



**Thumbi v Concern Worldwide (Cause 1181 of 2016)
[2022] KEELRC 12774 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12774 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1181 OF 2016
K OCHARO, J
SEPTEMBER 22, 2022**

BETWEEN

EDWIN WAGURU THUMBI CLAIMANT

AND

CONCERN WORLDWIDE RESPONDENT

(Before Hon. Justice Ocharo Kebira on 22/09/2022)

JUDGMENT

Introduction

1. At all material times the claimant was an employee of the respondent having been employed by the latter of the January 8, 2013. One and a quarter year into the employment relationship which the claimant contended was smooth, it got terminated. Holding that the termination was unfair, unjust and unlawful, the claimant sued the respondent through a Statement of claim dated May 4, 2016, seeking the following reliefs;
 - [a]. A declaration that the termination of employment by the respondent herein was unjust and unfair.
 - [b]. Maximum compensation of 12 months' salary amounting to Kshs 2,710,404.00 to be paid to the claimant by the respondent.
 - [c]. Pay in lieu of leave.
 - [d]. Pay in lieu of 3 months amounting to Kshs 667,601.00.
 - [e]. Service Pay- a month pay for a year Kshs 225.867.00.
 - [f]. Certificate of service



[g]. Any other or further relief that this hounourable court may deem fit to grant.

[h]. Costs of this claim.

2. The respondent filed a response to the claimant's statement of claim dated August 29, 2016, denying the claimant's claim and the reliefs sought. It contended that the claimant was summarily dismissed in accordance with its National Staff Human Resource Manual and the law.

The Claimant's Case.

3. At the hearing, the claimant moved the court to adopt his witness statement dated May 4, 2016 as part of his evidence in chief, and the documents that he had filed contemporaneously with the statement of claim admitted as his documentary evidence. They were so adopted and admitted respectively.
4. The claimant stated that he came into the employment of the respondent through a contract of employment dated January 8, 2013 as a Finance Manager. He was confirmed into employment on the April 15, 2013 after a successful completion of his probation period. His gross salary was Kshs 225,867.00.
5. He contended that pursuant to the contract he rendered services to the respondent diligently, honestly and unreservedly. This notwithstanding, on the April 17, 2014, the respondent terminated his contract of employment.
6. The claimant contended that the termination was anchored on a financial report by a partner for the period 2011-2013. This notwithstanding the fact that he joined the employment of the respondent organization on the January 8, 2013, and therefore would not be responsible for any happenings during the period in issue. The report didn't implicate him at all.
7. Throughout, his performance was appraised as excellent. The respondent did not have any justifiable reason to terminate his employment, therefore.
8. He contended that at the time of separation his gross salary was Kshs 239,622. The respondent failed to pay him for his unutilized leave days, three months salary in lieu of notice, and service pay.
9. The claimant contended that the respondent's Human Resource Manual required that the disciplinary committee that dealt with his matter be constituted of three members, however the termination letter indicates that committee had only two members. He further alleged that he was not given a chance to be heard contrary to the tenets of natural justice.
10. Cross examined by counsel for the respondent, the claimant testified that in his position as the Finance Manager he was charged with the responsibility of giving the Respondent's partners high level support in capacity building and ensure that they implemented projects properly. However, the support did not extend to their financial matters. As regards their finances, the partners had a free hand in dealing with the same. The situation would be equated to that of the National Government and the County Governments.
11. The claimant testified that he was served with a show cause letter, and subsequently he attended a meeting concerning the letter. The show cause letter referred to an audit for the periods 2011-2013. He reiterated that the disciplinary committee was constituted of two members instead of three as sanctioned by the Human Resource Manual. He protested the lack of quorum but the issue was not taken up. The committee didn't capture the protest in their minutes. He did not have control over the contents of the minutes of the meeting as he was not the one taking down the minutes. The meeting



was an informal meeting. Present was the Financial Controller, the Human Resource Manager, him and his witness.

12. The audit report was not segmented so as to isolate any part that might have been in issue for the period after he joined the respondent's employment, and more specifically relating to capacity building. Referred to the Fraud Report by CIFA of March 2014 and more specifically page 6 thereof, the he admitted that the part thereat related to the period when he was in the employment of the Respondent. However, the issues raised thereat had nothing to do with him as CIFA had its own independent funds management.
13. The claimant contended that the dismissal letter dated April 17, 2014 was not clear on the reason for his dismissal. If the alleged loss was suffered then it was by CIFA [the partner] not the by the respondent.
14. He admitted that he signed on the final Payment form. He received his pension from Jubilee Insurance. The respondent paid for the leave days that were pending. Consequently, he abandoned his claim for unpaid leave days.
15. In his evidence under re-examination, the claimant testified that he was served with the show cause letter on the March 27, 2014. As the committee was not duly constituted, the deliberations were null and void.
16. He testified that once the report was shared out, he was supposed to give his take on the contents thereof, but he was dismissed before he would. The report was latter received at a time when he had left the employment of the respondent. The sums allegedly lost kept on changing signifying that the respondent was acting on an incomplete audit.

The Respondent's case.

17. The respondent presented one Jackline Moraa Oeri, its Human Resource / Administrative Coordinator to testify in support of its defence against the claimant's claim. The witness urged the court to adopt her witness statement dated June 2, 2021 as her evidence in chief and the documents that the respondent filed herein admitted as its documentary evidence.
18. The witness stated that the claimant was employed by the respondent in the position of Finance Manager-Partner. His employment commenced on the January 8, 2013 subject to a three-month probation period. His appointment was confirmed subsequently through a letter dated April 15, 2013.
19. The witness stated that the claimant's responsibilities included;
 - [i]. Pre- assessment of partner financial capacities
 - [ii]. Monitoring partner expenditure and performance;
 - [iii]. Review[investigate] the partner's periodic financial reports and supporting documentation;
 - [iv]. Ensure donor compliance where applicable and give feedback;
 - [v]. Carry out planned and ad hoc reviews /audits to support organization's activities on agreed terms of reference;
 - [vi]. Audit Partner expenditure against the reported costs to the Respondent.
20. The witness stated further that sometimes between February 25 and March 10, 2014, the respondent undertook an audit on Concern Kenya Partner Community Initiative Facilitation and Assistance-CIFA. The audit covered the utilization of funds disbursed to the partner from 2011-2013. The audit resulted in production of a Fraud Report in March 2014.



21. She testified further that the audit revealed issues connected to fraudulent claiming of vehicle hire services; double payment to suppliers using the same log book; paying different suppliers using same log book; fabricating vehicle mileage in the log sheets and effecting payments for ghost movements; making payments using exaggerated rates resulting in overpayments; conflict of interest in the hire of motor vehicles; making cheque payments for vehicle hire services to CIFA staff members rather than the suppliers involved.
22. The witness asserted that the Fraud report reveals that the claimant approved costs which were fraudulently claimed without raising any alarm or notifying the management of the fraudulent activities.
23. The fraudulent activities resulted in misappropriation of funds by CIFA amounting to Kenya Shillings Five Million, Two Hundred and Thirty-Four Thousand [5,234,000]. The Report further revealed that the Claimant had been negligent in playing his role as a Financial Manager-Partners. Out of his gross negligence and or incompetence in performing his contractual duties, monetary loss was visited on the Respondent. This would rightfully and pursuant to the provisions of Section 10.3.2.2 of the Respondent's manual attract the sanction of dismissal against him.
24. As a result of the premises, the respondent wrote a letter dated March 27, 2014 to the claimant asking him to show cause why he should not be released from his duties. The claimant responded through his letter dated April 3, 2014.
25. The witness stated that on the April 11, 2014, the respondent initiated a meeting between the claimant, the Financial Controller and herself. The claimant took responsibility for the losses incurred by the Respondent in 2013, during the period when he was the Finance Manager in charge of Partners.
26. The claimant was subsequently summarily dismissed by the respondent *vide* a letter dated April 17, 2014, the letter outlined the reasons why he was being summarily relieved of his duties.
27. In her evidence under cross examination the witness testified that the respondent's Human Resource Policy and Manual provides for disciplinary procedure. The procedure requires that parties be in attendance of the disciplinary hearing. It also provides for the quorum for the disciplinary panel. It should be comprised of three members. Relevant to the claimant's matter, the panel had only two members present.
28. Testifying under re-examination, the witness stated that the manual does not provide for a specific number of the disciplinary panel members. It only provides for constituting of the panel and presence of the employee.

The Claimant's Submissions

29. The claimant's counsel submitted that the respondent in this matter failed to demonstrate that the claimant was linked to any wrong doing. Too, that the respondent's witness's evidence corroborated the claimant's that the summary dismissal was procedurally unfair. The mandatory procedure provided for under section 41 of the *Employment Act* was not adhered to by the Respondent. The summary dismissal was unfair in terms of section 41 of the *Employment Act*.
30. It was further argued that the claimant's right to fair Labour Practices was breached. Lastly that having proved that the dismissal was unfair, the claimant is entitled to the reliefs he has sought in his statement of claim.



The Respondent's Submissions.

31. The respondent submitted that an employer's decision to terminate an employee's employment can only be considered lawful if he or she is able to demonstrate that substantive and procedural fairness were observed. Section 45 of the [Employment Act](#) imposes an obligation upon the employer to so demonstrate. To buttress this submission, reliance was placed on the case of [Walter Ogal Anuro v Teachers Service Commission](#) [2013] eKLR.
32. It was argued that the respondent's witness's evidence sufficiently demonstrated that the dismissal of the claimant was in accordance with the procedure obtaining in the respondent's own National Staff Human Resource Manual. He was issued with a show cause letter, furnished with the fraud report, and heard before a disciplinary committee as shown by the minutes that were tendered as evidence. The show cause letter sufficiently detailed the accusations that the respondent had against him and to the same, the claimant gave a response.
33. The claimant cannot be availed the reliefs sought. The respondent duly paid him his terminal dues. The claimant duly acknowledged receipt of the same by executing the final payment form.

Analysis and Determination.

34. The following issues emerge for determination from the pleadings of the parties, their evidence and submissions;
 - [a]. Whether the summary dismissal against the claimant by the respondent was procedurally fair.
 - [b]. whether the summary dismissal was substantively fair.
 - [c]. whether the claimant is entitled to the reliefs sought.
35. There is no contest that the claimant was summarily dismissed from his employment through a letter dated April 17, 2014. In interrogating whether the dismissal was procedurally fair this court shall have to consider the provisions of section 41 of [Employment Act](#) and check whether there was adherence to the same by the Respondent, postulations of the respondent's Human Resource Manual, relevant constitutional provisions [this court has held in the past that the stipulations of the 2007 Employment and Labour Relations regime, are constitutionally spirited], and not lose sight of the fact that the said regime brought on board applicability of the tenets of natural justice into employment contracts.
36. In [Paul Katuku Mubengi v SMEP Micro Finance Bank Ltd](#) [2021] this Court expressed itself;
 - " 112. The answer as to what fair procedure is, is found in the provisions of section 41 of the [Employment Act, 2007](#) which provides; -
 - (1) subject to section 42 [1], an employee shall, before terminating the employment of an employee, on grounds of misconduct, poor performance or physical incapacity or incompatibility explain to the employee, in a language the employee understands, the reason for which the employer is preferring 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, any employer shall, before terminating the employment of an employee or



summarily dismissing an employee under section 44[3] or [4] hear and consider any representation 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.”

113. To my mind, this provision is in line with the provisions of the Constitution of Kenya 2010 , regarding the right to fair hearing, and those of the Fair Administrative Actions Act.
37. Adherence to the provisions of section 41 of the Employment Act is mandatory. A default in adhering by the employer will as a consequence attract a legal conclusion that the dismissal or termination was unfair in terms of section 45 of the Employment Act. The submissions by both counsel for the parties clearly appreciate this position of the law.
38. Through its show cause letter dated March 27, 2104, which read in part;
- “ From the CIFA Fraud Report, it is clear that the Finance Manager- Partners approved costs which were fraudulently claimed without raising alarm and or notifying the management of the goings on. The above fraudulent activities have resulted in a misappropriation by CIFA of an estimatedKshs 5,234,000/ Euros 44,356 during the hire of the motor vehicles between 2012-2013.
- From the Report, you did not play your role as the Finance Manager- Partners which reflects gross negligence/ Incompetence while performing your duties resulting in monetary loss for the organization [as per the National Staff HR Manual See 10.3.2.2.]
- In light of the above, the management has given you three [3] working days with effect from the date of this letter to show cause why disciplinary action should not be taken against you.”
39. Up to here, as regards procedural fairness, the Respondent was on track to the extent that it notified the claimant of its contemplation to take action against him and the grounds that stirred up the intention.
40. It is however imperative to point out at this stage that where an employer chose to use a show cause letter as a medium to convey his or her intention and the grounds, the letter must be crafted in a manner free of any ambiguity and with sufficient detail, to enable a reasonable and sufficient response from the employee. Both the show cause letter and the response are normally central in any disciplinary process against an employee.
41. The claimant contended that the accusations against him as contained in the show cause letter related to a period when he was not in the employment of the respondent. In her evidence under cross examination, the respondent’s witness admitted that indeed it did. The amounts that were alleged to have been lost as a result of the claimant’s gross negligence/incompetence was stated to have been lost between the period 2012- 2013. There is no doubt from the material placed before this court that the claimant was not in the employment of the respondent in the year 2012, yet the amount, Kshs 5,234,000 relates also to the year. In order for the letter to pass the no ambiguity, and sufficient details test, it was imperative that the accusations against the claimant be confined to the period when he was in the employment of the respondent, and that the alleged loss be segmented so that it would be clearly discernable by all, the loss that was suffered during the period the claimant was in service, and how the loss was linked to his gross negligence and or incompetence.
42. The claimant contended that he was not heard by the respondent contrary to what is contemplated in its own Human Resource Manual, and the law. The Human Resource Manual- Kenya programme



was tendered by the parties in this matter as evidence. At section 13.2 a detailed disciplinary procedure is provided. The provision stipulates in part;

“Formal Procedure:

“All employees shall be afforded natural justice during the course of the disciplinary process. In the handling of all the disciplinary issues, the alleged offence [e.g recurring absence, poor performance or breach of the code of conduct] will be examined thoroughly.

The employee will receive a written outline of the details of the alleged offence and be invited to attend a disciplinary hearing [emphasis mine] where s/he will have the opportunity to explain and or reply to the allegation. This meeting will be heard by the manager together with another manager or the HR Manager [the panel]. Notes will be taken to record the meeting and the employee will be asked to sign and date the interview notes. Staff may be requested to attend an investigatory meeting prior to a disciplinary hearing if this is deemed appropriate to the situation. [emphasis mine] The Panel will take time to consider the information gained in the disciplinary hearing and make a decision as to whether or not disciplinary action is required. The staff member will be asked to attend another meeting to be informed of the outcome of the disciplinary hearing and also be given a written copy of any sanction imposed.”

43. No doubt, the respondent’s Manual is in sync with the stipulations of section 41 of the [Employment Act](#), which encompass three components, the, information component, hearing component, consideration component.

44. Having said this, the question that needs to be answered here is, was the meeting that was held on the April 11, 2014, a disciplinary meeting or an investigatory meeting provided for under the formal procedure above or one of those informal meetings contemplated under section 13.2 of the Manual? The claimant testified that the meeting was an informal meeting. The respondent’s witness in her witness statement turned evidence in chief only stated;

“13. On the April 11, 2014, the respondent initiated a meeting between the claimant, the Financial Controller and myself. The claimant took responsibility for the losses incurred by the respondent in 2013, during the period when he was the Finance Manager in charge of Partners.”

45. From the stipulations of section 13.2 of the respondent’s Manual, brought forth hereinabove in detail, one cannot be off mark to conclude that a disciplinary hearing shall be preceded by a written invitation being extended to the affected staff member to attend the same. There was no evidence placed before this court that the claimant was such invited. In view of the postulations of the manual relating to other meetings other than a disciplinary hearing, all under section 13.2, and the position that was taken by the claimant that what happened wasn’t a disciplinary hearing, it was duty upon the respondent to demonstrate that the meeting was indeed a disciplinary hearing, by producing the invitation as evidence, one clearly showing the purpose for the meeting. This it failed to do.

46. This court has not lost sight of the fact that in her testimony in court regarding the meeting of April 11, 2014, the respondent’s witness stated that they had deliberations. She didn’t mention to court that what happened was a disciplinary hearing. In fact, a keen consideration of the notes of the meeting are not in character reflective of the meeting as a disciplinary hearing.

47. If indeed the meeting was a disciplinary hearing as contemplated in the manual, then one would expect prove that there was a second meeting where the decision by the panel was conveyed to the claimant.



48. The upshot of the foregoing being that I am persuaded that the claimant wasn't taken through a disciplinary hearing as contemplated by the provisions of section 13.2 of the respondent's Manual. In my firm estimation, the meeting of April 11, 2014 was an investigatory meeting, one which under the said provision would usher in a disciplinary hearing.
49. The claimant alleged that the meeting of April 11, 2014 wasn't quorate. I agree with the Respondent's contention that it was. Section 13.2 required the Manager and the HR Manager to be present. They were. I have not been able to discern where the claimant picks the three members quorum from.
50. In conclusion, there having been no disciplinary hearing against the claimant, the summary dismissal was not compliant with the provisions of section 41 of the *Employment Act*, there was absence of procedural fairness. It was unfair by dint of the provisions of section 45[2] of the Act.

Whether the dismissal was substantively fair.

51. Section 43 of the *Employment Act* imposes a legal burden on an employer to prove the reason or reasons for the termination of an employee's employment. However, it cannot be enough for the employer to show the reason for the termination, she or he must go further to demonstrate that the reason[s] was fair and valid. Section 45[2] imposes a further burden for the employer to so demonstrate, otherwise the termination shall be deemed unfair.
52. The claimant contended in his pleadings and testimony that the summary dismissal sanction was imposed on him yet the transactions in issue related to the period when he was not in the employment of the respondent. The claimant came into the employment of the respondent on the January 8, 2013. I have considered the Fraud Report, it in part relates to transactions within the period when he was in service. I have equally considered the notes of the meeting of April 11, 2014, the Claimant acceded to take responsibility for the loss that occurred during the year 2013. I am consequently not in agreement with the claimant's argument.
53. The claimant further contended that transactions that formed basis for the summary dismissal were transactions that fell outside his scope of employment. In essence, he was stating that if there was any loss as a result of the transactions no liability of whatever sort would attach to him. This contention would shift the evidential burden to the respondent to prove what the job description of the claimant actually was. But the claimant's acceptance in the stated meeting to shoulder the responsibility for the loss that was incurred during the year 2013, removed the burden from the shoulders of the respondent. In any event the Respondent's witness's evidence as regards the responsibilities of the claimant was not assailed in any sufficient manner.
54. Section 44[3] of the *Employment Act* provides;

“..... An employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.”

Section 44 of the Act provides for acts of commission or omission on the part of an employee that can amount to gross misconduct so as to attract a sanction of summary dismissal against him or her. As was rightly captured in the dismissal letter one of such acts is that contemplated under section 44[4], thus

“An employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty.



55. I have considered the responsibilities that the claimant's employment entailed, the Fraud Report, the accusations against the claimant, and the realm in society in which the respondent operates, and come to a conclusion that the claimant's acts of omission and commission that the respondent anchored the dismissal on were in character gross. Any reasonable employer would dismiss an employee on the same account. The dismissal was substantively justified.

What reliefs are available to the Claimant.

56. The claimant sought inter alia a maximum compensation of 12 months' salary amounting to Kshs 2,710,404.00. Section 49[1][c] of the *Employment Act* bestows upon this court the power to award a compensatory relief in the nature as sought by the claimant. The grant and the extent thereof are discretionary. The peculiar circumstances of each case influence the same. In this matter I have considered the fact that the respondent inexplicably didn't follow the stipulations of its Human Resource Manual and the provisions of section 41 of the *Employment Act* in the process leading to the dismissal of the claimant, the length of the period that the claimant was in the service of the respondent, and that the liability herein is attaching against the respondent on account that it defaulted in adhering to fair procedure only, and conclude that the claimant is entitled to a compensatory relief under the above stated provision to an extent of two months' gross salary, Kshs 451,734.
57. The claimant while testifying in court, admitted that his unutilized leave days were paid for and consequently abandoned his claim under limb [c] of the statement of claim. I will award nothing under the limb therefore.
58. Having found that the summary dismissal was substantively justified, I am not convinced that the claimant can be availed notice pay of three months as he has sought or notice pay to any extent. Under section 14 of the Manual upon dismissal the employee affected is only entitled to salary for the period worked, outstanding leave days and pension scheme contributions [to be processed as per scheme rules].
59. It is by reason of the provision, section 14 of the Manual that I decline too, to award the service pay sought by the claimant.
60. By reason of the foregoing premises, Judgement is hereby entered for the claimant in the following terms;
- [a]. A declaration that the dismissal of the claimant from employment was procedurally unfair.
 - [b]. Compensation pursuant to the provisions of section 49[1][c] of the *Employment Act*, two months gross salary, Kshs 451,734.
 - [c]. Interest on the awarded amount at court rates from the date of this judgment till full payment.
 - [d]. Costs of this suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 22nd DAY OF SEPTEMBER 2022.

OCHARO KEBIRA

JUDGE

Delivered in presence of;

Mr. Nyaga for the Claimant.

Mr. Munyaro for Respondent.



ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that Judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all Judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of **Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

OCHARO KEBIRA

JUDGE

