



**Swaleh v CMC Motors Group Ltd (Cause E665 of 2020)  
[2022] KEELRC 13287 (KLR) (24 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13287 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE E665 OF 2020  
AK NZEI, J  
NOVEMBER 24, 2022**

**BETWEEN**

**YASSER SAID SWALEH ..... CLAIMANT**

**AND**

**CMC MOTORS GROUP LTD ..... RESPONDENT**

**JUDGMENT**

1. The claimant sued the respondent on November 6, 2020 *vide* a memorandum of claim dated November 3, 2020 and pleaded that he was on September 6, 2018 employed by the respondent as a Ford Brand Manager, at an agreed basic salary of Kshs 550,000, and was in January 2020 transferred to Mombasa and given the position of Regional Manager Coast with effect from January 2020.
2. The claimant further pleaded that he was served with a show cause letter dated January 30, 2020, to show cause why severe disciplinary action could not be taken against him for gross misconduct. It was the claimant's further pleading that he was invited to a disciplinary hearing that was to be conducted on February 19, 2020, which he attended and defended himself against the allegations levelled against him, and was later served with a termination of service letter terminating his employment with effect from March 6, 2020.
3. The claimant further pleaded that he appealed against his termination and that the respondent heard and rejected the appeal on March 30, 2020.
4. The claimant further pleaded that he had worked for the respondent diligently, with dedication, and with little or no supervision, and that termination of his employment was illegal and unlawful and contravened the *Employment Act* as there was no fair hearing at the disciplinary hearing.
5. The claimant sought the following reliefs against the respondent:-
  - a. a declaration that the termination was illegal and unlawful.



- b. 12 months' compensation for unfair termination of employment.
  - c. unconditional reinstatement of the claimant to employment.
  - d. Certificate of service.
  - e. costs of the suit.
6. The claimant also filed a list of documents dated November 3, 2020, listing eight documents. The listed documents included an offer of employment dated April 24, 2018, the claimant's employment letter dated September 6, 2018, transfer letter dated January 6, 2020, a show cause letter dated January 30, 2020, an email dated January 27, 2020 in response to the show cause letter and a termination of service letter dated March 5, 2020, among others. The claimant's written witness statement dated November 3, 2020 was also filed. All these documents were filed together with the memorandum of claim.
7. The respondent entered appearance on November 19, 2020 and subsequently filed response to the memorandum of claim on December 4, 2020, and denied the claimant's claim. The respondent further pleaded:-
- a. that the claimant was invited to a disciplinary hearing and in observing rules of natural justice, he was given an opportunity to attend with a colleague or union representative.
  - b. that the claimant attended the disciplinary hearing and defended himself and that the committee recommended summary dismissal after reviewing all the facts and evidence against the claimant.
  - c. that the claimant was issued with a certificate of service, and was duly paid his terminal dues.
  - d. that the respondent's decision was undertaken in strict observance of the rules of natural justice and the relevant provisions of the law including sections 41,43 and 45 of the [Employment Act](#).
8. The respondent further pleaded that the claimant had been negligent in the performance of his duties, and stated particulars of negligence as follows:-
- a. deliberately misreporting sales resulting to the business losing incentives amounting to USD 48,000.00
  - b. victiciously reporting eighteen (18) units and benefiting the award of USD 2,160.00; receipt whereof the claimant admitted during disciplinary hearing and offered to refund.
  - c. misadvising the business on incentives due from Ford on sales of units thus resulting to overstating of expected income amounting of USD 145,100.00
  - d. reversing fourteen (14) units to try and cover his tracks from security.
9. The respondent also filed a written statement of one Margaret Wachira and a list of documents dated April 20, 2021, listing eight documents and some email correspondences. Documents listed by the respondent included the show cause letter dated January 30, 2020, the claimant's email response to the show cause letter dated January 27, 2020, invitation to attend a disciplinary hearing dated February 13, 2020 and minutes of a disciplinary hearing held on February 19, 2020, among others.
10. When trial opened on November 29, 2021, the claimant adopted his filed witness statement as his testimony and produced in evidence the documents referred to in paragraph 6 of this judgment. The claimant further testified that although he attended a disciplinary hearing to clear his name, the respondent was already decided, and terminated his services *vide* a letter dated March 5, 2020, and that



his appeal against the termination was heard on March 30, 2020 and was declined *vide* a letter dated April 3, 2020. That the termination was unfair, wrongful and unlawful.

11. Cross-examined, the claimant testified that under clause 16 of his employment letter/contract, he could be dismissed for dishonesty and gross misconduct, while under clause 19, the claimant was obligated to truthfully and faithfully serve the respondent company, and not to engage in other business.
12. The claimant further testified that the allegations of misreporting made against him by the respondent were due to lack of understanding on his part of the Ford System on which he had not been trained by the person he took over from (Kagwiria Mbiti) and that before he received the incentives in issue from Ford on the respondent's motor vehicles that he sold, he made entries into the Ford System. The claimant testified that the incentives he received had nothing to do with CMC. That his contract did not state that he (the claimant) would receive incentives from Ford, and that any losses to the respondent company was not intentional.
13. The claimant further testified that he received the show cause letter and that the letter inviting him for disciplinary hearing (dated February 13, 2020) gave him the option of being accompanied to the hearing by a colleague.
14. On payment of incentives by Ford and what they really were, the claimant testified that there was a reward for every sale of Ford-Pickup whereby the respondent benefited regardless of whether the motor vehicles were sold as a fleet or in retail, while the sales person and the location manager benefitted if a pick-up was sold in retail. The respondent did not controvert this evidence on payment of incentives.
15. The respondent called one witness, Sarah Kithaka (RW-1) who adopted her filed witness statement and produced in evidence the documents referred to in paragraph 9 of this judgment. The witness (RW-1) further testified that the claimant was given a show cause letter and an opportunity to respond, was taken through disciplinary proceedings, and was given an opportunity to appeal the disciplinary panel's decision.
16. RW-1 further testified that the claimant's ground of appeal, which he had also taken up as a defence during disciplinary proceedings, was that he had not been trained on how to use the Ford Sales System, yet he had been taken through a three months' training on the use of the Ford Sales System in South Africa as the respondent (CMC) was a Ford Franchise holder, and therefore had good understanding of the Ford System. The witness did not, however, adduce any evidence on when the training was given vis-à-vis the time when the alleged misreportings and system reversals were done. The allegation that the claimant had been adequately trained by his predecessor on access, handling and operation of the Ford System was also not proved. The claimant's predecessor, Kagwiria Mbiti, did not testify in court. Indeed, no evidence on the alleged training by the claimant's predecessor was produced in court.
17. In the contrary, the claimant testified:-
  - a. that he took over from Kagwiria Mbiti as Ford Brand Manager, and Kagwiria was demoted to sales.
  - b. that Kagwiria was supposed to train him on the Ford Sales System, but she did not. That Kagwiria totally frustrated the claimant's work; and that he wrote an email dated January 9, 2019 on the frustrations. That he was set up barely 6 months after joining CMC.
18. I have perused the emails dated January 9, 2019 (at page 42 of the respondent's bundle of documents produced in evidence by RW-1). The emails contain CMC official communication between the claimant and persons named in the emails as Thobejane, Tshepo and Ranga Narendra Chakka, giving



the claimant step by step instructions on how to add his details/id and email, and to , operate the system. The respondent did not tell the court why the claimant had to seek assistance on basics from the said persons if the person charged with the duty to train the claimant on the Ford System, Kagwiria Mbiti, was doing her duty.

19. Having considered the pleadings filed and evidence adduced by both parties, issues that present for determination, in my view, are:-

- a. whether termination of the claimant’s employment was unfair,
- b. whether the claimant is entitled to the reliefs sought.

20. On the first issue, section 41 of the *Employment Act* sets out mandatory procedural requirements that must be adhered to by any employer contemplating termination of an employee’s employment. The section provides:-

- (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, the 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 ground of misconduct or poor performance, and the person, if any chosen by the employee within subsection (1) make.”

21. The Court of Appeal stated as follows in the case of *CMC Aviation Limited v Mohamed Noor*[2015] eKLR:-

“In view of the foregoing, we find that the appellant’s act of summarily dismissing the respondent without giving him an opportunity to be heard amounted to unfair termination as defined under section 45 of the *Employment Act*. In *Kenya Union Of Commercial Food And Allied Workers v Meru North Farmers Ssacco Limited* [2013] eKLR, the Industrial Court held that whatever reason or reasons that arise to cause an employer to terminate the services of an employee, the employee must be taken through the mandatory process as outlined under section 41 of the *Employment Act*. That applies in a case of termination as well as in a case that warrants summary dismissal. See also *Mary Chemweno Kiptui v kenya Pipeline Company Limited* [2014] eKLR”

22. The court held as follows in the case of *Kenfright [E.A] Limited v Benson K. Nguti* [2016] eKLR:-

“apart from issuing a proper notice according to the contract (or payment in lieu of notice provided), an employer is duty bound to explain to an employee, in the presence of another employee or union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition, an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service is taken....We come to the conclusion and find, in agreement with the trial judge, that the termination of the respondent’s contract of service in the circumstances, was unfair, the payment in lieu of notice notwithstanding...”



23. In the present case, the claimant was issued with a show cause letter dated January 30, 2020, setting out the allegations levelled against him. The claimant responded to the show cause letter *vide* an email dated January 27, 2020. The respondent did not explain this discrepancy in dates. The claimant was invited for a disciplinary hearing *vide* a letter dated February 13, 2020, *vide* which the claimant was informed of his right to be accompanied to the disciplinary hearing scheduled for February 19, 2020 by a work colleague. Both the claimant and the respondent testified that the claimant was given an opportunity to appeal, and that he appealed but his appeal was declined.
24. I am satisfied that the procedure adopted by the respondent in termination of the claimant's employment was fair.
25. Section 45(2)(a) of the *Employment Act* provides that termination by an employer shall be unfair if the employer fails to prove that the reason for the termination is valid. The respondent stated the reasons for which it intended to terminate the claimant's employment. Those reasons were not disputed and/or rebutted by the claimant who, indeed, admitted that such occurrences may have happened, but blamed what happened on his lack of knowledge on the use of the Ford Sales System. The claimant testified that the person from whom he took over and was demoted on the claimant's appointment, Kagwiria Mbiti, did not train him on the Ford System, and did not share information on the system. Whereas the claimant blamed lack of training on the Ford System for alleged misreporting on sales, the respondent (RW-1) testified that the claimant had been trained by his said predecessor. The respondent did not, however, present any evidence on the alleged training. Kagwiria Mbiti did not testify in court on the alleged training of the claimant by herself.
26. The claimant testified that a sales person and location manager who sold a Ford Pick-up in retail were entitled to an incentive from Ford. The respondent did not rebut or controvert this evidence, and did not dispute the fact that the claimant had sold motor vehicles for which he was qualified to receive incentives from Ford.
27. In the show cause letter dated January 30, 2020, the respondent accused the claimant of deliberately misreporting sales resulting to the business losing incentives amounting to USD 48,000.00 after being clawed back due to the claimant's pre-reporting sales as retail for self-gain, misadvising the business on incentives due from Ford on sales of units resulting in overstating of expected income/margins amounting to USD 145,100.00 on Ford Sales for 2019, negatively impacting the company financially and reversing 14 units after realizing that he was being scrutinized by finance in order to cover his tracks.
28. In his answer to the show cause letter, the claimant stated:-

“...I am not sure if the figures/amount are correct for both the variances and in the incentives paid, but I guess these are the total paid to all Managers across the branches too?”

Finally, as regards training, I was never trained by any body on the Ford System, more than 85% of things I had learn through navigating the System on my own while the smallest percentage I learned through Kagwiria and Tshepo and Callinah whenever I was completely stuck.

Additionally, after I joined, for 6 months or so Kagwiria was still running the Ford System even though she had moved to other department; I had brought to your attention severally.

It's never my intention to bring conflicts nor cause the company any losses. If it so happened, I can guarantee you it was not intentional.”



29. The respondent never rebutted and/or controverted the claimant's allegation of lack of training on the Ford System upon being employed by the respondent as Ford Brand Manager; and did not deny the claimant's assertion that six months after the claimant's employment as Ford Brand Manager, his predecessor, Kagwiria, was still operating the Ford System even though she had been moved to another department.
30. The respondent did not give the time frame within which the alleged deliberate misreporting, pre-reporting and misadvice to the business was done. It is to be noted from the evidence adduced by both the claimant and the respondent that the claimant joined the respondent as Ford Brand Manager on September 6, 2018, and that the claimant was at some point in time sent to South Africa for training on the Ford System for three months. The time frame of this training is not given. The claimant's employment was terminated *vide* a letter dated March 5, 2020. The claimant thus worked in the respondent company for about one and a half years.
31. The respondent did not deny the allegation that the claimant's predecessor controlled the Ford System for six months after the claimant was employed. So, when were the acts over which the claimant was charged and for which he was dismissed committed? Had the claimant been adequately trained on the Ford System as at the time these acts were allegedly committed? The requirement for the claimant to be adequately trained on the Ford System appears, from the evidence presented by both parties, to have been pivotal. From the evidence presented, the claimant was still seeking help from his colleagues on the system as on January 9, 2019.
32. The letter terminating the claimant's employment (dated March 5, 2020) stated in part:-  
“... The disciplinary committee reviewed the circumstance, your conduct and it was proved that you were given adequate training and access logs to the Ford System in which confirmation emails were copied to you, an introductory letter dated September 8, 2018 to the principals copied to you, therefore your intimation that you were.....was incorrect, without lawful instructions you reversed 14 units...”
33. The letter said to have been dated September 8, 2018 was not produced in evidence by the respondent, and therefore I cannot comment on it. A trove of email correspondences was produced in evidence by both parties, but I am unable to find therein any indication of, or certification of the claimant's training on the Ford System. Further, no proof of the loss alleged to have been suffered by the respondent as a result of the claimant's alleged actions was presented.
34. Further, Kagwiria Mbiti, whom the respondent alleged had trained the claimant on the Ford System, is shown to have testified against the claimant at the disciplinary hearing on February 19, 2020 and stated that she had personally trained the claimant and informally handed over to him all the sales files on BPS Invoice, Goals Unit Orders, WIQ file, Sales reporting and logins as he underwent training. No evidence of this training and handover is shown to have been presented by Kagwiria at the disciplinary hearing, and none was presented before this court. Indeed, Kagwiria Mbiti did not testify before this court.
35. The fact that the respondent pleaded negligence on the part of the claimant cannot be ignored. This negligence was not proved.
36. Section 43(1) of the *Employment Act* provides  
“In any claim arising out of termination of a contract, the employer shall be required to prove the reason or the 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.”



37. Section 45(2) of the *Employment Act* provides:-

“ A termination of employment by an employer is unfair if the employer fails to prove:-

(a) that the reason for the termination is valid”

38. Section 47(5) of the *Employment Act* provides:-

“for any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or unlawful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or unlawful dismissal shall rest on the employer.”

39. It is my finding that the respondent did not justify the reasons given for the claimant’s termination, and did not demonstrate the validity of the allegations made against the claimant, and on the basis of which his employment was terminated.

40. It was held in the case of *Walter Ogallo Anuro v Teachers Service Commission* [2013] eKLR as follows:-

“...for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”

41. I make a finding that termination of the claimant’s employment was substantively unfair, and I so declare.

42. On the second issue, I award the claimant the equivalent of eight months’ salary for unfair termination of employment. The claimant pleaded that his monthly salary was Kshs 550,000. This was not disputed by the respondent, and was indeed admitted in the response filed in court. The prayer for reinstatement was dropped by the claimant at the hearing, citing the frustrations he underwent at the work place. It was held by the Court of Appeal as follows in the case of *Dalmas B. Ogoye v K.N.T.C Limited* [1996] eKLR:-

“courts do not order reinstatement in such cases because such an order would be difficult to enforce. Besides, it would be plainly wrong to impose an employee who has fallen out of favour on a reluctant employer.”

43. In sum, judgment is hereby entered for the claimant against the respondent for Kshs 4,400,000 being the equivalent of eight months’ salary for unfair termination of employment.

44. The awarded sum shall be subject to statutory deductions pursuant to section 49(2) of the *Employment Act*.

45. The respondent shall, within 30 days of this judgment, issue the claimant with a certificate of service pursuant to section 51(1) of the *Employment Act*.

46. The claimant is awarded costs of the suit and interest at court rates. Interest shall be calculated from the date of this judgment.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 24TH DAY OF NOVEMBER 2022**

**AGNES KITIKU NZEI**



**JUDGE**

**ORDER**

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

**AGNES KITIKU NZEI**

**JUDGE**

Appearance:

N/A for Claimant

N/A for Respondent

