated April 24, 2015 on a head hunting fore by the respondent. The claimant, in the absence of a formal job description was engaged in mundane operational and operations support tasks for both the respondent and its subsidiary company, Greystone Industries Ltd. The claimant further undertook various roles in the respondent employ including sales, procurement, logistics, general administration, human resource, production planning, internal auditing, selected finance duties such as business forecasting, cash flow forecasting and planning, sourcing for funds, working capital management, analysis and clerical work which he handled until his termination.(Annexed in bundle marked "JGN" is a true copy of the letter of offer of employment dated April 24, 2015 found at pages 1 to 3 of the claimant's bundle.)



5. Upon joining the respondent company the claimant was posted to work in the respondent's subsidiary company (Greystone Industries Limited) which is situated in Mitubiri, Kabati, Muranga while equally handling the assignments in the parent company. (See in the bundle marked "JGN" is a true copy of the letter of offer of employment dated April 24, 2015 found at pages 1 to 3 of the claimant's bundle.)
4. He earned Kshs 324,500.00.
5. The claimant's further case is that he worked from the first month with many of his employment benefits not effected thereby occasioning significant arrears due to date. His woes arose when he called for these arrears and also asked that he be allowed to utilise his pending and accumulated leave days.
6. The claimant's other case is that on December 17, 2019, he was granted leave. This was extended on January 14, 2020 for an indefinite period.
7. The claimant's further case is as follows;
 20. On March 6, 2020. A meeting scheduled to discuss matters of the claimant's unpaid arrears was again rescheduled to March 10, 2020 which meeting did not materialize and the same was later rescheduled to March 11, 2020. In the said meeting, a new agenda item of engagements on the role of a Finance Manager was brought on board leaving the claimant in limbo in light of his reasonable expectations of the proper agenda item(s). Even so, his arrears which was the principal agenda item of the meeting was flippantly discussed with dire intimidations from the Human Resource firm and the respondent's directors so as to drop a considerable number of his claims but he did not budge. The claimant was then asked to leave the meeting and report back after 5 (five) minutes and provide numerous personal documents. The said meeting ended without any dependable way forward.
8. The claimant avers that on March 11, 2020, in the afternoon, just before the meeting commenced he received two copies of show cause letters dated March 6, 2020 and March 10, 2020 respectively from the respondent in which the respondent allegedly cited negligence of duty. The respondent accused the claimant of failing to make statutory deductions that is PAYE from his gross salary. He was not invited to a disciplinary hearing as indicated in his letter.
9. The claimant thereafter responded to the respondent's show cause letter dated March 13, 2020 *vide* a letter dated March 16, 2020 responding to the accusations that had been tabled against him and awaited for an invite to a hearing as had been indicated in the respondent's letter of March 10, 2020.
10. The claimant's further case is as follows;
 25. The claimant did not get any further correspondences from the respondent. Later, on March 19, 2020 the respondent through its Managing Director in the company of another director and respondent's security manager called the claimant to their boardroom and handed him a termination letter together with a clearance form that required him to clear and vacate the respondent's premises with due immediacy under the escort of the security manager. (Annexed in bundle marked "JGN" is a true copies of the termination letter dated March 19, 2020. And clearance form respectively found at pages 55 to 56 of the claimant's bundle.)
 26. Despite demands for an apology and admission of liability having been made and notices of intention to sue having been issued, the respondent has neglected, ignored, refused and/or otherwise failed to adequately address the same thereby rendering this suit necessary. (Annexed in claimant's bundle of documents marked 'JGN' are true copies of claimant's letter dated June 3, 2020 addressed to the respondent demanding admission of liability and intention to sue



and the respondent's correspondence dated June 26, 2020 denying liability and the claimant's further letter to the respondent dated July 15, 2020 found at pages 57 to 66 of the claimant's bundle.)

11. The claimant frames the following as particulars of wrongful and unlawful termination of his employment;

Particulars of invalid reason for termination

- a. Failing to accord the claimant a hearing to defend himself against the allegations that were tabled against him contrary to section 41(2) of the *Employment Act*, 2007.
- b. Arbitrarily and irregularly terminating the claimant on unreasonable grounds and in unprocedural manner contrary to section 4 of the *Fair Administrative Actions Act*.
- c. Unfairly accusing the claimant of being hostile and using inflammatory allegations towards the respondent while the claimant legally raised a grievance on failure of payment of his dues and the respondent's consequential conduct of issuing a show cause letter for the same contrary to section 46(h) of the *Employment Act*.

12. He also cites the following as particulars of his severance and employment benefits;

Particulars of severance package and employment benefits

- a. Service pay (month pay/years worked) at 324,500 x 5) Kshs 1,622,500.00
 - b. 12 months' pay for unfair termination at (324,500x12) Kshs 3,894,000.00
 - c. 28 accrued leave days: March 19, 2010 (28/21x324,500) Kshs 432,667.00
 - d. Monthly airtime allowance accrued from May 5, 2015 at Kshs 148,610.00
 - e. Monthly allowance on mileage accrued from May 5, 2015 at Kshs 348,000.00
 - f. 1 month notice pay at Kshs 324,500.00
 - g. Refund for monies paid by claimant towards medical cover Kshs 347,989.00
 - h. Salary for days worked in March 2020 up to 19th Kshs 198,887.00
 - i. Pension benefit: 4 years plus 10.5 months 15,125 pm Kshs 884,812.50
- Total Kshs 8,197,778.83

13. It is his case and submission that his termination of employment was in contravention of section 41(2) of the *Employment Act* 2007 in that he was not afforded any hearing or consideration of his representation on grounds of his misconduct and poor performance, if at all.

He prays thus;

- i. A declaration that the claimant's termination was unfair and unlawful.
- ii. A sum of Kshs 3,894,000.00 being payment of Twelve (12) months compensation for unfair termination.
- iii. A sum of Kshs 432,667.00 being payment of 28 accrued leave days as of March 19, 2020.
- iv. A sum of Kshs 148,610.00 being payment for monthly airtime allowance accrued from May 5, 2015-January 31, 2017.



- v. A sum of Kshs 348,000.00 being payment for monthly allowance on mileage accrued from May 5, 2015-January 31, 2017.
 - vi. A sum of Kshs 324,500.00 being one month notice pay.
 - vii. A sum of Kshs 347,989.00 being monies paid by the claimant towards the medical cover for himself and his family.
 - viii. A sum of Kshs 198,887.00 being payment for salaries worked up to March 19, 2020.
 - ix. A sum of Kshs 884,812.50 being pension benefit for four (4) years plus 10.5 months.
 - x. An order for payment of actual pecuniary loss suffered as a result of termination leading to loss of career from the date of termination, to the date of payment.
 - xi. General, aggravated and exemplary damages for deceit, fraudulent misrepresentation and unfair termination.
 - xii. Costs of the suit and interest thereon at court rates.
 - xiii. Any other relief the court may deem fair and fit to grant.
14. The respondent denies the claim.
 15. It is her case that the claimant was employed as a Financial Manager but denies that he was not assigned specific tasks. He was in charge of the respondent's monetary and fiscal affairs including tax affairs which roles had been explained to him.
 16. The respondent's further case is that the claimant's assignment to Greystone Industries was in the ordinary course of the claimant's employment and is not an issue or otherwise in the relevance of his termination.
 17. The respondent's other case comes out thus;
 7. In response to paragraph 6 of the claim the respondent avers that the claimant did not match his academic qualifications with professionalism, work ethics and office etiquette. The respondent denies that the promise to off-set the claimant's notice to his former employer was prompted by the claimant's supposed track record with the previous employer as the respondent was not privy to this and could not confirm with certainty that the claimant delivered to his former employer. The respondent offered to pay the claimant's former employer the cost of the 21 days' notice solely because the respondent did not have a financial manager and wanted the new recruit to start working immediately.

Again,
 9. The respondent admits that the claimant was earning a gross salary of Kshs 302,500.00 inclusive of house allowance per month subject to statutory deductions, fuel allowance of Kshs 15,000.00 per month and post-paid line with airtime capped at Kshs 7000.00 per month together with medical cover, personal accident cover, life insurance cover and pension contributions. The parties did not, as per the offer letter, agree on any specific figures for the medical cover, personal accident cover and life insurance cover. The respondent is a stranger to the figures of Kshs 15,125.00 pension contributions, Kshs 103,992.00 annual premiums for medical insurance.



18. The respondent's further case comes out as follows; That the claimant was the Head of Finance and was tasked to *inter alia* manage the fiscal affairs and ensure statutory reporting and compliance. He was in charge of the payroll and failed to deduct and remit his PAYE leaving the respondent to prosecution. The claimant was not professional and did not introduce any changes in the organization structure which were rejected by the respondents. The claimant was wholly in charge of the payroll and abused his unfettered powers to fraudulently award himself and carry home his gross salary. The respondent was just starting up as an organization and therefore the claimant was tasked with developing and implementing a payroll system as part of his work. The respondent denies that her directors frustrated the implementation of the payroll. This is an excuse by the claimant and was not reported to his employer. No benefits or allowances were withheld from the claimant who received a gross salary. She denies that she was unhappy with the claimant asking for pending leave days and this was granted in 2019. It is the claimant's case that the problems for the claimant arose when he started making unsubstantiated allegations of criminal conduct against the directors that they had hatched a scheme to intimidate, blackmail, isolate and portray him as an incompetent professional with a view to dismissal. She dismisses rescheduling of meetings was occasioned by workload of her officers and was not ulterior. The respondent denies issuing the claimant the show cause letter either before or during internal staff meetings but avers these can be issuable at any time during work. The respondent admits issuing the claimant with three show cause letters dated March 6, 2020, March 10, 2020, and March 13, 2020. The claimant has fabricated stories to justify his misconduct on taking home a gross salary and failing to implement the payroll system. The claimant denies that the disciplinary hearing did not take place as the claimant was orally invited to a disciplinary hearing which took place on March 19, 2020 and was attended by the claimant, the directors as well as the HR Representative. It is not true that the claimant was called to the boardroom and handed a termination letter. He was heard and his oral and written testaments considered before a decision to terminate his services was made. This amounted to procedural fairness. There were valid reasons to terminate the employment of the claimant. The claimant violated section 44(4)(d) of the Employment Act which allows dismissal. It allows summary dismissal for use of abusive or insulting language or behaves in a manner insulting to his employer or to a person placed in authority over him by his employer. The claimant failed to substantiate the allegations against the directors on non-payment of his arrears and being sent on leave for six months with a view to making him resign. The respondent did not find explanation by the claimant credible and decided to terminate his employment.

The respondent lays a counter claim and set-off as follows;

The claimant was supposed to deduct and remit to the tax man Kshs 90,750.00 being PAYE. Claimant ought to earn Kshs 211,750.00 after statutory deductions. The claimant enriched himself at the expense of the respondent who now has to reimburse the unremitted PAYE to the tax man. This is a claim for the amount of excess salary paid with a view to remitting these to the tax man. He worked for 58 months accumulating Kshs 5,263,500.00 as due tax. The respondents now claim this amount from the claimant. The respondent seeks a set-off of the claimant's terminal dues with part of the unremitted tax as hereunder;

- a. The terminal dues of Kshs 1,558,312.00 as per the tabulations of March 31, 2020.
- b. Any other monetary award given to the claimant by the court.

On March 17, 2020 the respondent issued another show cause letter to the claimant whose contents were a new set of allegations including the claimant's attitude towards the business which was hostile, inflammatory, allegations and innuendo borne out of the claimant's grievance on non payment of his employment dues for 2 years. The claimant responded to these *vide* a letter dated March 16, 2020 and



awaited an invite to a hearing. He was not given any further write ups and on March 19, 2020 he was invited to a disciplinary meeting.

Reasons whereof the respondent prays against the claimant for;

- a. A set-off of Kshs 1,558,312.00 being the claimant's terminal dues and any monetary award(s) to the claimant in satisfaction of the unremitted PAYE.
 - b. A sum of Kshs 5,263,500.00 being the PAYE not deducted from the claimant's salaries less the amount set-off.
19. The claimant in a reply to the respondent's memorandum of response, counterclaim and set-off refutes the response, counter claim and set-off and avers that all this time, it was the Respondent's duty to implement employers statutory duty to deduct income tax.
 20. His further case is that the respondent was not registered for PAYE at the time of the claimant's employment and his attempts to implement this were rebuffed and fell on deaf ears.
 21. Secondly, filing tax returns and KRA queries was handled by Mr Joseph Maina the firm's Accountant together with the Managing Director while the claimant was assigned operational roles.
 22. The claimant further avers that there were various financial audits year in year out and no issues were raised with regard to his pay or that of the directors and accountants.
 23. Again, the respondent's managing directors approved off his pay and were aware of his salary all along as is evidenced by the respondent's letters to his bank confirming his pay.
 24. The claimant denies the occurrence of a disciplinary meeting on March 19, 2020 and that an invite was issued to him.
 25. Further, the claimant denies that the respondents remitted money to his pension and was also not included in the company's medical cover scheme.
 26. He therefore denies their counter claim and set-off and prays that the same is struck out and his claim be upheld.
 27. The respondent in reply reiterates his response, counter claim, and set-off and avers that at all times the claimant was aware that his salary was not subjected to tax deductions thereby putting his employer in arrears because of his and non remittance of other employees.
 28. The claimant was in charge of the payroll and tasked with tax deductions and remittances to KRA. She therefore prays for judgment against the claimant for the counter claim and set-off.
 29. The matter came to court variously until the June 28, 2021 when the parties agreed on a disposal by way of written submissions.
 30. The issues for determination therefore are;
 1. Whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful.
 2. Whether the respondent is entitled to the counter claim and set-off.
 3. Whether the claimant is entitled to the relief sought.
 4. Who bears the costs of the claim.



31. The 1st issue for determination is whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful. The claimant posits and submits a case of unlawful termination of employment which is denied by the respondent.
32. It is his submission that the respondent did not comply with section 45(2) of the *Employment Act* because the employer has failed to prove that his termination of employment was grounded on valid and fair reasons and further that it was done following a fair procedure. A reason is fair if it relates to the employee's conduct, capacity and compatibility of the employer's operational requirements.
33. Again, the termination of employment did not comply with sections 41 and 51 of *Employment Act*, 2007 in that he was not afforded an opportunity to be heard before termination and issue of certificate of service.
34. The employer has also failed and flouted section 43 of the *Employment Act* for not proving the reasons for termination and therefore rendering the whole exercise unfair and unlawful.
35. The letter dated March 10, 2020 indicated the claimant would be invited to a disciplinary hearing at a later date on his response to the show cause letter. This did not work. On March 13, 2020, he was issued with another show cause letter on new terms and issues including the claimant's attitude towards the business like hostility, inflammatory allegations and innuendo. This must have emanated from his grievance on non-payment of employment dues owing.
36. The claimant faults the entire disciplinary process for being disabled and not in compliance with section 41 of the *Employment Act* which provides thus;
 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).” Emphasis added.
37. The claimant further seeks to buttress his case by relying on the authority of *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR where the court held that for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness and that substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination. This came out as follows;

... upon analysis of both the investigation and the disciplinary process, the court formed the opinion that the respondents failed the test of procedural fairness in that it did not take its investigation full circle. In the light of the seriousness of the allegations against the claimant and the resultant consequences, the respondent should have done more, but it took the easy option and placed the claimant and the imposter on the same chopping block. For this reason, I find the termination of the claimant's employment by way of summary dismissal unfair for want of due procedure.
38. The respondent submits a case of justifiable and lawful termination of employment. It is her case that substantially, the ground for termination was the claimant's hostile and unsatisfactory attitude



- and utterances against his employer. He was not dismissed on account of claims of PAYE as this had ongoing investigations.
39. The claimant had been asked to respond to a show cause letter on this but before this used insulting language against the company directors and therefore another disciplinary issue arose. He was issued with a disciplinary letter dated March 13, 2020, heard and dismissed on this ground alone.
40. It is her case that the claimant was all this time informed of the allegations and accusations against him. He was given an opportunity to respond to the same and did so. He was heard and his representation considered.
41. On this, she seeks to rely on the authority of *Nabashon Muriithi Wambugu v Teachers Service Commission* [2016] eKLR where the court observed as follows;
- “In reviewing disciplinary action taken against an employee by an employer, the court does not apply the beyond reasonable doubt standard of proof applicable in criminal cases. In fact, the court does not even ask what it would have done if it were in the shoes of the employer, all it asks is whether the action by the employer was one that would have been taken by a reasonable employer acting on a fair understanding of the facts and appreciation of the law ...”
42. This is coupled with the interpretation of section 43(2) of the *Employment Act*, 2007 which provides as follows;
- 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.
43. Further, the respondent submits and relies on the authority of *Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd* [2013] eKLR where the court observed the following as the ingredients of a fair disciplinary process;
- The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee. Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible. Thirdly if it a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.
44. The respondent on this basis comes up with a case of lawful termination of employment in the circumstances.
45. The claimant’s case is that he was invited to the meeting of March 11, 2020 to discuss his arrears with the management but this was extended to the extraneous issues of poor performance and or deduction of PAYE on his pay which he denied. The respondent did not controvert this as she has not displayed any invitation letter or offered agenda items for the meetings to the claimant.



46. The claimant's case on the issue of PAYE deductions is that these were the province of his employer. At all times, his pay and that of other employees was approved by the directors and therefore he should not be faulted in the last minute and accused of fraud or failure to deduct.
47. The correct position on this is that PAYE is a statutory matter. It is a matter of law which binds an employer to deduct and remit PAYE deductions to the tax man. The claimant had been in employment for 58 months and all this time, issues on PAYE did not arise or were not raised. The respondent is therefore now estopped from raising the same and using this as a ground for disciplinary process. It was always the employer's responsibility to effect and cannot be visited on the claimant.
48. At the meeting of March 19, 2020, issues of insults to directors and allegations of witch hunt arose and he explained these but this was not satisfactory and therefore termination. The issue arising here is whether he was issued with an invitation and agenda for this meeting. The claimant posits that this was not. This is not acceptable.
49. All these disciplinary meetings were styled in ambush. The claimant was either not forewarned of the meeting or was not afforded adequate time and space to prepare for the meeting. Bearing in mind the nature of the issues between the parties, the claimant ought to have been afforded adequate time to thoroughly prepare his case and defence. This was not to be and therefore the fallacy of the disciplinary process.
50. Further, the minutes of these two meetings are not executed by any of the participants or even the claimant. This is suspicious and renders the same rudderless. A case of this magnitude may have required extra caution and exactitude on the part of the respondent.
51. The respondent also fails to controvert the claimant's evidence that as at the time of his employment, there was no structured PAYE system in place. Again, she could not explain her not raising this issue during the fifty-eight months stint of service of the claimant. All this boils out to a case of a premonitored case of termination of the employment of the claimant by the respondent.
52. The respondent has failed to rebut the claimant's case in accordance with the second limb of section 47 (5) of the *Employment Act*, 2007 which provides as follows;

“For any complaint of unfair employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”
53. She has not activated her burden of proof as shifted. She has not justified termination of employment. I therefore find a case of unlawful termination of employment and hold as such.
54. The 2nd issue for determination is whether the respondent is entitled to the counter claim and set-off. The foregoing analysis of this case and the evidence adduced comes up with a case of no culpability on non-deduction of PAYE by the claimant. Inasmuch as the claimant was the Finance Officer of the respondent, it is trite law that the issue of deduction and remittance of PAYE is the sole province of the employer. The claimant can only have been a side and silent facilitator to this.
55. There is no evidence that at any time the respondent insisted or enquired on non-remittance of PAYE by the claimant. It would appear that this fuss on the subject is only an afterthought and ill intended. Fifty-eight months is a long time. This is close to six years of acquiescence to wrongdoing on the part of the respondent. She cannot be heard to now come out and lay claim on matters arising out of her negligence. I find that she is not entitled to the counter claim and set-off and hold as such.



56. The 3rd issue for determination is whether the claimant is entitled to the relief sought. He is. Having succeeded on a case of unlawful termination of employment, he becomes entitled to the relief sought.

57. I am therefore inclined to allow the claim and order relief as follows;

- i) A declaration be and is hereby issued that the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful.
- ii) One (1) months salary in lieu of notice - Kshs 324,500.00.
- iii) Kshs 347,989.00 being refund of medical expenses incurred by the claimant for himself and family.
- iv) Kshs 198,887.00 being salary for 19 days of March, 2020.
- v) Six (6) months salary as compensation for unlawful termination of employment – Kshs 324,500 x 6 = Kshs 1,947,000.00.

Total of claim Kshs 2,818,376.00

DATED AND DELIVERED AT NYERI THIS 28TH DAY OF SEPTEMBER 2022.

D.K.NJAGI MARETE

JUDGE

Appearances

Ms. Kiongera instructed by Muma & Kanjama Advocates for the claimant.

Mr. Odongo instructed by Nchugu, Omwanza & Nyasimi Advocates for the Respondent.

