



**Githendu v Transcend Media Group Limited (Cause 2606 of 2016)
[2022] KEELRC 12896 (KLR) (13 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12896 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2606 OF 2016
L NDOLO, J
OCTOBER 13, 2022**

BETWEEN

JAMES GITHENDU CLAIMANT

AND

TRANSCEND MEDIA GROUP LIMITED RESPONDENT

JUDGMENT

Introduction

1. Human beings can be strong and frail in equal measure and sometimes, too much trust can break an otherwise good man. This case begins with a man by the name Ephantus Makhaya, who was a junior employee in the respondent's Finance Department.
2. Makhaya was the designated bank agent and in this capacity, he would ordinarily withdraw cash over the counter, on behalf of the respondent. One of the transactions that he would effect on monthly basis was to withdraw National Hospital Insurance Fund (NHIF) remittances deducted from the Respondent's employees, which he would then bank into the NHIF account.
3. Now it takes strong will and sometimes divine intervention to handle another person's cash when faced with personal financial needs. Bankers refer to legal tender issued to them by their employer as stationery but is it?
4. Makhaya yielded to temptation and for nine months, he would cash the NHIF cheque and instead of depositing the cash into the NHIF account, he would convert it to his own use. This went on undetected until September 2016, when Makhaya walked away and on his way to the wilderness, he sent the following email to his boss:

“Dear Sir,



I have over a period of one year, had financial issues. For nine months now I have not remitted monthly statutory payments for NHIF. Your office had trust in me but I let you down. For this reason, kindly do not victimize any other member of staff for my inconsiderate actions. TMG to me was a family, good family, and I regret that I had to be the black sheep. I am remorseful for my actions. I have tried to repair the damage only to end up digging the pit deeper. I'm tired of living this lie. I know what's coming to me so I have chosen to run. Again, I am really sorry.

I have left a bag containing all tools entrusted to me under your desk. The bike is parked at the ground floor bike parking bay.

PS. I'll strive to repay this debt."

5. James Githendu, the claimant in this case, was Makhaya's boss, holding the position of Finance and Administration Director. When he received Makhaya's email, Githendu did a preliminary inquiry which revealed that the respondent had not made any remittances to NHIF for a period of nine months. The respondent was therefore indebted to NHIF in the sum of Kshs 635,350 as principle remittances and Kshs 1,142,800 in penalties.
6. Githendu escalated the matter to the respondent's Directors and on October 3, 2016, he was dismissed. It is this dismissal that forms the subject matter of the dispute now before me.
7. The claimant states his case in a memorandum of claim dated December 19, 2016 and the respondent defends itself by a response and Counterclaim dated March 24, 2017, to which the claimant responded on December 30, 2021.
8. The matter went to full trial, with the claimant testifying on his own behalf and the respondent calling its Chief Executive Officer, Anthony Gatheca Wambugu. The parties also filed written submissions.

The Claimant's Case

9. The claimant states that he was employed by the respondent on June 4, 2012 as Finance and Administration Manager. He was promoted to the position of Finance and Administration Director effective July 1, 2016. The claimant pegs his monthly salary at Kshs 715,000.
10. The claimant worked for the respondent until October 3, 2016 when he was summarily dismissed on account of a theft which the claimant attributes to another employee of the respondent, Ephantus Makhaya.
11. The claimant terms the dismissal as unlawful and unfair. He accuses the respondent of failure to take into account the facts and circumstances surrounding the theft and adds that he was not given a fair hearing prior to the dismissal.
12. The claimant further states that upon dismissal he was not paid his terminal dues and he was not issued with a certificate of service.
13. The claimant particularises his claim as follows:
 - a. 12 months' salary in compensation.....Kshs 7,800,000.00
 - b. Salary in lieu of notice (including house allowance).....1,300,000.00
 - c. Salary for September 2016.....715,000.00
 - d. Service pay for 4 years.....1,733,333.33



- e. Accrued leave pay (15 days-2016).....568,750.00
- f. Staff medical cover (2 months).....450,000.00
- g. Insurance cover (2 months).....5,387.00
- h. Certificate of service
- i. Costs plus interest

The Respondent's Case

14. In its response and counterclaim dated March 24, 2017 and filed in court on March 28, 2017, the respondent admits having employed the claimant but denies that his dismissal on October 3, 2016, was unlawful or unfair.
15. The respondent accuses the claimant of neglecting to perform his duty as Finance and Administration Director thus exposing the respondent to a loss of Kshs 1,142,88 in penalties.
16. The respondent states that any infractions by Ephantus Makhaya were contributed by the negligent conduct and dereliction of duty by the claimant.
17. The respondent lists the following particulars of negligence against the claimant:
 - a. Failing to create fool proof financial reporting systems in the company thereby exposing it to exploitation by employees;
 - b. Failing to ensure sound financial management and control of the company's financial obligations and undertakings;
 - c. Introducing cash remittances (in August 2015) of statutory deductions being complete departure from previous system of cheque issuance thereby exposing the company to financial risk;
 - d. Failing and/or neglecting the duty to demand receipts confirming payment of NHIF remittances;
 - e. Failing to take action in respect of complaints by employees on the non-remittance of their NHIF and other statutory deductions; for instance, a complaint by Nyambura Karuthiru in August 2016 and on September 22, 2016;
 - f. Adopting accounting practices and financial strategies that are risky and ineffective;
 - g. Failing to provide or foster internal financial control and effective strategic financial, administrative and human resource planning;
 - h. Failing to ensure that all statutory requirements of the organisation are met including; withholding payments, income tax, NSSF, NHIF and other statutory deductions;
 - i. Failing to document and maintain complete and accurate supporting information for all financial transactions;
 - j. Failing to monitor risk management policies and procedures to ensure that project and organisational risks are minimised.
18. The respondent maintains that the claimant's dismissal was justified as contemplated in section 44 of the *Employment Act*. The respondent denies the claimant's entire claim.



19. In its counterclaim against the claimant, the respondent states that the claimant was employed on June 4, 2012 and was entrusted with the position of Finance and Administration Director with, *inter alia*, the duties and obligations to ensure:
- a. Sound finance strategy, development and implementation;
 - b. Sound financial accounting and reporting;
 - c. Payroll preparation and administration;
 - d. Establishment of budgeting guidelines;
 - e. Sound risk management;
 - f. Project management and accounting;
 - g. Office administration.
20. The respondent avers that due to the claimant's carelessness, improper performance of his work and/or negligent dereliction of duty, the company was exposed to the loss of statutory returns due to NHIF amounting to Kshs 635,350 as principle deductions and Kshs 1,142,800 as the statutory penalties for non-remittance.
21. The respondent further avers that as a result of the claimant's conduct, NHIF had demanded payment of Kshs 1,778,150.
22. The respondent asserts that the claimant's conduct constituted material breach of his contractual obligations.
23. By way of counterclaim therefore, the respondent claims the sum of Kshs 1,778,150 from the claimant.

Findings and Determination

24. There are three (3) issues for determination in this case:
- a. Whether the claimant's dismissal was lawful and fair;
 - b. Whether the claimant is entitled to the remedies sought;
 - c. Whether the respondent has made out a proper counterclaim against the claimant.

The Dismissal

25. The claimant was summarily dismissed by letter dated October 3, 2016 stating as follows:

“Dear James,

Re: Summary Dismissal

It has come to my attention that Transcend Media Group's NHIF payments accruing over a period of nine (9) months to August 2016 were never made.

You had advised that these payments should be made in cash form and the messenger you sent to do this never provided you back with receipts as should be the case. There is a ground to believe that you colluded with the said employee to defraud the company since you did not follow this up nor raise a red flag to me over such a long period of time.



As the Accounting Officer in charge of this docket it is your basic responsibility to ensure all cash disbursements are accounted for and records filed immediately the transaction takes place. Your negligent behaviour has cost the company losses amounting to Kshs 635,350 as a principle sum. Further, NHIF will penalize TMG for non payment to the tune of 5 times that amount leading to a potential loss of kshs. 3.1 M. (see attached record)

This is an act of gross misconduct as indicated in our HR policies and manual. For this you are hereby summarily dismissed from your role as Finance and Administration Director.

The company will recover the loss of the money from your September 2016 salary.

I ask that you hand over all the company property you hold and leave the company premises immediately.

Regards,

(signed)

Tony Gatheca

Chief Executive Officer”

26. This letter records the reason for the claimant’s dismissal as gross misconduct arising from non-remittance of NHIF dues for a period of nine (9) months leading to penalties being levied against the respondent.
27. From the evidence on record, it emerged that the unremitted dues had been converted by Ephantus Makhaya who served as the respondent’s bank agent at the time.
28. The claimant told the court that Makhaya would withdraw the monthly remittances in cash which he would then bank into the NHIF account and make a return to the Chief Accountant. The claimant sought to exonerate himself from any wrongdoing by stating that he had relied on accounting staff working under him to check the NHIF returns from month to month. He asserted that it was not possible for him to check each and every transaction.
29. The claimant’s actual job description was a matter in contention. The claimant however admitted that he was in charge of the entire Finance Department. The claimant testified that remittances to NHIF could be made either in cash or by banker’s cheque. Given the claimant’s position in the Finance Department, it is reasonable to conclude that the choice to effect the NHIF remittances in cash rather than by banker’s cheque, was made with his knowledge and concurrence.
30. In financial operations, cash transactions rank very high in the prism. In this case, reliance was placed on one man, Ephantus Makhaya, to do the right thing. As it turned out, Makhaya succumbed and converted the NHIF funds to his own use, thus exposing the respondent to unpaid dues and high penalties.
31. The question before this court is whether the respondent had a valid reason for dismissing the claimant. Section 43 of the *Employment Act* sets the following requirement:
 43. Proof of reason for termination
 - (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.



- (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

32. In applying this provision, Kenyan courts have adopted the reasonableness test pronounced by Lord Denning in *British Leyland UK Ltd v Swift* [1981] IRLR 91 in the following terms:

“The correct test is; was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered in all these cases that there is a band of reasonableness, within which an employer might reasonably take one view; another quite reasonably takes a different view. One would quite reasonably dismiss the man. The other quite reasonably keeps him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employer may not have dismissed him.”

33. It is not in contest that the claimant was the most senior employee in the Finance Department. It is also common cause that the respondent’s management, of which the claimant was a key member, had chosen to deal in cash in effecting NHIF transactions. Given his position and his wide experience as an Accountant, the claimant ought to have known the level of exposure in cash transactions and thus exercised more care.

34. For the diversion of NSSF dues to go undetected for nine months under his watch was no doubt a mark of negligence on the part of the claimant. In these circumstances I find and hold that the respondent had a valid reason for dismissing the claimant as required under section 43 of the *Employment Act*.

35. The next question for determination is whether in executing the dismissal, the respondent observed due procedure. This procedure is codified in section 41 of the *Act* which provides:

41. Notification and hearing before termination on grounds of misconduct

- (1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

- (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

36. In its decision in *Janet Nyandiko v Kenya Commercial Bank Limited* [2017] eKLR the Court of Appeal stated thus:

“Section 41 enjoins the employer, in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity, to explain to the employee in a language that the employee understands, the reasons for which the employer is considering to terminate the employee’s employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence



of a fellow employee or a shop floor union representative of own choice, and to hear and consider any representation which the employee may advance in response to the allegations leveled against him by the employer.”

37. From the evidence on record, the respondent made no attempt to comply with the procedural fairness requirements decreed by section 41 of the *Employment Act*. For this reason, I find and hold that the dismissal was unfair for want of procedural fairness. The claimant is therefore entitled to compensation to that extent.
38. With this in view, I award the claimant three (3) months’ salary in compensation. In arriving at this award, I have considered the claimant’s length of service, his contribution to the dismissal and the respondent’s unlawful conduct in executing the dismissal.
39. I further award the claimant two (2) months’ salary in lieu of notice as provided by clause 5 of his letter of appointment.
40. The respondent did not provide any leave records to counter the claim for leave pay which therefore succeeds and is allowed.
41. The claim for salary for September 2016 was admitted in final submissions and is thus payable.
42. Having been a contributing member of the National Social Security Fund (NSSF) the claimant is not entitled to service pay.
43. No basis was laid for the claims for staff medical cover and insurance cover which therefore fail and are dismissed.

The Respondent’s Counterclaim

44. By its counterclaim, the respondent seeks to recover Kshs 635,350 being unremitted principle deductions and Kshs 1,142,800 in penalties. I will say two things on this issue; first, no documentary evidence was availed to show the actual loss incurred by the respondent and second, it is on record that the loss was directly linked to Ephantus Makhyaya who would be right person for the respondent to pursue in this regard.
45. Consequently, the counterclaim fails and is dismissed.

Final Orders

46. Finally, I enter judgment in favour of the claimant as follows:
 - a. 3 months’ salary in compensation.....Kshs 1,950,000
 - b. 2 months’ salary in lieu of notice.....1,300,000
 - c. Salary for September 2016.....650,000
 - d. Leave pay for 15 days (650,000/30*15).....32,500Total.....3,932,500
47. This amount, which is subject to statutory deductions, will attract interest at court rates from the date of judgment until payment in full.
48. The claimant is also entitled to a certificate of service plus costs of the case.
49. Orders accordingly.



DELIVERED VIRTUALLY AT NAIROBI THIS 13TH DAY OF OCTOBER, 2022.

LINNET NDOLO

JUDGE

Appearance:

Mr Kinyanjui for the claimant.

Mr Maingi for the respondent.

