



**Kamuti v Freight Wings Limited (Cause 1199 of 2018)  
[2022] KEELRC 13192 (KLR) (11 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13192 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1199 OF 2018  
SC RUTTO, J  
NOVEMBER 11, 2022**

**BETWEEN**

**JOHN KAMUTI ..... CLAIMANT**

**AND**

**FREIGHT WINGS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant avers that he was employed by the respondent with effect from February 1, 2011. That due to his positive contribution to the respondent company, he was promoted and duly appointed to the position of supervisor-warehouse, maintenance section. He avers that he worked diligently, honestly and tirelessly and in so doing, always acted in the best interest of his employer.
2. The claimant further states that for the entire time he was employed by the respondent, he was never issued with any warning letter or his conduct as an employee put into question but was on the contrary, severally rewarded with promotions in recognition of his good performance.
3. He avers that he was issued with a letter of termination dated April 27, 2018, having been verbally summoned to explain the loss of the respondent's property. The claimant has termed his termination as unfair and in contravention of the law hence seeks several reliefs being compensatory damages, salary for the month of April, 2018, one month's salary in lieu of notice as well as salary in lieu of leave days earned but not taken.
4. Through its response to the memorandum of claim, the respondent denied the claimant's assertions that he was a diligent employee. That the claimant was terminated from employment based on his affirmation that he knew that there existed a "flower cartel" at the respondent's premises and failed to act as required of him in his job description. The respondent contends that the termination was done in accordance with sections 41 and 44(3) 44(e) and (g) of the *Employment Act* and articles 47 and 50 of the *Constitution*.



5. The respondent further counterclaimed against the claimant the sum of Kshs 191,250,000.00 being the loss allegedly occasioned as a result of the theft of its flowers from the period between January 25, 2018 to February 10, 2018. Consequently, the respondent has asked the Court to dismiss the suit with costs and allow its counterclaim as prayed.
6. The matter proceeded for hearing on June 14, 2022 and each side called oral evidence.

#### **Claimant's case**

7. The claimant testified in support of his case and at the outset, sought to adopt his witness statement and supplementary witness statement to constitute his evidence in chief. He further produced the documents filed with the initial claim as well as the supplementary documents as his exhibits before Court.
8. The claimant testified that at the material time, he was a supervisor-warehouse, maintenance section. That on March 10, 2018, he was verbally summoned by the respondent's Group Human Resource Manager to explain the loss of its property on February 25, 2018. That he responded verbally and subsequently, in writing. That at that point, he was only asked about the theft of the flower boxes.
9. He further clarified that his written statement dated March 28, 2018, was only in response to a verbal request to explain the loss that allegedly happened on March 25, 2018 and was not in answer to any notice to show cause or charge. That he only came to know that the respondent was considering disciplinary action against him through an internal memo that was pinned on the respondent's notice board. It was his contention that the said internal memo does not amount to a notice to show cause.
10. He stated in further testimony that he was not called upon and explained to, the nature of the alleged misconduct and that the respondent was considering terminating his employment. That he was not issued with a show cause letter to allow him favour the respondent with a written explanation. To this end, he termed the show cause letter exhibited by the respondent as defective and not in compliance with its own Human Resource Policy Manual.
11. He further stated that there was no disciplinary hearing conducted on 26<sup>th</sup> April, 2018 and at no time was he sent on compulsory leave prior to his termination, which was a mandatory step or action in any disciplinary proceedings on grounds of gross misconduct. That this ought to have been done immediately he was served with a notice to show cause.
12. He further denied attending any hearing and added that the other staff who were implicated on the theft were taken through a disciplinary hearing except him.
13. That he was not in charge of the warehouse and that there were other supervisors. That there was one in charge of operations and another in charge of the flower team while another was in charge of security. That he was not in charge of the flower team, was not responsible for flowers at all and did not steal from the respondent.
14. He further added that he did all that was reasonably expected of him generally, which was to report his suspicions on anomalies to his superior, Mr. Prince Mathews who was and still is the respondent's Operations Manager. That he even suggested actions to be taken to curb any such vice but any such information he volunteered and suggestions he gave were ignored. That if any boxes of flowers were lost, then the respondent was the author of its own misfortune.
15. That further to the foregoing, he was a whistle blower hence the respondent was obligated, by its own Human Resource Policy Manual to protect him from any form of victimization and which responsibility, the respondent abdicated.



16. He further admitted being issued with a warning letter dated December 1, 2015 but contended that by virtue of the respondent's own Human Resource Policy Manual, the validity of the said warning letter expired on or about December 1, 2016 hence the respondent was thereafter barred from considering the same in any disciplinary matter and in particular in the proceedings subject to this matter.
17. That on April 27, 2018, the respondent through its Group Human Resource Manager, verbally informed him that his services had been terminated and was subsequently ordered to forthwith vacate the respondent's premises and to only return on April 30, 2018 to collect his letter of termination.
18. He further told court that his employment was terminated without notice and that he was not been paid salary for the month of April, 2018 and salary in lieu of leave days earned but not taken for the year 2018.
19. In conclusion, he asked the court to allow his claim as prayed and to dismiss the counterclaim.

### **Respondent's case**

20. The respondent called oral evidence through Mr. John Matanyi who testified as RW1. He identified himself as the Senior Human Resource Officer at the respondent company. Similarly, he adopted his witness statement and bundle of documents filed on behalf of the respondent, to constitute his evidence in chief. The documents were also produced and marked as the respondent's exhibits before court.
21. He told the court that the claimant was initially employed as a loader and thereafter promoted to the position of warehouse supervisor, which position he held at the time of his termination.
22. That the claimant's service to the respondent was not diligent and tireless as he has alleged. That on December 1, 2015, the claimant was issued with a warning letter making reference to two incidences where he had conducted his duties with negligence and lack of commitment to duty.
23. It was RW1's further testimony that the investigations conducted by the respondent revealed that there was a cartel that was siphoning goods from its premises, especially flowers and fish and this would take place largely in the night from 8.00 pm to 9.00pm.
24. That as a result of the flower theft from the period between January 25, 2018 to February 10, 2018, the total number of stolen flower boxes were 300 with a market value of Kshs.191,250,000.00. That this loss was attributed to the claimant.
25. RW1 further testified that following the investigations, the claimant was issued with a notice to show cause dated March 28, 2018. That as the warehouse supervisor, the claimant was in charge of making a complete check of the cold room, overseeing the off-loading of flower trucks and reporting any anomalies to the management. That the claimant had been named as a suspect in the flower theft. That investigations revealed that 32 flower boxes were missing on arrival at their destination in France.
26. That the claimant denied all the allegations through his response dated March 28, 2018. That his explanation was considered and he was subsequently invited for a disciplinary hearing which was conducted on April 26, 2018.
27. That pursuant to section 45 (2) of the *Employment Act*, 2007, the respondent terminated the claimant's employment for a valid and fair reason, in accordance with fair procedure. In summing up his testimony in chief, RW1 asked the Court to dismiss the claim with costs and allow the respondent's counterclaim.



## Submissions

28. It was submitted on behalf of the claimant that the respondent neither complied with its own disciplinary procedures nor with the provisions of section 41 of the *Employment Act*. That the notice to show cause exhibited by the respondent was questionable hence unsafe to be relied upon as evidence.
29. That further, there was no evidence that the claimant was invited to attend a disciplinary hearing. In further submission, the claimant stated that there was no indication that the respondent's management relied on any minutes or guilty verdict of a disciplinary committee in terminating his employment. To this end, the court was invited to consider the decisions in *Anthony Mkala Chitavi v Malindi Water Sewerage Company Limited* (2013) eKLR, *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* (2014) eKLR, *Kenfreight (E.A) Limited v Benson Nguti* (2016) eKLR and *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR.
30. It was further submitted that the respondent had failed to prove that the claimant was involved in the flower theft syndicate or was negligent in the performance of his duties. That there was no evidence that he was guilty of the reasons alluded to in the letter of termination.
31. With regards to the respondent's counterclaim, it was submitted that the same was in the nature of special damages which must not only be specifically pleaded, but proved with a degree of certainty. To buttress this argument, the claimant placed reliance on the case of *John Richard Okuku v South Nyanza Co. Ltd* (2013) eKLR,
32. On the part of the respondent, it was submitted that the claimant was terminated for justifiable reasons in that he negligently performed his duties of ensuring a complete check of the cold room and reporting any anomalies to the management thus resulting in the theft of the flower boxes. That the claimant's involvement amounted to gross misconduct which is a justifiable ground for summary dismissal under section 44(4) of the Employment Act. In support of this argument, the respondent placed reliance on the cases of *Anthony Mkala Chitavi v Malindi Water Sewerage Company Limited* (2013) eKLR and *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* (2014) eKLR.
33. It was further submitted that the procedure applied in terminating the claimant's employment was lawful as he was issued with a show cause letter and invited to attend a disciplinary hearing where he was granted an opportunity to make presentations on the allegations made against him.
34. In regards to its counterclaim, the respondent submitted that it had proved on a balance of probability that the theft of the flower boxes occurred and that the same was occasioned by the claimant's negligence. On this score, the respondent cited the case of *Mitchell Cotts (K) Ltd v Musa Freighters* (2011) eKLR.

## Analysis and determination

35. From the pleadings, the evidence presented and the rival submissions, it is evident that the following issues fall for the court's determination:
  - a. Whether there was a fair and valid reason to terminate the claimant's employment.
  - b. Whether the claimant was subjected to a fair process prior to being terminated.
  - c. Is the counterclaim justified?
  - d. Is the claimant entitled to the reliefs sought?



## Fair and valid reason for termination?

36. Pursuant to section 43(1) of the *Employment Act* (Act), an employer is required to prove the reasons for termination, and in absence thereof, such termination is deemed to be unfair. Tied to this provision is section 45 (2) (a) and (b) of the Act, which provides that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and is related to the employee's conduct, capacity or compatibility; or based on its operational requirements.
37. What I have outlined above is also as known as substantive justification. It bears to note that the burden of proof in this regard, rests with the employer.
38. Applying the aforementioned statutory provisions to the case at hand, the respondent was required to prove that it had a valid and fair reason to terminate the claimant's employment.
39. The reasons leading to the claimant's termination from employment are discernible from his letter of termination which is couched as follows:

### “Termination of Contract

This is to inform you that your contract has been terminated with effect from April 27, 2018.

This is in reference to a flower syndicate that has been brought to the attention of management in the course of investigating the loss of 32 flower boxes that occurred on 25<sup>th</sup> February, that has since been reported to the police for further investigations. This syndicate has been stealing flowers from the company and selling to unknown and unauthorized dealers.

Investigation into this syndicate has revealed that your role as a warehouse supervisor points to anomalies and gaps. Reference is made to your Job Description as follows:

1. Make a complete check of the cold-room
2. Oversee the off-loading of flower truck
3. Report any anomalies to the management

The investigation has revealed that the above duties were grossly compromised. Flowers were stolen and stored in the same cold room for later dispatch to unknown and unauthorized dealers.

Your role as referenced in No. 1 above was handled with a lot of negligence especially in view of the fact that the cold room is one big open space. To segregate boxes for later unauthorized dispatch must have been done within your knowledge and if not, then you did not perform any cold room checks as was required thereby facilitating theft by omission.

The warehouse/cold room that has been under your total supervision has been the central scene in the criminal activities of flower theft that has occurred in Freight wings from January 29, 2018– February 5, 2018; In addition to the formally reported loss that occurred on February 25, 2018 and other dates not mentioned herein.



There was(sic) also weak oversight roles on the off-loading of flower trucks as the flower boxes meant for theft were segregated right from the truck and stored inside the very cold-room where you were a supervisor. Your employment in this position is no longer tenable.”

40. It is evident from the reproduced letter of termination that the claimant was being accused of negligence in that he failed to perform his duties properly, thus leading to the theft of the respondent’s flowers. Essentially, his performance of duty was being called into question. The respondent highlighted three relevant roles that fell within the claimant’s job description to wit; Make a complete check of the cold-room; Oversee the off-loading of flower truck; and Report any anomalies to the management.

41. It is apparent that when confronted with the allegations, the claimant prepared a written statement dated February 28, 2018, which was exhibited by the respondent. The statement is as follows:

“I am John Kamuti I work as a supervisor in warehouse maintenance, my work being to ensure all equipment/machines inside warehouse are in operational condition. Also I do check flower boxes whether are properly stacked on the wooden pallets.

The issue of February 25, 2018 that day I was off duty and to know exactly what happened is hard. In the same issue of missing flower boxes came to my knowledge two to three years ago and every report I was getting I was sharing it with Prince Mathew. On last year 30<sup>th</sup> September, is when I got a clip of Fred/Benjamin from Isaak talking about how they share money and I also forwarded the clip to Prince Mathew. Also on January 27, 2018 before the valentine season started, there was some rumours from flower security team on how they can start their deals. Also I reported the report to Prince Mathew.

All this comes to me because certain flower security teams have noticed I was against what they have been doing and also they noticed I was briefing Prince on what they are doing.”

42. It was the respondent’s case that the claimant was found culpable following investigations into the flower theft. An excerpt from the said investigation report reads as follows:

“Note: there is a warehouse asst who is viewed as the right hand man of the ops manager. However he is critical for the safekeeping of the siphoned boxes in the warehouse as this is his work station. He is used as a decoy to obstruct the ops manager from the real deal.

He blinds the ops manger with minor loopholes e.g he can come with wild allegations -that 2 or 3 boxes were placed at a funny corner within the warehouse, let’s fix a camera or lets change this or that etc. this tactic has earned him unquestionable trust with the ops manager.”

43. It is notable that although the claimant’s name is not mentioned, it is apparent that the above excerpt is in reference to him as the “organogram of the cartel” has his name just below the title, “Warehouse Assistant”

44. At the outset, it is noteworthy that the claimant does not dispute knowing the existence of the flower theft cartel. His contention is that he performed his duties as expected and



specifically, reported to the Operations Manager by the name Prince Matthew, his suspicions of the existence of the cartel within the respondent's organisation and even suggested actions to be taken to curb any such vice. According to the claimant, his suggestions were ignored.

45. The claimant further stated that he even forwarded a clip he received from one Isaac to his supervisor, Prince Matthew. That in the said clip, one Fred and Benjamin, who were adversely mentioned in the investigation report, were discussing how they share the money supposedly from the said flower theft.
46. In light of the foregoing, several things stand out. First, the respondent did not exhibit evidence in whatever form or manner, in which the said Prince Matthew denied receiving reports from the claimant and for that fact, the clip mentioned. Second, there is no evidence in regards to the steps taken by Prince Matthew upon receiving such reports from the claimant, for instance investigating their veracity. As a matter of fact, I must add that a statement from the said Prince in regards to the flower theft, is conspicuously missing from the investigation report.
47. Being the Operations Manager and the alleged theft having taken place at the warehouse which was within his docket, it is rather odd that his version of events is not reflected in the said investigation report. Thus, the question, did he participate in the investigations at all? and if so, what did he have to say?
48. It is also important to note that from the cited excerpt in the investigation report, the claimant's suggestions were termed as "wild". He was further regarded as a "decoy" used to distract the Operations Manager. Again, there was no evidence that the reports emanating from the claimant were unsubstantiated and only meant to distract the said Prince Matthew. Indeed, one wonders how the respondent concluded that the suggestion by the claimant, for instance, to fix a camera, was wild.
49. This leads me to question further how the respondent concluded that the claimant's suggestions were wild and that he was being used as a decoy without obtaining Prince Matthew's side of the story?
50. The foregoing lapses severely dents the respondent's case and in the circumstances, I cannot help but conclude that it has not proved on a balance of probability, that it had a fair and valid reason to terminate the claimant's employment. His termination was therefore unfair in terms of sections 43 and 45(2) (a) and (b) of the Act.

### **Procedural fairness?**

51. Beyond proving reasons for an employee's termination, an employer is required under section 45(2) (c) of the Act to subject an employee to a fair process prior to termination. The specific requirements of a fair hearing are provided for under section 41 of the Act. In this regard, the procedure entails notifying the employee of the allegations he or she is required to respond to and thereafter granting him or her the opportunity to make representations in response to the said allegations in the presence of a union representative or an employee of own choice.
52. The respondent states in its response that the claimant was issued with a notice to show cause and that he gave a written explanation. That he was subsequently invited for a disciplinary hearing. The claimant has denied receiving the letter to show cause and attending the disciplinary hearing. In this regard, he has disowned the signature appearing in the show cause letter and the minutes of the disciplinary hearing exhibited by the respondent.



53. What I hear the claimant to be saying is that the signatures appearing on the show cause letter and in the disciplinary minutes are not genuine. What he is essentially alleging is that the signatures are an act of forgery. Having alleged as much, it was incumbent on him to prove the same. It is trite law that “he who alleges must prove”.
54. In this regard, I find the following expression from the Court Appeal in the case of *Kinyanjui Kamau v George Kamau* [2015] eKLR, to be apt:
- “It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo v Ndolo* (2008) 1 KLR (G&F) 742 wherein the Court stated that:
- “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”
55. I further draw guidance from the determination of the Court of Appeal in the case of *Demutilla Nanyama Pururmu v Salim Mohamed Salim* [2021] eKLR where it was held that:
- “As the appellant was the one claiming that the documents were forgeries, the burden was on her to prove that the documents were not authentic government documents as claimed by the respondent. Section 107 of the Evidence Act, provides as follows: -
- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
  - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
56. Back to the case at hand, the claimant did not lead any evidence to discount the authenticity of his signature as appearing in the show cause letter and the minutes of April 26, 2018.
57. I must add that the court does not have the expertise to examine documents and handwritings in order to determine whether or not they are authentic. Indeed, it is quite unfair to the court, to have the parties disown documents and signatures without providing the requisite proof. How is the court to discern this fact and ascertain the authenticity of the signatures on record?
58. In light of the foregoing, the court has not been given a plausible reason to doubt the authenticity of the show cause letter and the minutes of the disciplinary hearing held on April 26, 2018. I am therefore enjoined to consider the same.
59. That said, it is not clear from the minutes exhibited by the respondent in regards to the meeting held on April 26, 2018, whether the persons present were rendering their testimonies or interrogating the claimant. This is owing to the fact that the word “testimony” is indicated against their respective names. Further, the claimant’s responses are not indicated in the minutes.
60. In addition, there are no findings emanating from the disciplinary hearing. How was it determined that the claimant was culpable following the hearing? How did the respondent resolve to terminate the claimant without findings to that effect?



61. Therefore, in as much as the respondent may have issued the claimant with a show cause letter and held a disciplinary hearing, the manner in which it arrived at its decision to terminate the claimant remain doubtful. Under section 41 of the Employment act, such a disciplinary hearing is aimed at giving the employee an opportunity to present his explanation. The hearing should not be cosmetic but rather, demonstrate from the totality of the evidence on record, that the employee was given a fair chance to present his or her defence. This is not apparent from the minutes of April 26, 2018.
62. To this end, I am not satisfied that the hearing as conducted was fair and within the spirit of section 41 of the Act.
63. I also find it imperative to make a mention about the internal memo dated March 28, 2018. The same is addressed to 26 persons including the claimant. It states the allegations and advises the persons named to give written explanations, in regards to the theft of the flower boxes.
64. It is not clear whether the said internal memo was meant to serve as a notice contemplated under section 41 of the Act. If it was, as it appears to be, then it was irregular in all respects. There is nothing like collective responsibility when it comes to gross misconduct. Responsibility for gross misconduct is individual. As such, each employee must be addressed individually and the specific allegations against him or her clearly spelt out.
65. Therefore, such an internal memo as the one issued by the respondent does not and cannot take the place of the notice envisaged under section 41 of the Act.
66. Against this background, the court ultimately finds that the respondent did not prove that there was a valid and fair reason for the claimant's dismissal and that it applied a fair process prior to his termination. The net effect thereof, is that the claimant's dismissal was unfair and unlawful in terms of section 45 of the Act.

### **Is the Counterclaim justified?**

67. From the record, there is no evidence from the respondent's end linking the claimant to the loss of the flowers. Granted, the respondent may have lost its flowers, but for the counterclaim to succeed, it was required to lead evidence to prove that the claimant was responsible for the loss either directly or indirectly. To put it succinctly, it had the burden to prove the loss and that the same was occasioned by the claimant. This, it failed to do.
68. In the circumstances, the counterclaim against the claimant collapses and the same is dismissed in its entirety.

### **Appropriate Reliefs**

69. On account of the fact that the claimant's termination was unfair and unlawful, he is awarded one month's salary in lieu of notice.
70. As the Court has also found that the claimant's dismissal was unfair, he is awarded seven (7) months' salary as compensatory damages. This award is informed by the length of the employment relationship and the fact that the respondent did not prove the reasons for the claimant's dismissal nor subject him to a fair process.
71. The claimant is further entitled to salary for the month of April, 2018 and payment of the untaken leave days as the respondent did not dispute that the claimant was entitled to the same. There was also no proof that the same was paid. The respondent's only contention was that the claimant had not been cleared.



## Orders

72. In the final analysis, I enter judgment in favour of the claimant against the respondent and he is awarded: -
- a. Compensatory damages equivalent to seven (7) months' gross salary being Kshs 203,700.00.
  - b. One (1) month's salary in lieu of notice, being the sum of Kshs 29,100.00.
  - c. Salary for the month of April, 2018 being the sum of Kshs 29,100.00.
  - d. Payment for unutilized leave days being the sum of Kshs 9,700.00.
  - e. The total award is Kshs.271,600.00.
  - f. Interest on the amount in (e) at court rates from the date of Judgment until payment in full.
  - g. The respondent shall also bear the costs of the claim.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11<sup>TH</sup> DAY OF NOVEMBER, 2022.**

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**STELLA RUTTO**

**JUDGE**

**Appearance:**

For the Claimant Mr. Mwanthi

For the Respondent Ms. Oduo

Court Assistant Abdimalik Hussein

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**STELLA RUTTO**

**JUDGE**

