



**Akanga v Capital Markets Authority (Cause 1187 of 2014)
[2022] KEELRC 12773 (KLR) (6 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12773 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1187 OF 2014
MN NDUMA, J
OCTOBER 6, 2022**

BETWEEN

SOLOMON AKANGA CLAIMANT

AND

CAPITAL MARKETS AUTHORITY RESPONDENT

JUDGMENT

1. The suit was filed on July 31, 2014 by the claimant seeking various reliefs including: -
 - (a) 3 months' salary in lieu of notice – Kshs395,478
 - (b) Unpaid salary Kshs.395,478 (during appeal Process.)
 - (c) Accrued annual leave for 21 days – Kshs 131,826
 - (d) Compensation for unlawful dismissal for the remainder of the contract period and in the alternative equivalent of 12 months' salary.
 - (e) Costs and interest.
2. The suit was defended by a statement of Defence and Counter-Claim filed on August 20, 2014. The same was responded to by the claimant on September 23, 2014 and the claimant denied the counter-claim and joined issues with the defence proffered by the respondent.
3. C.W.1 the claimant, testified that he was employed by the respondent on May 10, 2011 in the position of Human Capital Officer by a letter of employment of the same date. He was confirmed to the position by a letter dated February 27, 2012. That he served faithfully and diligently until the summary dismissal from employment by a letter dated October 25, 2013.
4. C.W.1 testified that his summary dismissal was actuated by malice and vendetta by Chief Executive Officer, Mr. Paul Muthaura, Director Corporate Services, Mr. Njamura and Manager Human Capital



- and Administration Mr. Andrew Muthabuku. That the scheme was hatched on October 18, 2012 when Mr. Muthabuku uttered words “Charity give me 2 months. Huyu ataenda (He will go). We can’t work with him.”
5. That Mr. Muthaura and Mr Njamura did not commence any disciplinary action against Mr. Muthabuku despite, the claimant reporting the threats made by Muthabuku to them.
 6. That the said utterances were not investigated at all. C.W.1 testified that he was discriminated by denial of training and salary review. That C.W.1 at all times performed his work with integrity despite often strained relationship with the said officers, for example, when Mr. Muthabuku stormed an interview session on May 31, 2013, and demanded a candidate pursuing a Degree in B. Com be considered for a legal role.
 7. That the said incidence was shared with Mr. Njamura and Mr. Muthaura but it was ignored.
 8. That in February, 2013, Mr. Muthabuku directed Finance Manager to deduct fringe benefits tax from claimant’s salary. The said deductions were later refunded to all employees.
 9. That the claimant was wrongly accused of deserting duty when he proceeded on annual leave which had been provided for in the Respondent’s approved leave plan. That the claimant had applied for the leave to be granted and it was approved by his immediate supervisor as required. (Form is attached as exhibit ‘7A’) and approval email attached and marked ‘7.’
 10. That Mr. Muthabuku had unlawfully directed the immediate supervisor of the claimant to rescind her previous leave approval without sufficient notice yet it was an employment right of the claimant. That this was a plot by the three top management officers to terminate the employment of the claimant. That the claimant had properly handed over before he proceeded on leave.
 11. That the dismissal was actuated by malice orchestrated by the three officers.
 12. That on November 21, 2021 the claimant was served with a notice to show cause for negligence of duty and insubordination. The claimant defended himself on November 23, 2012. That the reasonable defence disclosed by the claimant in his response including the malice by these officers of the respondent was ignored, which implied collusion by all top officers.
 13. That during the disciplinary hearing on September 20, 2013, the Staff Advisory and Disciplinary Committee (SADC) denied the claimant opportunity to be accompanied by an employee of choice. That the claimant was denied opportunity to call a witness and was not allowed to cross-examine witnesses of the respondent.
 14. That the minutes of the disciplinary hearing presented by the respondent contain falsehoods and misrepresentation as to what transpired.
 15. That C.W.1 appealed the decision to dismiss him summarily but he was denied opportunity to recall witnesses relied upon by the respondent.
 16. The claimant vide his advocates wrote a demand letter to the respondent dated February 12, 2014 which was ignored by the respondent.
 17. That the dismissal was unlawful and unfair. That the claimant has suffered loss and damages and he be awarded as prayed.
 18. The witness statement adopted by the claimant as his evidence in chief was filed on 20th April, 2017.



19. The claimant relied on bundle of documents attached to the statement of claim to substantiate the aforesaid testimony.
20. The respondent in its defence and counter-claim called R.W.1 Andrew Muthabuku, the Senior Manager Human Capital and Administration. He adopted a witness statement dated November 9, 2015 as his evidence in chief. R.W.1 testified that on or about July 2, 2012, the claimant sent an abusive email to employees of Savings and Loan (S & L) in regard to a mortgage application. On July 3, 2012, C.W.1 was issued with a notice to show cause and was required to send a written apology to Savings and Loan employees. The claimant wrote an apology and he was subsequently cautioned on this unacceptable conduct.
21. That on or about November 21, 2012, the claimant was issued with another notice to show cause due to the negligent manner he had executed his duties in addition to insubordination. The claimant was cautioned and advised to change his behavior and improve his performance.
22. That on August 7, 2013, the claimant was issued with another notice to show cause due to a rude email he sent to another staff, Lucy Kimani. The claimant responded to the notice to show cause on August 8, 2013. Before the matter was concluded the claimant applied for leave from August 12, 2013 to August 30, 2013. The claimant had previously been scheduled to proceed on leave from August 19, 2013 as per the respondent's leave plan. The claimant informed his line supervisor that he required to take leave from August 12, 2013 as he had exams to take within the period. The claimant was informed to complete his pending tasks before the leave was approved. The claimant was also requested to submit his exam timetable in order to facilitate consideration for his application for leave. The claimant failed to report to work on August 12, 2013 in blatant disregard of his supervisor's advice and instructions.
23. The claimant's supervisor wrote to R.W.1 on August 15, 2013 outlining the issue and requested that a notice to show cause be issued to the claimant. R.W.1 wrote to Director Corporate Services on the matter and the past disciplinary issues. R.W.1 requested that the claimant be issued with notice to show cause which was issued on August 29, 2013 and was notified to respond and thereafter attend a disciplinary hearing. Upon conduct of the disciplinary hearing, the claimant was summarily dismissed by a letter dated 25th October, 2013. That the claimant appealed and the appeal was dismissed for lack of merit. That the suit be dismissed for lack of merit.
24. R.W.2 Wycliffe Shamiyah testified as R.W.2. He relied on a witness statement dated November 9, 2013 as his evidence in chief. R.W.2 was Director in-charge of marketing operations. He testified that He was the Chairperson of the Ad hoc Appeals Committee (ACC). That Ad hoc Appeals Committee dealt with the case of the claimant. R.W.2 testified that Ad hoc Appeals Committee on November 27, 2013 requested the claimant to submit a written memorandum of appeal within 14 days. The claimant submitted the memorandum as received on December 11, 2013. The claimant sought to cross-examine certain members of staff. The claimant declined to appear before the Ad hoc Appeals Committee unless he was allowed to cross-examine the stated staff members. The Appeal was found to be without merit and dismissed by a letter dated January 16, 2014.
25. R.W.3 Luke Ombara, Director Policy and Market Development testified by adopting a witness statement dated November 9, 2015. R.W.3 testified that he sat in the Staff Ad hoc Disciplinary Committee which heard the case of the claimant. R.W.3 stated Staff *Ad hoc* Disciplinary Committee is appointed by Chief Executive Officer and is chaired by Director, Corporate Services and members include Manager Human Capital and Administration; the Directorate of the Corporation Secretary and Communications (DCSC), Directorate of Market Operation (DMO), Manager in charge of Policy and Market Development and the Chair or Representative from the Staff Welfare Committee.



26. The Committee was introduced to the claimant and he expressed his reservation about the Director of the Directorate of the Corporation Secretary and Communications (DCSC) being part of the committee or the chair because he had filed a complaint against him being the notice to show cause dated August 7, 2013. He asked that he recuses himself. Director of the Directorate of the Corporation Secretary and Communications (DCSC) recused himself upon deliberation. That the claimant was allowed to submit written submissions to the committee. He highlighted the submissions and intended to call witnesses. The claimant made his submissions but was not allowed to call witnesses. The claimant was questioned about the case against him. R.W.3 stated that the claimant was not remorseful stating that he was right and he did not intend to be rude to the Director of the Directorate of the Corporation Secretary and Communications (DCSC).
27. That he was not negligent as he was a good performer. That he was officially on leave as from August 12, 2013 since his leave application had been approved. The claimant was notified of the objection by the supervisor regarding his going on leave. The claimant stated that he actually fell sick on August 12, 2013, hence proceeded on leave and could not report back as requested by the supervisor. Documents showed that the claimant had attended induction by the judiciary during the period he stated he was sick.
28. The claimant was found guilty of defying instructions from his supervisor not to proceed on leave on August 12, 2013 to August 30, 2013. That the claimant was dishonest on the issue at the hearing. The claimant was found to have absconded work and was guilty of gross misconduct in violation of section 44(4) (e) of the *Employment Act*, 2007.
29. The Committee considered the past record of the claimant which included verbal warnings. The committee recommended summary dismissal of the claimant in terms of the applicable regulations of the respondent and the law. R.W.3 prays that the suit be dismissed with costs.
30. The parties filed written submissions and the issues for determination are: -
 - (a) Whether the respondent had a valid reason to summarily dismiss the claimant and whether it followed a fair procedure in taking the action.
 - (b) What remedies if any, is the claimant entitled to.
31. In terms of Section 41, of the *Employment Act*, 2007, an employer must give an employee facing charges of misconduct that may lead to his/her dismissal opportunity to be heard and allow the employee to be accompanied by an employee of choice during the hearing.
32. From the evidence before Court, the claimant has not demonstrated that he intended to be accompanied by a named employee who was denied opportunity to accompany the claimant.
33. The claimant however wished to cross-examine his accusers but was denied opportunity to do so. He was only allowed to make written submissions and highlight them at the hearing.
34. The claimant reiterated the demand to cross-examine his accusers when he filed his appeal but was again denied that opportunity. The claimant had named his accusers to include. Andrew Muthabuku (R.W.1) and Charity Mutua, Assistant Manager, Human Capital and Administration and Edwin Njamura who he alleged were acting maliciously and with intent to cause his termination from employment. The respondent presented the minutes of the DCSC hearing which clearly show that



the claimant wished to cross-examine the three officers but the committee denied him the opportunity stating at page 2:

“The SADC hearing was not designed to be an adversarial process but as provided in the CMA manual. The purpose was inter alia to listen to the employee involved and corroborate with evidence presented against the staff (emphasis added).

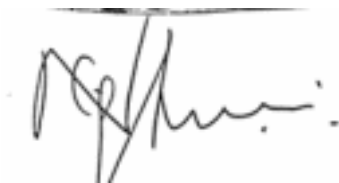
35. Clearly, no staff officer was called to the disciplinary hearing to present any evidence against the claimant in the presence of the claimant with opportunity given to the claimant to test the veracity of the accusations made against him.
36. The Committee merely relied on the show cause letter with charges against the claimant dated September 11, 2013, which letter was already in the custody of the disciplinary committee. The charges discussed related to incidents in December, 2012 and August, 2013 already canvassed in this judgment and onfirmed in a second notice to show cause dated August 7, 2013 and a 3rd notice to show cause dated August 29, 2013 concerning negligence and insubordination.
37. The disciplinary hearing was a continuous examination of the claimant in the absence of any evidence tabled by the witnesses before the disciplinary committee. To this extent, the Committee became the accuser, prosecutor and judge and the veracity of the accusations was not tested by the claimant at all from the record of the proceedings and admissions by R.W.1, R.W.2, and R.W.3 who deemed such a process to be outside the scope of CMA regulations.
38. The conduct of the disciplinary process clearly failed to provide a reasonable opportunity to the respondent to validate the charges made against the claimant by persons who did not appear before the committee. This process violated the cardinal rule of natural justice, to provide a fair hearing to the employee and consider available evidence to determine the validity of charges made against him. The claimant was not allowed representation also.
39. The process by the respondent violated Section 41 of the *Employment Act* by not allowing the claimant representation and opportunity to call witnesses, despite his request. This failure denied the respondent opportunity to satisfy the provisions of Section 43(1) & (2); 45(1) & (2) and 47(5) of the *Employment Act*, 2007.
40. Accordingly, the respondent has failed to demonstrate it had a valid reason to summarily dismiss the claimant. The claimant to the contrary demonstrated in terms of Section 47(5) that the summary dismissal was wrongful and was actuated by malice and vendetta. The Court finds that the summary dismissal of the claimant was unlawful and unfair.
41. The claimant is entitled to remedies sought in the statement of claim in term of Section 49 of the *Employment Act*, 2007. The Court relies in this respect on the Supreme Court Decision in *Kenfreight (E.A.) Limited –vs- Benson K. Nguti* (2016), Civil Appeal No. 31 of 2015 in which the Court asserted the onus of prove is on the employer to demonstrate that it had a valid reason to dismiss an employee and that the claimant is entitled to compensation for unlawful and unfair termination where the employer fails to discharge that onus. The case of *Loice Otieno –vs- Kenya Commercial Bank Limited*, - Cause No. 1050 of 2011, is on point also that before an employer summarily dismisses an employee, he/she must demonstrate there was a valid reason to do so and that a fair procedure was followed in arriving at that decision.
42. With regard to the remedies sought by the claimant, it is apparent that the claimant was not granted notice of three months in terms of his contract of service upon summary dismissal. Indeed, the counter claim is founded on unproved facts that the claimant had absconded duty without notice. That



counterclaim is without basis and is dismissed. To the contrary, the Court finds that the claimant is entitled to the payment of three (3) months' salary in lieu of notice in the sum of Kshs395,478.

43. The claimant has equally proved that he was owed 21 untaken leave days at the time of summary dismissal and is awarded Kshs 131,826 in lieu of leave days not taken.
44. Upon summary dismissal, the employment of the claimant came to an end and the Court finds that the claimant was not entitled to any salary in the period between the summary dismissal and determination of the appeal which was dismissed by the respondent.
45. In terms of the decision in Kenfreight (supra) the Court may either reinstate an employee, re-engage or compensate the employee who has been summarily dismissed in terms of Section 49(1) (c) and 4 of the *Employment Act*, 2007,
46. In this regard, the claimant who has demonstrated was a good performer was trampled on by his supervisors for reasons known to themselves which they did not present before the disciplinary panel. To this extent, the Court finds that the claimant cannot be said to have contributed significantly to his summary dismissal. To the contrary, the Court finds that the summary dismissal was actuated by malice and vendetta especially from R.W.1. To this extent, the claimant suffered loss and damage and good career prospects in a superior organization with great growth prospects,
47. The claimant was not paid notice and or any terminal benefits by fact of the summary dismissal. The claimant as at the time of the trial had not obtained any equivalent employment to mitigate the loss visited upon him unlawfully and unfairly.
48. The claimant had served the respondent for a period of two (2) years. The Court notes that the consecutive notices to show cause followed by verbal warnings comprise evidence of victimization rather than bad conduct by the claimant. The Court having considered all the above awards the claimant the equivalent of three (3) months' salary in compensation for the unlawful and unfair summary dismissal in the sum of Kshs 395,478.
49. In the final analysis, judgment is entered in favour of the claimant against the respondent as follows: -
 - (a) Kshs 395,478 in lieu of 3 months' notice.
 - (b) Kshs 395,478 being the equivalent of 3 months' salary in compensation.
 - (c) Kshs 131,826 in lieu of leave days not taken.
Total award Kshs 922,782,00.
 - (d) Interest at Court rate from the date of filing suit till payment in full.
 - (e) Costs of the suit

DATED AND DELIVERED AT NAIROBI (ELECTRONICALLY) THIS 6TH DAY OF OCTOBER, 2022.



Mathews N. Nduma

Judge



Appearances

Kwengu & Co. Advocates for the Respondent

Mr Kithome for claimant

Ekale: Court Assistant

