



Mugambi v Solution Savings and Credit Co-operative Society Ltd (Employment and Labour Relations Cause E032 of 2021) [2022] KEELRC 13118 (KLR) (31 October 2022) (Judgment)

Neutral citation: [2022] KEELRC 13118 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU
EMPLOYMENT AND LABOUR RELATIONS CAUSE E032 OF 2021
DKN MARETE, J
OCTOBER 31, 2022

BETWEEN

JANE KARIMI MUGAMBI CLAIMANT

AND

SOLUTION SAVINGS AND CREDIT CO-OPERATIVE SOCIETY LTD RESPONDENT

JUDGMENT

1. This matter was originated by way of a Memorandum of Claim dated October 4, 2021. It does not disclose an issue in dispute on its face.
2. The Respondent in a Respondent's statement of Response to the claimant's Memorandum of claim dated February 3, 2022 denies the claim and prays that it be dismissed with costs.
3. The claimant's case is that she was initially employed on an open ended form of contract from 2013 on a probation period of six (6) months as a graduate clerk and earned an approximate salary of Kshs 38,750.00 per month.
4. The claimant's other case is that she was thereafter confirmed to permanent and appointed Internal Auditor commencing October 28, 2013 and occupied this position until August 5, 2015 when she was promoted and posted to the Respondents Timau Branch as Branch Manager.
5. Her continued exemplary service led to her appointment as chair of the Respondent's procurement committee sometimes in December, 2016 at which time she was also promoted to Finance and Administrative Manager and Deputy CEO at a salary of Kshs 182,525.00. This was her position at her termination on December 5, 2018.



6. The claimant's other case is that during her tenure of office as Finance Manager, around 2017, she discovered a colossal loss had occurred prior to her tenure. She reported a report on this which implicated several employees, including the former Finance Manager who is the current CEO.
7. The claimant avers that she later testified in Meru Chief Magistrate's Court Criminal Case No 1814 of 2017 Republic vs Eric Thurania & Others where the Respondent's Chief Executive Officer (CEO) appeared as the complainant despite having been implicated in the scam where his personal data had been used to defraud the Respondent a sum of Kshs 51,000,000.00; during his tenure as the Finance manager. The claimant's report that implicated the CEO's involvement in fraud was the genesis of her strained relations with the CEO
8. The claimant further avers that on November 21, 2018, she was suspended without pay for two months on grounds that she had authorised payment without compliance with laid down regulations. Later, on November 27, 2018, she received a letter of invitation to disciplinary proceedings on November 30, 2018 instant and on attendance was dismissed on December 5, 2018.
9. No other reason for termination was offered and the claimant continues to suffer loss and damages for unlawful and unfair actions of the Respondent.
10. She prays thus;
 - a. A declaration that the claimant was unfairly and unlawfully terminated;
 - b. 12 months' salary for unfair and unlawful termination;
 - c. 2 months' salary in lieu of notice;
 - d. Bonus for the year 2018;
 - e. Gratuity for the 6 years worked
 - f. Costs of this cause plus interest in (b), (c) (d) and € above
 - g. Any other relief that this Honourable court may deem fit and just to grant.
11. The Respondent admits that the claimant worked for her in various positions between year 2013 and November, 2018 when her services were legitimately terminated. This was done through a legally constituted disciplinary process. She puts it thus;
 4. The Respondent states that as at the time of termination of her services, the claimant held the position of Finance Manager and Deputy Chief Executive officer of the Respondent and was also the Chairperson of the Respondent's procurement committee, with a total Gross earning of Kshs 182,525/- per month of which the Basic pay was Kshs 101,025/- while the rest were allowances.
 5. The Respondent does not dispute paragraph 6 of the claimant's Memorandum of claim to the extent that while the claimant served as the Finance Manager, she prepared a report in which she alerted the Respondent about the existence of a fraudulent scheme within the Respondent's operations through which some employees of the Respondent had fleeced or embezzled funds from the Respondent and/or engaged in various financial malpractice through which the Respondent had lost a colossal amount of money.
12. Her other case is that the Respondent further states that the said criminal matter is still on-going in the relevant court and the Respondent will not wish to respond to the sensational allegations now being raised by the claimant herein as doing so would be subjudice and further, this Honourable court would



- have no jurisdiction to interfere with an ongoing criminal proceedings that are pending determination before a relevant court in that jurisdiction.
13. The Respondent denies a relationship between the report and termination. She also denies bad blood between the CEO and the claimant and avers that this has not been raised any earlier during the tenure of her employment. She therefore sustains that the termination was lawful, proper and fitted.
 14. Further, the Respondent restates that the claimant was on December 19, 2016 appointed as the chairperson of the procurement committee of the Respondent and her roles, as enumerated in the appointment letter included the following roles:-
 - i. Analyzing various procurement requests.
 - ii. Collaborating with technical, legal and finance services in relation to procurement.
 - iii. Participating fully in bid opening, evaluation and award decisions.
 - iv. Providing advice on rules and procedures on procurement
 - v. Maintaining procurement records in form of minutes and other important references.
 15. The claimant was by expectation, required to execute her mandate and duties diligently and in a responsible manner while taking into account the respondent's best interests, productivity, profitability and competitiveness but on various occasions, the claimant failed to perform and fulfil her duties and obligations as expected of her, contrary to the provisions of the terms of her employment.
 16. Other instances of poor performance raised by the Respondent and answered by the claimant include; Dalliance on procurement matters addressed by a letter from the CEO Reply by claimant ECDE teachers ECDE teachers withdrawal raised to the claimant by the CEO vide a letter dated 5th July, 2018. Sourcing of computer for breach botched up and unilateral acquisitions made against procurement processes. Single ended processing and payment for the computers. Payment of Kshs 2,836,820 stopped by the CEO. Claimant on investigation was found to be in the middle of the unlawful and illegal procurement.
 17. The Respondent's further case is that amongst the issues that came to the fore during the said internal investigations were, but not limited, to the following:-
 - i. Contrary to the resolution of the Respondent's Executive Committee made on September 19, 2018, the claimant purported to procure computers, laptops and other appliances purportedly to be used in other branches other than the Nairobi Branch.
 - ii. The claimant unilaterally and unlawfully handpicked a supplier for the said items without following the due process of issuing the requisite local purchaser order (LPO) and bidding which is contrary to the law on procurement and the regulations thereof.
 - iii. The claimant illegally and in collaboration with the said supplier, caused to be prepared an invoice dated September 24, 2018 as well as two (2) delivery notes dated September 24, 2018 and September 25, 2018 in favour of MB World Business Systems Limited contrary to the Respondent's procurement procedures which require a thirty (30) days grace period for the process.
 - iv. The items or goods purported to have been purchased by the claimant were overpriced and exaggerated and some items even charged at a price higher than the existing quotation at the time meaning that the claimant had caused the Respondent to incur enormous financial



losses occasioned by the claimants unlawful acts and which were contrary to her terms of employment.

- v. The claimant illegally and/or unprocedurally, hurriedly procured specialized items and/or goods without the involvement of the technical persons with the requisite skills on ICT infrastructure thus the items/goods were not verified in terms of quality, durability, specification and description to meet the end user needs.
 - vi. Contrary to the Respondent's procurement procedures, the claimant caused the defective items/goods to be sneaked into the Respondent's stores without inspection and assessment and further without being recorded into the Respondent's assets register as required.
18. The Respondent's CEO thereon issued a show cause letter requiring her to show cause as to why disciplinary action should not be taken against her for participation in the flawed procurement process. This was responded to in a letter dated November 20, 2018.
 19. The Respondent further avers that in the said response, the claimant did show any remorse but was on the defensive and justification cause. This led to a suspension and disciplinary process and proceedings on November 30, 2018 in which she admitted the flawed procurement process. Termination of her employment ensued. Terminal dues were paid.
 20. Further, the claimant in the same letter authorized the Respondent to clear off her then outstanding Mkombozi Loan from the non-withdraw able shares (deposits) held by the Respondent and to utilize her provident fund to offset her super loan. The said loan facilities had been taken by the claimant in her capacity as an employee of the Respondent. Upon request she was issued with a letter of recommendation and *inter alia*, many other issues raised.
 21. Other developments in this matter are a letter dated January 7, 2019 advising the claimant to collect her terminal dues on clearance with the ICT and Finance Department. Again, the claimant in a letter dated February 7, 2019 by claimant undertaking to pay her two loans. Unlawful termination therefore baseless for;
 - i. The claimant violated the law on procurement and the regulations there under while serving as the chairperson of the procurement committee and head of the Tender Committee of the Respondent.
 - ii. The claimant was accorded a Disciplinary hearing as provided for under section 41 and 45 of the *Employment Act*, 2007 after she had been served with a show cause letter.
 - iii. The claimant admitted to the charges levelled against her during the disciplinary hearing and also in her prior response to the show cause letter.
 - iv. The Respondent did not conduct itself in breach of any provisions of the Terms and conditions of service of the claimant or the *Employment Act*, 2007.
 - v. The claimant did not contest or appeal the decision or verdict arrived at by the Respondent's Board after the disciplinary hearing.
 - vi. Upon being issued with the letter of Termination dated December 5, 2018, the claimant accepted the decision and wrote to the Respondent seeking to be cleared and to be paid her Terminal dues.
 40. Consequently the Respondent states that the claimant's claim herein is ill advised, misconceived and bad in law and the same should be dismissed.



42. The Respondent states that the claimant had earlier filed a similar claim against the Respondent being MERU CMCC Cause No MCELRC No 3 of 2021 which she later withdrew and she was directed to pay costs to the Respondents and which she is yet to pay.
43. The Respondent shall at an opportune moment herein seek for stay of any further proceedings herein until the claimant pays to the Respondent the costs for defending MERU CMCC Cause No MCELRC No 3 of 2021
22. 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 claimant is entitled to the relief sought.
 3. Who bears the costs of the cause.
23. 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 in her written submissions dated July 19, 2022 posits that the sole reason for her termination from employment is unearthing over flawed involving a hefty sum of Kshs 51 million in the establishment and also involving the CEO. This is as follows;
- 'The financial fraud syndicate involved a number of employees who had stolen over Kshs 51 Million from the respondent. The claimant being an astute auditor who has served the respondent meticulously for the years, on September 29, 2017, discovered theft of respondent's funds through fictitious members' accounts, transactions and loans. This theft took place before September 29, 2017 in the previous banking system. See the Report on this matter listed No 15 at the claimant's list of documents at pages 28-33 of the claimant's bundle of documents. The report explains in detail fraud syndicate.
24. The claimant's further submission is that the Respondent does not have a standardised procurement regulation but operates on a customised system determined by the CEO.
- 'The moment the bidding and approvals for the annual service provides was done by the procurement committee on behalf of the respondent: to whom any contract was awarded was mainly determined by the CEO who verbally communicated to the claimant. Hardly was there any written communication. That is why there cannot be traced any procurement process on how Nairobi office was acquired, furnished and set for opening on October 1, 2018. The only time the Nairobi office is mentioned to the procurement processes is on the electronic appliances that were needed for the launch on October 1, 2018.'
25. The Claimant further submits and asserts that the allegation of withdrawal of ECDE teachers was not factual. This could even have been established as at the time of letter of complaint.
26. The claimant underlines the following as the operative process of procurement in the absence of a formal procurement process by the Respondent;
1. The head user places request to the Head of department.
 2. The Head of department communicates to the in charge of the store.
 3. If the item is not available the store manager informs the Head of department.



4. The head of department informs the CEO for purposes of approval and procurement.
 5. The CEO informs the Board where he sits.
 6. If the Board approves the item it informs the CEO.
 7. The CEO communicates to his assistant who doubles as Finance Manager and in charge of procurement.
 8. The procurement committee then requests the pre-qualified service provides in the panel offering such item for quotations.
 9. The finance Manager presents the quotations to the CEO with necessary advice.
 10. The CEO considers the quotations which he presents to the Board.
 11. The Board approves one of the service providers that the item be procured through the CEO.
 12. The CEO informs the Finance manager of the service provider the Board has approved and directs that the items be procured.
 13. The Finance Manager communicates to the service provider to deliver the items as per the proposed quotations.
 14. The service provider delivers items to the store manager.
 15. The store manager together with the Head of department receive and confirm the items upon which they sign delivery notes.
 16. The service provider raises invoice, attaches the delivery note which they present for payment to the finance manager.
 17. The finance manager raises a payment voucher and passes it on together with the invoice and delivery note to the operations manager.
 18. The Operations Manager raises a cheque with the amount on the invoices, delivery note and the voucher which they transmit to the CEO's secretary.
 19. The secretary raises a letter for authorisation and attached the invoice, delivery note voucher and the cheque which documents are presented to the CEO.
 20. The CEO is supposed to present the documents to the 3 mandatory signatories to sign the cheque and the authorizing letter for the payment.
27. The Claimant further submits that she did not flout any procurement process involving MB World because it is impossible to invoke a unilateral procurement. She puts it thus;

'The claimant submits that she did not flout any procurement process involving the MB WORLD because it is impossible for her to procure anything for the respondent unilaterally. Surely the respondent is a big and mature financial institution with old and long standing operation structures. Every docket has an officer in charge and in support. There is no possible way the claimant would unilaterally operate as the Finance Manager, the store manager, the security, the operations manager, the cashier, the secretary, the CEO, the national executive or the board, to enable her unilaterally procure anything.'



28. MB World was then in a contractual relationship with the Respondent and this is demonstrated by various previous payments to herself.

29. The claimant further avers that the accusation of procurement without authority by the respondent is false, malicious and actuated by vendetta on the part of the CEO because of the theft exposure. The termination was without basis and a consequence of a revenge mission by the Respondent and her wannabes. She further puts it thus;

'We submit that the LPO issue is a creation of the respondent that it has found in law and want to exploit it to the detriment of the claimant. The same should be rejected.'

30. This is all clear and demonstrated by lack of intervention of the procurement process by the CEO who was always aware and participated in the process. This is as follows;

The impugned goods were delivered to the respondent on September 24, 2018. The goods were received, checked and confirmed by the respondent's authorized officers being the ICT incharge Nicholas Gitonga and the Store In Charge one Martin Kimaita. They both received the goods, confirmed and signed the delivery note or invoice as required. Though the report is questionable, at pages 26 and 32 of the respondent's bundle of documents it is admitted there was the in charge of store who received the goods. This is a further lie to cover up for the truth because they deny that the ICT manager was not present whereas he was there.

31. The claimant's further submission is that he (CEO) authorised payment of Kshs 2,816,820.00 was not done by herself but a tripartite that is authorised to deal on large amounts. She is not in this category and therefore the allegation is unfounded and untrue. It is not even supported by any factual basis. The Respondent has not produced any documentary evidence of the claimant authorizing the payment to the supplier.

32. The Respondent's case is pegged on the alleged misconduct of the claimant in so far as the procurement process was concerned. It is her case that upon realization the flaw in the procurement process involving Mbworld Business Systems Limited was discovered, the claimant was served with a show cause letter which she responded to. Thereafter, disciplinary proceedings involving her were conducted with a finding for dismissal of the claimant.

33. The Respondent's further case and submission is that the claimant admitted culpability in the flawed procurement process and acceded to her dismissal and even went on to suggest the way forward for her departure and liquidation of her due and outstanding loans. However, the Respondent does not tender any evidence of these pleasantries with the claimant in their last moments.

34. Again, the Respondent largely relies on the minutes of the disciplinary proceedings and asserts that the claimant admitted her part in the purported flawed procurement process. This is again not displayed or apparent in the disciplinary proceedings or supported by any other evidence whatsoever. It cannot therefore be used as a justification for lawful termination of the employment of the claimant.

35. A scrutiny of the hearing and disciplinary proceedings indicates that this were flawed ab initio on the following grounds;The letter did not disclose the minutes requiring the claimant to appear for disciplinary hearing.The show cause letter did not issue reason(s) on accusations requiring the claimants to appear before the committee.There was no statement of accusation, case, investigation reports or changes, or at all.

36. Again, the alleged minutes or resolution purported to have been used to victimize the claimant are all a forgery, fraud or anything else but genuine. We urge this honourable court to take notice of the



minutes referenced in the letters dated November 16, 2018 which is Min 93/BOD/2018, letter dated November 21, 2018 is Min4/BOD 2018 and the dismissal letter dated December 5, 2018 which is Min 4/BOD/2018. There is no way minutes for the same year could run from Min 93 to Min 4. Also there is no way the Board could have issued two letters on the same Min 4/BOD/2018 one for suspension and another for dismissal whereas the said letters bears different content and different dates. Unless there was forgery of the minutes. We submit that the minutes are a fraud, falsified, tailor-made and calculated to cover up for the unlawful and unfair termination of the claimant. We say so because:

1. The minutes are inconsistent in that the minute for warning letter is 93/BOD/2018
37. The minute for suspension is 4/BOD/2018 (see PExh9 and PExh10)
2. The minute for suspension is similar to the minute for the dismissal the same being Min4/BOD/2018 (see PExh10 and PExh12)
 3. The dates, parties present, matters discussed and the minutes alluded to by the respondent are too inconsistent for anyone to make any sense out of them.
 4. The minutes are not signed.
 5. The minutes signed have different signatures of one official.
38. Further, the respondent has expressly admitted at paragraph 25 of the response to the claim that it is relied on an Investigation Report to terminate the employment of the claimant. The respondent's said report indicates that the Finance Manager approved the invoice. This is not true because once goods are delivered, the delivery note is confirmed and signed by the officers authorised by the respondent. These officers are the store manager and the ICT manager. The finance manager was to ascertain the same and raise a voucher to facilitate payment. The claimant did as such and countersigned the invoice/delivery note at page 78 of the claimant's further list of documents.
39. The Respondent seeks to buttress her case by relying on the authority of [*Kenya Union of Commercial, Food and Allied Workers v Del Monte \(K\) \(2019\) eKLR*](#), the court held thus;
- ' As to whether was a valid reason for the termination of the grievant, it should be noted that before an employer can exercise the right to terminate the contract of an employee, there must be a valid reason or reasons that touch on grounds of misconduct, poor performance or physical incapacity. Once this is established the employee must be issued with a notice, given a chance to be heard and then a sanction meted by the Respondent after due consideration of the representation made by the affected employee or his representative in terms of section 41 of the [*Employment Act*](#)'
- Under the [*Employment Act*](#), the reason or reasons for termination of a contract of employment 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. This matter tilts in favour of the claimant's case. This comes out both on a test of preponderance of evidence and balance of probabilities. The claimant has adduced overwhelming evidence and generated a case of no default on her part concerning the complain of procurement process for the Respondent. It is her case that all this time, there was no standard or formal procurement policy or standard for the Respondent. Two, the firm involved in this procurement was always familiar and acted for the Respondent on previous occasions.



41. Again, the claimant's case and submissions is that at all times during the procurement process, there were avenues for intervention which were not exercised by the Respondent. She was not and cannot have been the only actor in this procurement process. She was not even a part of the tripartite that was involved in passing and authorising payments and signing cheques on procurement or other matters.
42. Her further case and submission that the Respondent is now floating the Procurement Act to justify termination is sustainable.
43. The claimant pleads and submits a case of malice and overboard in her dismissal. This sounds so. It is not entirely senseless and adds value to her case. I therefore find a case of unlawful termination of employment in the circumstances.
44. The 2nd issue for determination is whether the claimant is entitled to the relief sought. She is. Having won on a case of unlawful termination of employment she becomes entitled to the relief sought.
45. 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 182,525.00
 - iii. Service pay for 6 years. $Kshs\ 182,525.00 \times 15/30 \times 6 = Kshs\ 547,575.00$
 - iv. Six (6) months salary as compensation for unlawful termination of employment. Kshs 1,095,150.00
Total of claim. Kshs 1,825,250.00
 - v. The costs of this cause shall be borne by the Respondent.

DATED AND DELIVERED AT NYERI THIS 31ST DAY OF OCTOBER, 2022.

D.K.NJAGI MARETE

JUDGE

Appearances

1. Mr. Thangicia instructed by Thangicia M. David & Co. Advocates for the Claimant.
2. Mr. Kariuki instructed by Mithega & Kariuki Advocates for the Respondent.

