



**Mwamati v Karangi Coftea Limited (Cause 79 of 2018)
[2022] KEELRC 13195 (KLR) (11 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13195 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 79 OF 2018
SC RUTTO, J
NOVEMBER 11, 2022**

BETWEEN

JOHN KAMULI MWAMATI CLAIMANT

AND

KARANGI COFTEA LIMITED RESPONDENT

JUDGMENT

1. The claimant instituted the instant suit vide a Memorandum of Claim dated January 9, 2018, through which he avers that he was employed from July, 2011, by the respondent as a caretaker at its Kajewa flats. He avers that he served diligently to the respondent's satisfaction. That following the instructions of the respondent, he was arrested by police on September 26, 2017 on allegations that he had stolen paint worth Kshs 97,038.00. That the allegations were fabrications by the respondent, aimed at pushing him out of employment.
2. That upon his release from the police station, he reported back to work on September 29, 2017 and was sent on compulsory leave to await further communication. That no communication was forthcoming from the respondent and his enquiries to that effect elicited no response.
3. That it was only on October 9, 2017 that he was summoned on phone by the respondent's assistant maintenance manager who without much ado, handed him a letter of termination. According to the claimant, the respondent's action of terminating his employment in such a manner was unlawful and unfair. It is on that account that he now claims several reliefs against the respondent including compensatory damages, one month's salary in lieu of notice, unpaid house allowance and payment for public holidays.
4. The respondent in opposing the claim, avers that the claimant stole its paint valued at Kshs 97,038/= and which action was to its detriment, hence warranted summary dismissal. That the claimant's termination was reduced to a normal termination, which was effected on October 9, 2017. That the



claimant's dues were not paid as the value of the paint he had stolen, exceeded his entitlement on leaving service. Consequently, the respondent has denied owing the claimant any money and prays that the suit be dismissed with costs.

5. The matter proceeded for hearing on June 13, 2022 and each side presented oral evidence.

Claimant's Case

6. The claimant took the stand and testified in support of his case. He started by adopting his witness statement together with the bundle of documents which were filed with the claim, to constitute his evidence in chief. He also produced the said documents as his exhibits before Court.
7. In his testimony before Court, the claimant stated that on September 26, 2017, he was arrested by the police while at work following instructions from the respondent, and booked at parklands police station where he spent two nights. That he was then taken to Kibera law courts on September 28, 2017 but was not presented in Court. That he was then taken back to parklands police station and thereafter released and told that the respondent had failed to avail evidence.
8. That following his release from the police station, he went back to work on September 29, 2017 and a Ms Mary from the respondent's office, asked him to proceed on compulsory leave and await further communication.
9. It was his further testimony that there was no communication from the respondent hence, on October 1, 2017, he went to enquire from the maintenance manager, a Ms Nyokabi, as to when he should report for duty.
10. That his enquiries elicited no response from Ms Nyokabi who told him to go and wait for further communication. That he was later summoned through phone by a Ms Mary, the assistant maintenance manager who handed him a letter of termination.
11. The claimant further denied stealing from his employer as alleged. He further added that he had done nothing to warrant termination without any explanation or deliberations. It was his further testimony that he was not taken through a disciplinary hearing prior to his termination and that he is not aware of any investigations undertaken by the respondent into the theft of the paint. He concluded his testimony by asking the Court to allow his claim as prayed.

Respondent's Case

12. On its part, the respondent called Ms Phyllis Nyokabi Kamau, who testified as RW1. She identified herself as the respondent's maintenance manager. She proceeded to adopt her witness statement together with the bundle of documents and supplementary documents filed on behalf of the respondent, to constitute her evidence in chief. She further produced the said documents as the respondent's exhibits before Court.
13. It was the testimony of RW1 that on September 22, 2017, the respondent brought several tins and drums of crown paint and other items worth Kshs 121,983.00 and took them for safekeeping and for works at Kajewa flats where the claimant was a caretaker. That on September 23, 2017 at around 1030 hours, she went to the site at Kajewa flats and found the painters going on with the paint works.
14. That thereafter, she was informed by another caretaker by the name David Were who was at Jamena flats, that he had seen the claimant and other people moving large quantities of paint from the store. That subsequently, she called the claimant but he failed to pick her calls. That she then called the person



in charge of the store who informed her that he was away at Nyamakima, but advised her on where to find the keys.

15. RW1 further testified that upon opening the store, she discovered that 26 tins of 4 litres each and 2 litres gallons of paint worth Kshs 106,620.00 were missing. That she went back the following day to do a stock take and ascertained that paint worth Kshs 97,038.00 was missing. That on September 25, 2017, she reported the matter at parklands police station and the same was booked as OB 28/25/09/2017.
16. That the claimant reported back to work after two days and that is when he was taken to the police station to record a statement through which he admitted stealing the paint. That upon investigations, the police recommended that the claimant and his accomplice be charged with the offence of stealing by servant. That the respondent did not wish to pursue the criminal charges as the claimant had confessed to the theft and directed that the costs of the paint he had stolen, be deducted from his dues.
17. She further told Court that the claimant's conduct amounted to gross misconduct liable for summary dismissal but the respondent decided to treat his termination as a normal termination hence computed his terminal dues but the total fell short of the value of the paint he had stolen. That the claimant was informed of the reason for termination through a letter dated October 9, 2017. In summing up her testimony, RW1 told Court that the respondent was justified in terminating the claimant's employment.

Submissions

18. It was submitted on behalf of the claimant that he was a victim of circumstances and was not guilty of the theft as alleged. That he was not issued with a notice to show cause nor invited for a disciplinary hearing. In support of the claimant's submissions, the Court was invited to consider the decisions in the case of *Anthony Mkala Citavi vs Malindi Water & Sewerage Company Limited* (2013) eKLR, *David Gichana Omuya vs Mombasa Maize Millers Limited* (2014) eKLR and *Boniface Musyoka Kyambo vs DPL Festive Limited* (2021) eKLR.
19. On the other hand, the respondent submitted that the claimant admitted carrying the paint from the store. That he had not been authorized to carry the paint from the store. That the fact that he disappeared from work for three days and did not inform the respondent of his whereabouts, shows that he is guilty. That the evidence on record shows that the respondent did what any reasonable employer would do, in the circumstances. To buttress its submissions, the respondent placed reliance on the case of *Michael Dowling vs Workplace Safety & Insurance Board* (2004) CAN LII 436 92.
20. The respondent further submitted that before terminating the claimant's services, it heard his side of the story.

Analysis and Determination

21. I have carefully considered the pleadings, the evidentiary material placed before me and the submissions on record and find the issues falling for the Court's determination to be:
 - a. Whether the claimant's termination was unfair and unlawful.
 - b. Is the claimant entitled to the reliefs sought?

Unfair and Unlawful Termination?

22. The determination of this issue turns on the provisions of section 41,43 and 45 of the *Employment Act* (Act). The import of these provisions is that an employer must prove that there was substantive justification to warrant the termination of an employee and that the same was undertaken procedurally.



Essentially those are the two tests to be applied in determining whether an employee's termination from employment was fair and lawful.

23. I will first deal with substantive justification, which is addressed under section 43 and section 45(2) (a) & (b) of the Act. In this regard, Section 43(1) requires an employer to prove the reasons for termination, and in absence thereof, such termination is deemed to be unfair. Under 43(2), such reasons are the matters the employer at the time of termination genuinely believed to exist, and which caused the employer to terminate the services of the employee.
24. On its part, section 45 (2)(1) and (b) of the Act provides that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and related to the employee's conduct, capacity or compatibility; or based on its operational requirements.
25. The reason which led to the termination of the claimant's employment can be traced to the letter dated October 9, 2017, which is couched as follows:

“RE: Termination of Appointment

The management has decided to terminate your employment wef October 9, 2017. The decision to terminate your services has been arrived at after it was found out that on September 23, 2017 you stole paints worth Kshs 97,038.00 at our Kajewa flat building which has been construed to be an offence to the detriment of the company property.

Your interview with Ms Nyokabi, and your subsequent text messages sent to Ms Nyokabi confirms your involvement in the above offence committed by yourself.

The offence you committed amounts to gross misconduct with adequate justifications for summary dismissal but after careful consideration, it has been decided you be given a normal termination.

Accordingly you are hereby asked to hand over any company property entrusted to you to Ms Nyokabi. By a copy of this letter, the Accountant has been requested to pay you all your dues less the sum of Kshs 97,038.00.

I take this opportunity to thank you for the service rendered to us and to wish you every success in the future.”

26. Evidently, the claimant was terminated on grounds of gross misconduct which was connected to the theft of the respondent's paint, from its Kajewa flats.
27. The claimant distanced himself from the theft of the paints, pointing out that the respondent did not carry out investigations and arrest the real perpetrator.
28. In support of its case, the respondent exhibited the investigation diary in respect to OB 28/25/09/2017 and written statements recorded at the parklands police station by several persons including the claimant, a caretaker by the name David Were, RW1 and the investigating officer by the name Pius Ochieng. Each gave their version of events in regards to the paint stolen at the respondent's Kajewa flats.
29. The claimant stated as follows in his statement:

“I'm the above-mentioned male adult of sound mind and currently working as a care taker at Jamena Flats.



I do recall on September 22, 2017 I went to my place of work as usual and found my boss to have bought several paints which I directed the painters to keep in one of the rooms at the site.

On September 23, 2017, one of the painters. Namely Seneta called me and told me that he want (sic) to transport paints to another site, I assisted him where to put the paints in a Motor vehicle Reg No KCB 544X Toyota blue in colour where I drove for him out of the compound and left him with the driver of the said m/vehicle namely Kimani hence they drove away and flats all I can state.”

30. While David Were had this to say:

“I’m the above mentioned male adult a resident of Waruku Kangemi, I work as a care taker within Karangi Kachawa in Jamena flats.

I do remember very well. On Friday at around 1300hrs when I was within the building ready to go for lunch. I witness about 49 tins of paints of 4 liters and 20 liters container placed on the ground at a parking within the compound.

Shortly they were kept inside a house that was being painted at the site and by the painters were in the compound working.

Now at around 1400hrs, I saw one John Kamuli who is also my fellow caretaker but in another site came in then started to talk with one of the painter known to me as a Seneta in Kamba vernacular while pointing at another car which was in a parking, but the way they were talking in a suspicious manner I sensed that they must be planning to do something wrong. So I decided not to go for off duty because John came and asked me when I will go for an off duty, of which I told them that I won’t go.....Now come on a Saturday at around 0800hrs, I, John, Seneta and other painters came into the compound then shortly I saw the said Seneta and John Kamuli going aside and started talking in the same Kamba Language which I could hear them talking about the paints.

I then decided to go and approach Seneta to ask him about what they were planning to do but there by I twisted and pointed at a 4 litres paint and asked him the value where he told me that it worth Ksh 2000/= per tin.

I then left him alone and went my way and by then John was suspiciously (sic) moving..... Now at about 1600hrs I saw Seneta coming out with one box of paint which normally contains 4 tins but when he saw me he took it back.

Then he went and talked to John where after John came to me and told me that, he has come to pick the paints and requested me to be part of their deal which I declined.

Now being that I knew they wanted to steel (sic) the paints, I decided to send a flash back “please call me”. To my boss namely Nyokabi Kamau but before that I had told one Julius Gachwere to be alert in that John and his colleagues want to steel (sic) the paints.

Shortly I saw John opening the car boot then Seneta came with 2 Jericans of 20 litres paint and put them in to the same car Reg No KCB 544X Toy blue in colour and it was a station wagon he then went back and collected about 4 boxes of 4 litres paints then put in the car boot.



In the process, one tenant came and told John to remove another vehicle which had blocked her car but he refused and drove the said motor vehicle which was carrying the paint out of the compound to unknown destination.

But by then Seneta came out of the compound while walking by foot and my boss whom I send the flash back never called me. Coz I wanted to inform him of the theft but shortly after John and Seneta had left my boss came in hence I narrated to him about the incident and that's all.”

31. Flowing from the above statements, the following deductions can be made:
- i. The respondent bought paint on September 22, 2017, which was stored in one of the rooms at Kajewa flats, where the claimant was a caretaker.
 - ii. The claimant was aware that the respondent had bought the paint.
 - iii. The claimant is the one who showed the painters where to store the paint.
 - iv. The claimant admitted that on September 23, 2017, one of the painters by the name Seneta told him that he wanted to transport the paint to another site.
 - v. The claimant assisted the said Seneta to load the paint on a motor vehicle which was to transport the said paint.
 - vi. The motor vehicle was registration No KCB 544X, Toyota in make and was blue in colour.
 - vii. The claimant drove with the said Seneta out of the compound of Kajewa flats.
 - viii. The said Seneta left with the paint.
 - ix. The claimant knew the name of the driver of the motor vehicle which was used to transport the paint. He stated that his name was Mr Kimani.
 - x. The paints were not recovered hence the police report.
32. The investigating officer, by the name Mr Pius Ochieng who investigated the alleged theft, also prepared a statement in which he implicated the claimant and the said Seneta. He stated thus, “On investigations, I found that the accused together with the painter who is not in “...illegible....” are rightly to be charged.”
33. It is common ground that the claimant was working for the respondent as a caretaker at its Kajewa flats hence he was responsible for looking after its property thereat. Therefore, for all intents and purposes, he was the one in charge of the said property. In this case, the paints disappeared under the watch of the claimant and indeed he is the one who assisted the painter by the name Seneta, to make away with the respondent's paint.
34. According to the claimant, he acted on the word of Seneta, in that the paint was to be used in another site. This does not sound plausible at all. One wonders how the claimant simply handed over the paint to a third party, knowing very well that the same was his employer's property, without first ascertaining whether the employer had authorized as much.
35. Coupled with the foregoing, the claimant knew the driver of the motor vehicle which was used to transport the stolen paint. How was he able to tell his name if they were not working jointly?



36. The claimant's defence that he was not the one in charge of the store does not hold water since he is the one who assisted the said Seneta load the paint on the motor vehicle, that was used to transport it. In essence, they acted jointly with the said Seneta.
37. The foregoing does not portray the claimant as an honest employee. How does an employee hand over the property of his or her employer without seeking the necessary authority? No doubt, the claimant's actions cast doubt on his credibility.
38. Assuming the claimant was not complicit in stealing the paint, then it is obvious that he acted imprudently in the circumstances.
39. It is not in doubt that the claimant's nature of work required that he be on site, outside his employer's office set up. As such, he worked unsupervised hence he was required to be trustworthy as he was entrusted him with the respondent's property.
40. The conduct of the claimant in the circumstances breached the trust the respondent had in him. How would the respondent trust him as a caretaker of its property moving forward? Indeed, the incident must have dented the employment relationship in a fundamental way.
41. On this score, I will adopt the determination by the Canadian supreme Court in the case of *McKinley vs BC Tel* [2001] 2 SCR 161 where it was determined as follows:

“Whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer.”
42. In this case, it is apparent that upon the occurrence of the incident and considering the claimant's level of participation, the respondent genuinely believed he could not be trusted anymore to take care of its property. Seemingly, the trust issues had gone to the root of the employment relationship and as such, constituted fair and valid grounds to terminate the claimant's employment.
43. As such, the respondent acted as any employer would, faced with similar circumstances.
44. It is therefore my finding that the claimant's conduct gave the respondent a valid and fair reason to terminate his employment, hence his termination was not unfair.
45. Turning to the question of procedural fairness, Section 45(2) (c) of the Act provides that for termination to be fair, it ought to be in line with fair procedure. In this respect, section 41(1) of the Act requires an employer to accord an employee a hearing prior to termination. This 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.
46. In this case, the respondent did not prove that it complied with the process envisaged. There was no proof that the claimant was invited to show cause and explain why his employment should not be terminated on account of the allegations levelled against him. Further, if at all a disciplinary hearing took place as the respondent stated, then there was no evidence to prove as much.



47. Regardless of the fact that the allegations against the claimant constituted grounds of summary dismissal, the respondent was enjoined to apply the process envisaged under section 41 of the Act. Subsection (2) is relevant in this case as it relates to summary dismissal. It provides thus:

“(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.”
Underlined for emphasis

48. In total sum, the respondent’s actions of dismissing the claimant without according him a hearing as demanded by section 41, fell outside the legal parameters and on that basis, the dismissal was unprocedural.

49. Is the claimant therefore entitled to any of the reliefs sought?

Reliefs

50. As I have found that the claimant’s dismissal was unlawful for want of procedure, the Court awards him one month’s salary in lieu of notice.

51. Having found that the respondent had a valid reason to terminate the claimant’s employment and noting his own contribution to the said termination, I will decline to award him compensatory damages.

52. I further decline to make an award with regard to house allowance given that clause 1 of the claimant’s contract provided that his salary was consolidated. This means that the same was inclusive of other allowances. I am fortified by the determination in the case of *Charity Wambui Muriuki vs M/s Total Security Surveillance Limited* [2017] eKLR where it was held that:

“A consolidated salary includes basic pay and allowances payable to an employee and housing allowance is usually one of them.”

53. Similarly, the claim for public holidays is declined for want of proof. It was incumbent upon the claimant prove that indeed, he worked on the public holidays he alleges to have worked.

54. On this issue, I am guided by the decision in *Rogoli Ole Manadiegi vs General Cargo Services Limited* (2016) eKLR where the Court expressed itself as follows:

“The burden of establishing hours or days served in excess of the legal maximum, rests with the employee. The claimant did not show in the trial court when he put in excess hours, when he served on public holidays or even rest days... he did not justify the global figure claimed in overtime, showing specifically how it was arrived at...”

Orders

55. In conclusion, the claim succeeds on account that the process was flawed and the termination is reduced to a normal one. The claimant is therefore entitled to one (1) month’s salary in lieu of notice, being the sum of Kshs 14,9000.00. Interest shall apply at Court rates from the date of Judgment until payment in full.



56. Each party shall bear his/its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF NOVEMBER, 2022.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Ms. Omamo

For the Respondent Mr. Githiri

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 15th March 2020 and subsequent directions of 21st 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

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