



**Ondiri v Sukari Sacco Limited (Employment and Labour Relations Cause
20 of 2017) [2022] KEELRC 13271 (KLR) (24 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13271 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS CAUSE 20 OF 2017**

**JW KELI, J
NOVEMBER 24, 2022**

BETWEEN

ANNETTE CAROLYNE ONDIRI CLAIMANT

AND

SUKARI SACCO LIMITED RESPONDENT

JUDGMENT

1. The claimant filed a claim against the respondent, former employer, dated February 6, 2017 seeking the following reliefs:-
 - a. An order that the claimant be paid her salaries allowances and all her entitlements in law as per contract of employment dated April 24, 2012 and such be done from date of 1st suspension till date of full settlement .
 - b. An order of reinstatement of the claimant to full service in her employment and in lieu thereof damages for wrongful termination of employment and malicious arrest, pain and suffering.
 - c. Cost of this suit and interest on (a) and (b) above until settlement in full.
 - d. Any other relief the honourable court may deem just and fit to grant in the circumstances of the case.
2. Together with the claim the claimant filed her verifying affidavit sworn on the February 6, 2017 and list of documents of even date together the bundle of documents paginated as 7- 37.
3. The claimant appointed advocate to represent her being Ouma-Okutta & Associates and filed notice of appointment of advocate dated March 7, 2017.



4. The respondent entered appearance through the federation of Keya Employers and filed response to the claim dated December 10, 2018 and filed in court on even date and annexed documents marked as appendix A-I. The respondent also filed witness statement of Norman Joseph dated July 9, 2019.

The Hearing

5. The court issued hearing date of July 5, 2022 with notice to issue to the respondent. On the July 5, 2022 the respondent was absent. Affidavit of return of service was filed. The court being satisfied with service of the hearing date upon the respondent proceeded with the hearing. The claimant testified on oath as the sole witness of fact and the claimant's case was closed. The defence case was also marked as closed for non – attendance.

Claimant's Case In Summary

6. The claimant told the court that she joined the employer, the respondent in 2010 and left in 2016. That her colleagues took her password and used it to steal money from the employer. The claimant stated that the disciplinary process took place when the criminal proceedings were ongoing. That the director of public prosecutions withdrew the case against her and stated they were treating her as their key prosecution witness and recommended she be reinstated by the employer. That she was not reinstated. That the disciplinary process having taken place same time the criminal case was ongoing prejudiced her. That she had not been paid dues on termination. The claimant told the court that she relied on her claim as filed and produced her documents marked as nos. 1-18. The claimant told the court that she was 49 years old.

Defence Case

7. The respondent did not attend the hearing to produce their evidence. Its case as per memorandum of response was that the claimant was dismissed from employment upon an audit carried out for the purposes of compliance with the provisions of Unclaimed Financial Assets Act of 2011 disclosed the fraudulent loans processed through the farmers' dormant accounts and cash withdrawn *vide ATM* and paid through recoveries from the said farmers' account after creating fraudulent sheets. That the respondent made a formal complaint after which the claimant and others were arraigned in court and charged. The respondent issued the claimant with show cause letter in respect to the fraudulent creation of the loan in violation of the credit policy and their by-laws leading to a loss of Kes 5,222,361/- . That on the March 18, 2016 the respondent suspended the services of the claimant to pave way for investigations which were extended on the 21st April and the May 23, 2016.
8. That the claimant on receipt of the show cause denied all the allegation *vide* letter of March 10, 2016. On the June 9, 2016 upon invitation for hearing by the respondent the claimant attended the hearing session and denied all the allegations, she was however unable to explain how her password was used to access the system and create and post fraudulent loans. The respondent was not satisfied with her explanation and proceeded to summarily dismiss the claimant from employment on the June 30, 2016. On the July 6, 2017 the claimant appealed against her dismissal. On the 5th august 2016 the respondent invited the claimant for hearing of her appeal. The appeal was upheld as no new issue was raised. The respondent stated the claimant was not remorseful and could not explain how her password was used in creating the fraudulent loan accounts and consequently was dismissed from employment under section 44(3) and (4)of the Employment Act.



Issues Not In Dispute

9. The claimant was dismissed on allegation of theft of funds through creation of fraudulent loans accounts using her password. That the claimant was arraigned in court and charged with criminal charges on the same issue and disciplinary process was done on same issues. That the claimant was heard before the dismissal.

Determination

Issues for determination

10. The claimant in her submissions reiterated her case and relying on the letter by the ODPP (page 27) submitted she was terminated for unjustified reasons and prays for claim to be admitted as the defence was not prosecuted.
11. The respondent filed written submissions and addressed issue of fair termination and whether the reliefs sought should be granted.
12. The court considers that this being a case challenging the summary dismissal the issues for determination of the dispute as follows:-
 - a. Whether the summary dismissal of the claimant by the respondent was lawful and fair
 - b. Whether the claimant is entitled to reliefs sought.

Whether The Termination Of Employment Of The Claimant By The Respondent Was Lawful And Fair.

13. It is considered position of the court that for termination of employment to be said to be lawful and fair it must comply with the requirements of section 43,45 and 41 of the *Employment Act*. Section 43 of the Act requires proof of reason for termination. Section 43(2) guides the court on the prove of reasons by providing as follows, “43(2) the reasons 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”. The termination is unfair if the reasons did not exist.
14. Section 45 further expounds on the reasons by providing as follows: -“(2)A termination of employment by an employer is unfair if the employer fails to prove:-
 - a. That the reason for the termination is valid
 - b. That the reason for the termination is a fair reason - (i) related to the employee’s conduct, capacity and capability or (ii) based on the operational requirements of the employer
 - c. That the employment in termination is in accordance with fair procedure”.
15. The criteria of fair procedure is provided under section 41 of the *Employment Act* and the court finds that three ingredients are to be met namely:-
 - a. The employer, before the termination explains to the employee in a language they understand, the reason the employer is considering termination. The court considers issuance of a letter to show cause giving reasonable time and in a language the employee understands sufficient compliance with condition.



- b. Secondly the employee is entitled to have another employee or a shop floor union representative of his choice during this explanation. The court considers that this right must be reflected in the letter of invitation to the disciplinary hearing and in the minutes of the proceedings of the hearing.
- c. Thirdly the employee and his representative must be afforded opportunity to be heard and the employer must consider their representation on the grounds in its finding. The court considers the minutes of the hearing meeting reflecting the hearing of the representatives and consideration of their representation to meet this condition.
16. Applying the foregoing requirements of the law the court then considers whether there were valid and justified reasons for summary dismissal of the claimant. The dismissal letter dated June 30, 2016 issued to the claimant (exhibit 8) disclosed that the claimant was dismissed for creating and posting fraudulent loans and for being dishonest, untrustworthy and negligent in discharging her duties. She was dismissed for gross misconduct under the human resources manual of the employer and section 44(4)(c) of the *Employment Act*.
17. It was not in dispute that the claimant was charged on the foregoing reasons and later on October 13, 2016 discharged under section 87(a) of the *Criminal Procedure Code*. In the letter dated August 3, 2016 by the ODPP(exhibit 12) it was recommended the claimant be treated as witness for the prosecution and the charges be withdrawn against her under section 87(a) of the *Criminal Procedure Code*. This was done and the prosecutor in a letter dated October 13, 2016 (exhibit 9) then wrote to the respondent stating they needed her assistance to prosecute the case and that she be reinstated which the respondent failed to. The claimant submits that the letter by the ODPP proved she was terminated for unjustified reasons.
18. The respondent submits that the employer is bound by the instruments of engagement rather than the fact that a matter is pending before a criminal court. To buttress its submissions the respondent relied on the Court of Appeal decision of in *Attorney General & another v Andrew Maina Gitihini and another* (2016)e KLR by Waki JA(Rtd) paragraph 12, 15 and 16 and paragraphs 3 and 4 of the judgment by Kiage JA where the court drew distinction between service contracts and criminal court proceedings. In the decision by Waki JA ,the judge held in the cited paragraphs as follows:- “ 12. *David O Owino v Kenya Institute of Special Education* [2013] eKLR was another industrial court decision on similar submissions but the court followed another decision of this court and held:
- “ 12. In the case of Kibe v Attorney General (Civil Appeal No 164 of 2000) the Court of Appeal held that acquittal in a criminal case does not automatically render an employee immune to disciplinary action by an employer. The reason for this is straightforward; a criminal trial and internal disciplinary proceedings initiated by an employer against an employee are two distinct processes with different procedural and standard of proof requirements. While an employer may rely on the outcome of a criminal trial against an employee to make its decision on that employee, going against the outcome does not by itself render the employer's decision wrongful or unfair.”
15. I have considerable sympathy for the reasoning in all the above cases which leads me to the conclusion that the cause of action in this case did not arise after the conclusion of the criminal case against the respondents. The respondents had a clear cause of action against the employer when they received their letters of dismissal on October 2, 2010. They had all the facts which had been placed



before them in the disciplinary proceedings and they could have filed legal proceedings if they felt aggrieved by that dismissal, but they did not.

16. It also leads me to the conclusion that the Mbowa case (supra) which was followed by the trial court, was distinguishable. The case itself was properly decided on its facts. It was about malicious prosecution and had nothing to do with unfair/wrongful dismissal from employment. Logically, the cause of action in the Mbowa case would not have arisen until after the plaintiff's acquittal in the criminal trial. The acquittal, as well as malice, were necessary elements of the cause of action. Not in this case."
19. In the decision by Kiage JA "As to whether it should have been sustained, I, like Waki JA, would answer in the affirmative. Of their own showing, the respondents were dismissed from employment on February 2, 2010. The three-year period within which they could lawfully challenge their dismissal expired on or about February 1, 2013. They did not file suit within that period, doing so only on June 13, 2014, which was well out of time. That ought to have led to a striking out of the suit as sought through the preliminary objection. It is quite clear to me that the learned judge fell into error in holding that time could only run from October 23, 2013 when the respondents were acquitted of criminal charges that arose from the same facts and circumstances giving rise to the dismissal. I am not persuaded that the acquittal was a prerequisite to the claim for reinstatement and or damages for unlawful termination of employment. The learned Judge proceeded on the basis that it was in much the same way as it is for a claim in malicious prosecution, his reliance on *Mbowa v East Mengo Administration* [1972]EA 352. In that he erred since a dismissal is lawful or unlawful and therefore actionable or not on the date it is effected. A dismissed employee need not await the outcome of any criminal proceedings that may be mounted concurrently with internal disciplinary processes that may culminate in the impugned dismissal. If he chooses to do so, it is at his own peril should the statute bar him, as happened herein."

Decision On Fairness Of The Termination.

20. The court finds and holds that the standard of proof of justification of reasons for termination of employment is on balance of probabilities while the criminal cases standard of proof is of beyond reasonable doubt. The criminal trial court discharged the claimant on basis of the position of the ODPP(exhibit 12). The claimant relies on the discharge to submit the reason for her employment termination was not justified. section 87 (a) of the *Criminal Procedure Code* reads:- "Withdrawal from prosecution in trials before subordinate courts In a trial before a subordinate court a public prosecutor may, with the consent of the court or on the instructions of the director of public prosecutions*, at any time before judgment is pronounced, withdraw from the prosecution of any person, and upon withdrawal— (a) if it is made before the accused person is called upon to make his defence, he shall be discharged, but discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts; (b) if it is made after the accused person is called upon to make his defence, he shall be acquitted."
21. The court finds and holds that the fact of the claimant having been discharged under section 87(a) was not tantamount to being declared innocent and hence the court rejects the invitation to fault the reason for the termination the claimant's services based on the said discharge.
22. The court in determination of the validity of the reasons and fairness of the dismissal is guided by 45(2) of the *employment act* to wit -"(2)a termination of employment by an employer is unfair if the employer fails to prove:-



- d. That the reason for the termination is valid
 - e. That the reason for the termination is a fair reason - (i) related to the employee's conduct, capacity and capability or (ii) based on the operational requirements of the employer
 - f. That the employment in termination is in accordance with fair procedure".
23. The summary dismissal letter dated June 30, 2016 issued to the claimant (exhibit 8) disclosed that the claimant was dismissed for creating and posting fraudulent loans and for being dishonest, untrustworthy and negligent in discharging her duties. She was dismissed for gross misconduct under the human resources manual of the employer and section 44(4)(c) of the *Employment Act*.
24. The claimant produced the show cause letter, her response, the suspension letters, the summary dismissal letter and the appeal decision letter. The content of the correspondence are consistent on the reasons for the summary dismissal. The claimant had not denied that her work password was used for the fraudulent transactions of which her employer accused her of. The court finds and holds that the reasons for termination of the claimant's employment were justified. The court upholds the decision of the Court of Appeal in *Attorney General & another v Andrew Maina Gitbinji and another* (2016)e KLR by Waki JA(Rtd) in paragraph 12 to hold that the discharge of the claimant in the criminal case did not render the dismissal unfair and in any case the discharge is not an adjudgment of innocence. See paragraph 12 in the case of *Kibe v Attorney General* (Civil Appeal No 164 of 2000) where Court of Appeal held that acquittal in a criminal case does not automatically render an employee immune to disciplinary action by an employer. "The reason for this is straightforward; a criminal trial and internal disciplinary proceedings initiated by an employer against an employee are two distinct processes with different procedural and standard of proof requirements. While an employer may rely on the outcome of a criminal trial against an employee to make its decision on that employee, going against the outcome does not by itself render the employer's decision wrongful or unfair." (paragraph 12)
25. The court is further guided by the Court of Appeal in *Clement Karuri v Kenya Ports Authority* (2018) eKLR where it held:- "whether an employer is justified in dismissing an employee on grounds of dishonesty is a question that requires an assessment of the content of the alleged misconduct. More specifically the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. The test could say, for example, that just cause for dismissal exists where the dishonesty violates essential condition of the employment contract, breaches the faith interests to the work relationship or is fundamentally or directly inconsistent with the employee's obligations". In the instant case the court finds that the fact of use of the claimant's password to defraud the respondent led to a breakdown of the employee-employer relationship and further any reasonable employer would have dismissed the claimant in the circumstances.
26. The court finds and determines the reasons by the respondent for the summary dismissal of the claimant from its employment were valid and justified.

Whether The Procedure Adopted In The Termination Was Lawful

27. Applying the criteria under section 41, the court found evidence that the claimant was processed through a fair hearing and in any case the claimant did not dispute the disciplinary hearing process save to state she was prejudiced as the process ran parallel to the criminal process. The court applying the *Attorney General & another v Andrew Maina Gitbinji and another* (2016)e KLR (supra) decision finds that the internal disciplinary processes are distinct from the criminal processes by the state. The



standards of proof of the two processes are also distinct. The employer is entitled to run its disciplinary proceedings notwithstanding any ongoing criminal proceedings against the employee.

28. The court determines that there was procedural fairness in dismissal of the claimant from employment by the respondent.

Whether The Claimant Is Entitled To Reliefs Sought

(a) Claim for reinstatement.

29. The respondent submits that the reinstatement order cannot be granted by dint of section 12(3)(vii) of the *Employment and Labour Relations Court Act*, 2011 as read together with section 49(3)(a) and 50 of the *Employment Act* the claim having been caught up by limitation. Section 49(3)a of the *Employment Act* reads ‘3) where in the opinion of a labour officer an employee’s summary dismissal or termination of employment was unfair, the labour officer may recommend to the employer to— (a) reinstate the employee and treat the employee in all respects as if the employee’s employment had not been terminated; and section 50:- courts to be guided In determining a complaint or suit under this Act involving wrongful dismissal or unfair termination of the employment of an employee, the industrial court shall be guided by the provisions of section 49.
- a. Section 12(3)(vii) *Employment and Labour Relations Court Act*, 2011 reads: “(vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the court thinks fit to impose under circumstances contemplated under any written law”.
30. The claimant was dismissed from employment on June 30, 2016. 3 years have since lapsed since the termination of employment of the claimant hence the order of reinstatement is not available.

(b) Compensation for unfair termination

31. The court found there was valid and justified reasons to terminate the employment of the grievant. The court also find the termination procedure was fair. The claim for compensation is dismissed.

C. Claim for unpaid salaries allowances and all entitlements in law as per contract of employment dated April 24, 2012 from date of 1st suspension to date.

32. From the statement of claim and demand letter by counsel the court did not find any evidence to support the claim. During her evidence in chief, the claimant told the court that she had not been paid termination dues and relied on the statement of claim. In the submissions the claimant submits that she be paid special damages as stated as there is no defense. Section 109 reads: ‘The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.’ The lack of defence does not discharge the claimant from proving their case.
33. There was no pleading of any particular special damages under the reliefs sought in claim dated February 6, 2017 nor was any evidence led by the claimant on the prayer.
34. The court finds that the employment letter of the claimant dated April 24, 2012 (exhibit1) provided for provident fund and that would amount to terminal dues of which is the claimant’s right.
35. The court finds that the claim for special damages or salary and allowances was not proved.



Conclusion And Final Determination

38. The court determines that the termination of the employment services of the claimant by the respondent was lawful and fair and proceeds to dismiss the claim dated February 6, 2017.

39. No order as to costs.

DATED, SIGNED & DELIVERED IN OPEN COURT AT BUNGOMA THIS 24TH NOVEMBER 2022

J. W. KELI,

JUDGE.

In the presence of:-

Court Assistant : Brenda Wesonga

Claimant:- Olutta - Absent

Respondent: Mr Dickens Ouma

