



**Malombe v Cooper-K Brands Limited (Cause 2483 of 2017)  
[2022] KEELRC 12754 (KLR) (6 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12754 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 2483 OF 2017  
L NDOLO, J  
OCTOBER 6, 2022**

**BETWEEN**

**JAMES MALOMBE ..... CLAIMANT**

**AND**

**COOPER-K BRANDS LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. By his statement of claim dated November 21, 2017 and filed in court on December 20, 2017, the claimant proceeds against the respondent seeking relief for unlawful and unfair termination of employment. In its defence, the respondent filed a statement of response dated March 13, 2018 to which the claimant responded on March 28, 2018.
2. At the trial, the claimant testified on his own behalf and thereafter called Patrick Kidemi and Mike Jotham. The respondent called its General Manager, Catherine Gitobu and Group Human Resource Manager, Anne Wanjohi. The parties also filed written submissions.

**The Claimant’s Case**

3. The claimant states that he was employed by the respondent from June 1, 2009 until September 14, 2017, when his employment was terminated on allegations of maintaining regular contact with a team that was under investigation. At the time of termination, the claimant earned a monthly salary of Kshs 40,000.
4. The claimant terms the termination of his employment as unlawful and unfair. In particular, the claimant accuses the respondent of failure to provide evidence relied on to terminate his employment. The claimant states that the respondent’s failure in this regard rendered him unable to defend himself.
5. The Claimant now seeks the following remedies:



- a. Damages (1 year's salary).....Kshs 480,000
- b. Unpaid service pay.....160,000
- c. Reinstatement
- d. Costs plus interest

### **The Respondent's Case**

6. In its statement of response dated and filed in court March 13, 2018, the respondent admits that the claimant was its employee under a contract of employment. The respondent further admits that at the time of separation, the claimant earned a monthly salary of Kshs 40,000.
7. The respondent states that the claimant's employment was terminated on September 14, 2017 after a disciplinary hearing, where it was established that he had withheld information in his possession regarding the theft of goods belonging to the respondent's customer.
8. The respondent maintains that there were valid grounds for the termination and that proper procedure was followed.
9. The respondent avers that the claimant, who was employed in the position of warehouse operations manager, had breached the company's standard code of business principles as set out below:
  - a. On August 7, 2017, a 25Kg drum of Levamisole HCL was stolen from the respondent's client's premises. It was suspected that two employees of the company, who worked at the Warehouse had participated in the theft. The respondent conducted investigations by way of a business inquiry into the matter. Each employee of the respondent in the warehouse and production areas was interviewed between August 22, 2017 and August 25, 2017. The employees were required to sign a voluntary statement indicating that all information they had provided was true;
  - b. The claimant was interviewed on August 25, 2017 and he signed a statement indicating that he had not communicated with the two employees who were suspected to have participated in the theft, from the time the theft incident was reported until he saw them on August 22, 2017. He further stated that he had not spoken to the two employees about the incident. At the end of the interview, the claimant signed the voluntary statement that all that he had stated was true;
  - c. The investigations revealed that contrary to the claimant's statement, there had been regular communication between the claimant and his team from August 7, 2017 to August 15, 2017. The two employees who were suspected of the theft were working in the warehouse and the claimant was their team leader. The claimant's statement that he had not spoken to the two employees was found to be untrue.
10. The respondent accuses the claimant of fundamental breach of its code of business principles and his contract of employment in that he:
  - a. Withheld information which was in his possession as warehouse team leader about the theft of the 25Kg drum of Levamisole HCL;
  - b. Denied knowledge of the company's suppliers while he was trading directly with one of the respondent's business partners with nitrogen tanks that were stolen from the respondent.
11. By letter dated September 8, 2017, the claimant was asked to show cause why disciplinary action should not be taken against him.



12. On September 9, 2017, the claimant wrote back to the respondent seeking more details on the show cause letter.
13. Thereafter, the claimant was given notice of a disciplinary hearing scheduled for September 13, 2017. The claimant attended and made oral representations at the disciplinary hearing.
14. The respondent states that the claimant was confronted with a CCTV footage showing his interactions with the two employees he had denied contacting during the inquiry. According to the respondent, the footage also showed that the claimant had had contact with employees of suppliers.
15. By letter dated September 14, 2017, the claimant was informed that his contract of employment had been terminated. The respondent avers that the claimant was paid all his terminal dues in the sum of Kshs 47,688.

### **Findings and Determination**

16. There are two (2) issues for determination in this case:
  - a. Whether the termination of the claimant's employment was lawful and fair;
  - b. Whether the claimant is entitled to the remedies sought.

### **The Termination**

17. The termination of the claimant's employment was formalised by letter dated September 14, 2017 stating as follows:

“Dear James,

Re: Termination of Employment Contract With Coopers

Through this letter the Company wish to inform you of the termination of your employment as per the terms of the contract dated June 1, 2009 clause 12 with one month's notice pay effective September 14, 2017.

I refer to the disciplinary meeting held September 13, 2017 Cooper-K Brands which was attended by you and the Disciplinary committee.

The committee finds that you did not uphold the Standard of Code of Business Principles of our operations with honesty, integrity and openness through the statement given & signed by yourself as a team leader in the business inquiry conducted on August 25, 2017(attached). Your termination is on these grounds:

1. You maintained regular contact with your team that was under investigation and choose (sic) to conceal that information from the investigators engaged by the company to conduct an enquiry and signed into record as true statements 8 & 9 contrary to the findings of the enquiry. Further in the disciplinary hearing held on September 13, 2017 and a discovery meeting held on 7<sup>th</sup>, September you maintained the same stand that there was no communication with the two.
2. The management has lost trust in you as a team leader due to the reason given above (1) which is a core value in our business code of Ethics.
3. Breaking the terms of your employment contract specifically the employees code of conduct and the Company's core values-Integrity.



You are entitled to pay in lieu of notice as terms of your contract, any outstanding remuneration including the date of this letter and any accrued leave days.

Take this opportunity to return any company property in your possession and complete the clearance process for final dues to be paid.

Sincerely

Cooper-k-brands Ltd

(signed)

Catherine Gitobu

General Manager”

18. This letter records the reason for termination of the claimant’s employment as his failure to uphold the standard of code of business principles; particulars being that the claimant had maintained and concealed regular contact with employees who were under investigation for theft.

19. Prior to the termination, the claimant had been issued with an unsigned show cause letter dated September 8, 2017 with the allegation that he had violated the following code of business principles:

Standard Code of Conduct “we conduct our operations with honesty, integrity and openness and with respect for the human rights and interests of our employees.”

20. In response to the show cause letter, the claimant sent an email dated September 9, 2017 seeking clarification on the charges against him. For some reason that was not clear to the court, the respondent did not respond to the claimant’s request.

21. In determining whether a termination of employment fits the fairness bill, the court is required to answer two questions; first, whether a valid reason for termination has been established and second, whether due procedure was adhered to.

22. As to what constitutes a valid reason for termination of employment, section 43 of the Employment Act states as follows:

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.

23. In applying this provision, Kenyan courts have adopted the reasonableness test pronounced by Lord Denning in *British Leyland UK Ltd v Swift* (1981) IR LR 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.”

24. The Kenyan *Employment Act* has given guidance as to what a reasonable employer is required to do in order to establish a valid reason for terminating the employment of an employee. 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.

25. In its decision in *Collins Tembo v Awanad Enterprises Limited & another* [2021] eKLR this Court stated the following:

“Section 43 of the *Employment Act* requires an employer to establish a valid reason for terminating the employment of an employee. This burden is discharged at the shop floor by the employer notifying the employee of the administrative charges against them and allowing them an opportunity to respond. This then is the necessary nexus between the evidential burden of section 43 and the procedural fairness requirements of section 41 of the Act.”

26. Regarding the roll out of the procedure set by section 41 of the Act, this Court in its decision in *Rebecca Ann Maina & 2 others v Jomo Kenyatta University of Agriculture and Technology* [2014] eKLR held as follows:

“...in order for an employee to respond to allegations made against them, the charges must be clear and the employee must be afforded sufficient time to prepare their defence. The employee is also entitled to documents in the possession of the employer which would assist them in preparing their defence. The employee is further entitled to call witnesses to buttress their defence.”

27. By ignoring the claimant’s request for particulars of the charges levelled against him as contained in the email dated September 9, 2017, the respondent put the claimant’s right to fair hearing in jeopardy.

28. What is more, the respondent chose not to share the full investigation report with the claimant or the court, ostensibly because it contained confidential information. Further, the respondent elected not to call the investigator as a witness. Instead, the respondent availed an extract prepared by the General Manager, Catherine Gitobu who evidently, was not the maker of the investigation report.

29. On the whole, I find that the respondent intentionally kept crucial evidence away from the court and the only inference to make is that this evidence would have been prejudicial to the respondent’s case.



30. I further find that the respondent's refusal to present detailed charges to the claimant rendered the disciplinary process a sham and the charges were not proved to the standard required by section 43 of the *Employment Act*. The logical conclusion is that the termination of the claimant's employment was substantively and procedurally unfair and he is entitled to compensation.

### **Remedies**

31. I therefore award the claimant eight (8) months' salary in compensation. In arriving at this award, I have taken into account the claimant's length of service, his employment record as well as the respondent's unlawful conduct in executing the termination.
32. Having been a contributing member of the respondent's pension scheme in addition to the National Social Security Fund, the claimant is not entitled to service pay.
33. In the end, I enter judgment in favour of the claimant in the sum of Kshs 320,000 being 8 months' salary in compensation for unlawful and unfair termination of employment.
34. This amount, which is subject to statutory deductions, will attract interest at court rates from the date of judgment until payment in full.
35. The claimant will have the costs of the case.
36. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 6<sup>TH</sup> DAY OF OCTOBER 2022**

**LINNET NDOLO**

**JUDGE**

### **Appearance:**

Mr. Muumbi for the Claimant

Mr. Makori for the Respondent

