



REPUBLIC OF KENYA



**Shah v Menengai Oil Refineries Ltd & another (Cause E007 of 2020)  
[2022] KEELRC 12771 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12771 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
CAUSE E007 OF 2020  
HS WASILWA, J  
SEPTEMBER 22, 2022**

**BETWEEN**

**ZAHIR ALI SHAH ..... CLAIMANT**

**AND**

**MENENGAI OIL REFINERIES LTD ..... 1<sup>ST</sup> RESPONDENT**

**ONKAR SINGH RAI ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Claimant sued the Respondents, the 1<sup>st</sup> Respondent being his employer and the 2<sup>nd</sup> Respondent being a director of the 1<sup>st</sup> Respondent, vide a memorandum of claim dated 5<sup>th</sup> October, 2020 alleging to have been unfairly terminated and seeking for compensation for the alleged unfair termination. He sought for the following reliefs;
  - a) A declaration that the Claimant's fundamental rights under Article 41 of *the Constitution* to fair labour practices has been violated and or infringed by the Respondent.
  - b) A declaration that the summary dismissal of the Claimant was unfair unjustifiable unlawful, null and void ab initio.
  - c) An order that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents pay the sum as per paragraph 29 and 30 of the claim or such an amount as the Court may finds it reasonable and fair inclusive of full salary and benefits from the date of the unfair termination to the date of judgement and interest thereon.
  - d) An order for the return of the Claimant's personal belongings as pleaded or in the alternative the market value of the belongings.
  - e) General damages.
  - f) A certificate of service.



- g) Costs of this suit.
  - h) Interest at commercial Bank rates on (c) ,(d) & (e) above till payment in full.
  - i) Any other further relief that this Honourable Court shall deem fit and just to grant.
2. The summary of the Claimant's case is that, he was employed by the Respondents vide the letter of employment dated 29<sup>th</sup> August, 2012 as the Store manager. The commencement date was indicated as 1<sup>st</sup> August, 2012 and his starting salary was Kshs. 172,860. The other benefits attached to the said position were bonus pay upon achievement of the objective for each financial year and annual leave of 21 days. In the said letter, termination could be initiated by any party with a notice of one month or payment in lieu thereof.
  3. It is averred that the Claimant rose through the ranks to be the head of procurement earning a gross salary of Kshs.388.806.14. He continued working for the Respondent till 7<sup>th</sup> February, 2019 when he was issued with a one-month suspension letter to allow for investigation into allegation of purported gross misconduct.
  4. The Claimant was then directed to leave the Respondent's premises immediately. Before he could leave he states that he was served with another letter of 7<sup>th</sup> February, 2019, terminating his services with immediate effect.
  5. The Claimant states that he was not allowed to clear his table or take his personal belonging that remain at the Respondent's company. These items include, mobile phone charger and MacBook air charger, original logbook for his Toyota IST KBR 273F, Toyota Prado rims and 4 piece tyres, Toyota VX Rims, Toyota LC 100 from bumper with fog light, Hilux Vigo robs magic shocks with springs and rear tow hitch, Garmin with Europe maps, Pioneer under seat speaker, Baby cot and Bed frame and BF Goodrich tyres 16 inch 3 pieces.
  6. He states that the abrupt way in which he was dismissed from employment was both unfair and malicious because the termination was not preceded by a notice and the suspension letter did not give any particulars of the alleged gross misconduct. Also that the he was not subjected to any disciplinary hearing as provided for under section 41 and 43 of the *Employment Act*.
  7. During the pendency of employment, the Claimant states that the Respondent made unsubstantiated deduction in the Claimant salaries in the duration between 2017 and 2019 amounting to Kshs. 182,781.44, in total breach of section 19 of the *Employment Act*.
  8. The Claimant states that throughout his employment with the Respondent of 6 years 7 months, he was not granted leave, neither was he paid for the same.
  9. The Claimant avers that the Respondent in the bid to justify his termination, drummed up criminal charges against him and terminating him abruptly causing him serious embarrassment and humiliation having been one of the top management at the Respondent. Additionally, that he was a specialist in oil and soap industry sector and the manner in which he was fired has made it hard for him to secure any other gainful employment.
  10. The Claimant now wants the Respondent to be compelled to pay him one month pay in lieu of notice, salary for the month of February, 2019, 7 years leave not taken, damages for unfair termination, general damages, unlawful deductions, loss of earning between February, 2019 to July, 2020 and damages for loss of opportunity for gainful employment.



11. The Respondents filed a response to claim on the 28<sup>th</sup> October, 2020 admitting to employing the Claimant and stating that he was terminated on justifiable grounds.
12. According to the Respondents the Claimant performed his duties diligently at the beginning of the contract till sometimes in the year 2018-2019 when his character became wanting as he was engaged in fraudulent acts that caused the Respondent's massive financial loss.
13. It is stated that the Claimant was indeed suspended on the 7<sup>th</sup> February, 2019 to pave way for investigation into his suspicious activities. The Claimant then proceeded for the suspension and on 14<sup>th</sup> February, 2019 he was invited for disciplinary hearing which he attended but his explanation was not satisfactory leading to his termination on the said date. The Respondent contends that the termination was done on 14<sup>th</sup> February, 2019 not 7<sup>th</sup> February, 2019 and the letter exhibited was erroneously dated and in fact the correct letter was served on the labour officer.
14. The Respondents state that the reason for termination was based on Claimant's misconduct which included; using his position to knowingly cause filling of non-existent goods in the goods received note(GRN) triggering payment for undelivered goods, Intimidating his juniors, receiving kickback from suppliers contract to the Respondent's policy, forging the 2<sup>nd</sup> Respondent's signature and superimposing on payment approval documents in settlement of fictitious invoices and presenting fraudulent delivery notes and invoices to justify claims of some suppliers to his benefit. These offenses caused financial hardship to the Respondents, which resulted to criminal charges against the Claimant in Nakuru Criminal case number 1018 of 2019 which matter is still pending in Court.
15. It is for those reason that the Respondent contends that the termination of the Claimant's services was justified and therefore not unfair as pleaded.
16. The Respondents aver that the deduction of the salaries raised by the Claimant was done after consultation towards a justified cause and the said deduction was on all employees of the Respondent.
17. It is averred that the Claimant utilized all his leave days each years and none is pending.
18. In the response to defence the Claimant filed a reply to the defence on the 27<sup>th</sup> November, 2020 reiterating his claim and in addition stating that the director of Public prosecution dropped the charges on the 28<sup>th</sup> February, 2020 and he was discharged on the 12<sup>th</sup> August, 2020.
19. The case herein was heard on the 26<sup>th</sup> October, 2021, 29<sup>th</sup> March, 2022 and on the 9<sup>th</sup> June, 2022 where each party presented their case.

#### **Claimants case.**

20. The Claimant testified as CW-1 and adopted his witness statement dated 5<sup>th</sup> October, 2020 which reiterates the contents of the memorandum of claim and produced documents as his exhibits.
21. Upon cross examination by Opondo Advocate, the Claimant testified that he was employed by the 1<sup>st</sup> Respondent. He avers that he attended a meeting at the Respondent on the 14<sup>th</sup> February, 2019 and several issues were discussed relating to the cause of his suspension. He stated that he attended the said meeting alone and was not informed of the need to have a representative accompanying him. He stated that the deductions include for a phone call given to him and loan he had borrowed from the Respondent. It was his testimony that the screen shots did not indicate the telephone numbers of the person he was chatting with and also that there is no evidence before Court demonstrating that the personal items were his and at the Respondent's premises.



22. Upon further cross examination, the Claimant testified that he encashed his 2017/2018 leave and with regard to the others, he affirmed that he did not have evidence showing that he applied for the said leave and was denied. On gratuity, he stated that he was a paid up NSSF member.
23. On re-examination the Claimant testified that the deductions on his salary included deductions that were not justified. He avers that upon termination he was not allowed to pick his personal belongings. He maintained that he never took his leave since 2012 to 2016. On the reason of termination, he stated that none was substantiated and the criminal charges against him were withdrawn.

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

24. The Respondent called Four witnesses. The first witness was Apitha Patel, the head of procurement officer who testified as RW-1. She adopted her witness statement dated 13.11.2020.
25. Upon cross examination by Khan advocate, the witness testified that she started working for the Respondent on 1<sup>st</sup> January, 2015. She avers that she was the assistant to the Claimant and when issue with regard to his conduct was raised, the Managing Director and the General manager directed her to spear head the investigation and she did with the help of DCI. She admitted that she was not part of the committee that carried out disciplinary hearing.
26. On re-examination she testified that she carried out investigation of the Claimant desk and recovered cut out signatures belonging to the 2<sup>nd</sup> Respondent, though no one was with her during the said investigations. She added that further investigations were undertaken by DCIO.
27. Peter Maina, the Respondent's Administration manager, testified as RW-2 and adopted his witness statement dated 13<sup>th</sup> November, 2020.
28. Upon cross-examination by Khan Advocate, the witness testified that the Claimant earned a gross salary of Kshs 388,806. He stated that he did not pay the Claimant his February 2019 salary. He affirmed that he did not issue the Claimant with certificate of service upon termination. On the leave days he avers that the pending leave days were 43 which the Claimant utilized 18 days. With regard to the deductions made on the Claimant salary, the witness herein testified that the deductions were with regard to the purchases made by the company together with loans and interest. It is his testimony that the Claimant was suspended and investigation done internally by the procurement department.
29. Upon further cross examination the witness testified that the Claimant was subjected to disciplinary hearing and terminated vide the letter which was erroneously dated 7<sup>th</sup> February, 2019 instead of 14<sup>th</sup> February, 2019. He stated that the Claimant was charged for stealing from the company. He however stated that he did not know the exact amount of money that was stolen by the Claimant. It was his testimony that upon termination the Claimant was not allowed back to the premises and on the personal belonging pleaded by the Claimant, the witness testified that the Respondent does not keep any belongings for its employees.
30. Jay patel, the former general manager of the Respondent testified as RW-3 and adopted his witness statement dated 13.10.2020.
31. Upon cross-examination by Khan Advocate, the witness testified that he left the Respondent's employ in January, 2022. He avers that while at the Respondent's employ, he was the one charged with overseeing the entire operations of the Respondent. He distanced himself from the salary deduction and stated that he was not aware of any deductions. upon being shown the document he stated that he does not recall the purpose of the said deductions. He further stated that the claimant was charged but is not aware that the said charges were withdrawn.



32. Onka Singh, the Respondent's director testified as RW-4 and adopted his witness statement of 13<sup>th</sup> November, 2020.
33. Upon cross examination by Khan Advocate, the witness testified that the Claimant had illegally purchased goods worth 54 Million. On the allegation that the Claimant superimposed his signature on document, the witness, testified that it was true though the Claimant was not charged for the alleged forgery. On the allegation of receiving kickback, the witness herein admitted that no evidence was table before Court to support the said allegation. RW-4 also testified that there were no policies on salary deduction on employees and the deduction if any was on loan. On the termination letter dated 7<sup>th</sup> February, 2014, the witness testified that there was an error on that and the letter was of 14<sup>th</sup> February, 2019.
34. Upon further cross-examination, RW-4 testified that Aziza was the one that carried out investigation into the misconduct of the Claimant, however that the said Aziza was not present in the disciplinary hearing of 14<sup>th</sup> February, 2019. It was his testimony that the initially amount allegedly stolen was 50 Million but later the charge sheet indicated the lost amount was Kshs 2.5 Million. He also admitted that the figure was later changed to 13 Million and indicated that the exact figure lost is still under investigations.

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

35. It was submitted for the Claimant, that he was not paid his terminal dues upon termination. He argued that RW-2, the Human Resource Officer admitted to that fact as such the Respondent undisputed sum owing is Kshs 4,088,306.
36. On whether the termination was unfair, it was submitted that, the Claimant was not issued with a notice to show cause, neither was he subjected to disciplinary hearing as provided for under 41 and 43 of the *Employment Act*. In support of this case, the Claimant relied on the case of *Liz Ayany V Leisure Lodges Limited* [ 2018] eKLR where the Court held that;

“ 20. However, under section 45 and 41 of the *Employment Act*, termination for a valid reason or on grounds of misconduct is supposed to be accompanied by a fair process involving notification of the employee of the grounds and affording the employee an opportunity to be heard prior to termination.” Further, as the Court held in *Shankar Saklani -Versus- DHL Global Forwarding (K) Limited* [2012]eKLR a notice and a hearing are mandatory and necessary even in cases of summary dismissal only that in summary dismissal, the notice is permissible to be shorter than is prescribe by statute or contract. Again, the Court follows *Kenya Union of Commercial Food and Allied Workers -Versus- Meru North Farmers Sacco Limited* [2014] eKLR (Mbaru J) where it was held that “section 41 of the *Employment Act*, 2007 is couched in mandatory terms and where an employer fails to follow the mandatory provisions and an employee is terminated after such flawed process such termination is ultimately unfair. Again, in *Rebecca Ann Maina & 2 Others -Versus- Jomo Kenyatta University of Agriculture and Technology* [2014]eKLR, (Ndolo J) it was held that whereas each case would be considered on its own merits, non-compliance with any provisions of section 41 of the Act rendered any disciplinary action out rightly unfair. In the present case the Respondent clearly failed to comply with the mandatory provisions of section



41 of the Act and the Court finds that on that account the termination was unfair.”

37. On procedural fairness, the Claimant submitted that no notice to show cause was served upon the Claimant for the alleged disciplinary hearing on the 14<sup>th</sup> February, 2019, in any case that the letter of termination was issued dated 7<sup>th</sup> February, 2019 before he was subjected to the alleged hearing, therefore the hearing was for the purposes of rubberstamping an already preconceived decision.
38. On whether there was a valid reason for termination, the Claimant submitted that the reason given for the suspension was on “willful violation of company rules and regulation”, however that the particulars on the alleged violation of the company rules were never substantiated. Similarly, that the letter of termination indicated that it was based on ‘gross misconduct’ which conduct was not demonstrated by the Respondents, to warrant dismissal of his services. It was argued that failure to prove reason for termination, rendered the termination unlawful and unfair. In this he relied on the case of [\*Pamela Nelima Lutta V Mumias Sugar company limited\*](#) [2017] eKLR where the Court held that.
- “case of //Caliph O Ogega v National Social Security Fund Cause 280 of 2013 (unreported) where the Court held:
- “Before any employee is terminated or dismissed, such an employee must be taken through a fair procedure. This is per section 43 and 47 of the [\*Employment Act\*](#) where such an employee must receive notice with an outline of the reasons for such termination. A hearing of the employee is paramount in fair employment and labour relations based on section 35 and 41 of the [\*Employment Act\*](#). ... due process must be followed.”
39. In conclusion, the Claimant submitted that it has proved its case to the required standard and urged this Court to allow the claim as prayed.

### **Respondents’ Submissions.**

40. The Respondents submitted from the onset that the 2<sup>nd</sup> Respondent was not a necessary party in the claim as the no cause of action was raised as against the 2<sup>nd</sup> Respondent. He argued that being a director to the company does not make him a necessary party to the pleadings in any case that, he is a separate legal entity from the company as was held in *Solomon v Solomon & co limited* [1896] UKHL 1, [1897] AC 22.
41. On whether the Claimant’s termination was unfair, the Respondents submitted that the Claimant was dismissed for a fair and valid reason, of flouting procurement rules occasioning financial loss upon his employer. These action are tantamount to gross misconduct, a cause for termination. He argued that RW-3 received two local purchase orders dated 1<sup>st</sup> December, 2018 and 31<sup>st</sup> January, 2019, which were unusually late, prompting RW-3 to inform the 2<sup>nd</sup> Respondent of the actions by the Claimant and its at that point that it was discovered that the Claimant was raising invoices for goods already purchased, the issue raised question prompting the suspension of the Claimant and upon carrying out investigations, 2<sup>nd</sup> Respondent’s cut out signatures, were found in the desk of the Claimant affirming the forgery allegation.
42. The Respondent submitted that the test for reason to warrant dismissal is on facts that the employer genuinely believed to exist and the reasonableness of the action taken thereafter. In this they relied



on the case of *Judicial Service Commission v Gladys boss Shollei and another* [2014] eKLR where the Court held that;

“From my own analysis of the record before us, I would very much doubt that there are many employers who, faced with conduct such as displayed by the 1st Respondent, would have retained her in her position. I am not saying there would be none, only that such an employer would be a rarity indeed. As to the action of dismissing the 1<sup>st</sup> Respondent, I find and hold that it was an eminently reasonable action to take by an employer. It probably would have been the only reasonable and responsible cause of action left open to the employer. The dismissal therefore passes with ease the test propounded by Lord Denning in the same British Leyland case (ibid.);

“Was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might have reasonably dismissed him then the dismissal was fair.”

43. On procedural fairness, the Respondents maintained that they subjected the Claimant to disciplinary hearing on 14<sup>th</sup> February, 2019. It was argued that the Claimant failed to exonerate himself leading to the termination.
44. On the reliefs sought, the Respondent submitted that it did not admit to any of the claim and in fact prayed for the entire claim to be dismissed, the Claimant having been terminated on a justifiable cause.
45. I have examined all evidence and submissions of the parties herein. The Claimant herein was indeed suspended by the Respondents vide a letter dated 7/2/2019 for violation of company rules.
46. The nature of the transgression was not disclosed to the Claimant though.
47. It is also true that the Claimant was summarily dismissed vide a letter dated the same day 7/2/2019.
48. The Respondents aver that the letter was done on 14/2/2019 and the date of 7/2/2019 is actually a typographic mistake.
49. The Respondents also aver that they subjected the Claimant to a fair hearing on 14/2/2019 before dismissing him but no minutes of such disciplinary hearing were submitted before this Court. In fact the Claimant denied being subjected to any disciplinary hearing and indicated that he met the General Manager on this day and had a discussion with him but was not informed that he was attending a disciplinary hearing.
50. The Respondents didn't produce any document to show that the Claimant was invited to any disciplinary hearing. From this analysis of events preceding the Claimant's dismissal, I make an analogy that the Claimant was dismissed without being subjected to any fair hearing.
51. Secondly without a fair hearing it follows that the reasons which the Respondents may have relied upon to dismiss the Claimant were not established.
52. In fact the summarily dismissal letter is vague as to what led to the Claimant's dismissal save to indicate that he didn't satisfactorily account for his activities.
53. Whatever this means is left to various interpretations and is therefore not clear as to why the Claimant was dismissed.
54. Section 41 of the *Employment Act* 2007 states as follows;



<p>“41.</p>	<p>Notification and hearing before termination on grounds of misconduct</p>	
<p>(1)</p>	<p>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.</p>	
<p>(2)</p>	<p>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</p>	



	poor performance, and the person, if any, chosen by the employee within subsection (1), make”.
(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”.

55. Section 45(2) of the *Employment Act* also state 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”.

56. Given that, the Respondents have not demonstrated that they had valid reasons to dismiss the Claimant and that they subjected him to a fair disciplinary process, I find the dismissal unfair and unjustified and I declare that so.



57. As relates to remedies sought I find for the Claimant and award him as follows;

1. 10 months salary as compensation for the unfair and unjustified termination =  $10 \times 388,806/ = 3,888,060/=$
2. 1 month's salary in lieu of notice =  $388,806/=$
3. 1 year leave not taken =  $388,806/=$
4. 7 days salary for the month of February =  $7/30 \times 388,806 = 90,721.40/=$
5. Money that was deducted from the Claimant's salary unlawfully =  $182,781.44/=$   
Total=  $4,939,174.84/$   
Less statutory deductions
6. Issuance of a certificate of service.
7. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this Judgment.
8. The claim against the 2<sup>nd</sup> Respondent is dismissed accordingly.

**DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 22ND DAY OF SEPTEMBER, 2022.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Khan for Claimant – present

Opondo for Respondent – present

Court Assistant - Fred

