



**Mubweka v Sameer Africa Limited (Cause 33 of 2020)  
[2022] KEELRC 13076 (KLR) (4 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13076 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 33 OF 2020  
B ONGAYA, J  
NOVEMBER 4, 2022**

**BETWEEN**

**JESSE JONATHAN MUBWEKA ..... CLAIMANT**

**AND**

**SAMEER AFRICA LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant filed the memorandum of claim on July 22, 2020 through Olando Okello & Lusenaka Advocates. The claimant prayed for judgment against the respondent for:
  - a. A declaration that the claimant was constructively dismissed.
  - b. A declaration that the said dismissal was unlawful and/or unfair
  - c. Immediate reinstatement with full salary and benefits from the date of dismissal to the date of reinstatement.In the alternative
  - a. Special damages (to be computed).
  - b. Unpaid dues (up to the time of dismissal)
  - c. Interest on (c)(d) and (e) at court rates from date of termination up to the date of full payment.
  - d. Costs of this suit with interest at court rates.
  - e. There is no other suit pending and there has been no previous proceedings between the Claimant and the Respondent.
  - f. The court has power to hear and determine this cause
2. The respondent filed a statement of defence on November 30, 2020.



3. To answer the 1<sup>st</sup> issue, there is no dispute that parties were is a contract of service. The claimant joined the respondent after college education as an intern in February 2014. He was later employed by the contract dated March 4, 2015 as a store Keeper on renewable two years contract from March 9, 2015 till February 8, 2017. The contract was renewed and salary increased over time. As at June 2019, his monthly salary was Kshs. 50, 008.66.
4. To answer the 2<sup>nd</sup> issue for determination, the Court returns that the contract of employment was terminated by the letter of summary dismissal dated July 15, 2019. The letter stated that after an inquiry dated 15.06.2019, the claimant's response dated June 24, 2019 and a hearing meeting on June 24, 2019, stocks worth Kshs. 342,591.00 were lost while it was the claimant's responsibility as a sales and stocks administrator to receive, monitor and maintain stocks on the ERP system. The letter started that the same amounted to breach of the respondent's core values and negligence on the part of the claimant as a Sales and Stocks Administrator. Further his response to the management had been found unsatisfactory. He was therefore summarily dismissed from employment effective July 15, 2019. He was to be paid salary and allowances up to July 15, 2019; leave earned but not taken; and less Kshs. 4,774.00 leave travelling allowance taken but not earned as at July 15, 2019.
5. The 3<sup>rd</sup> issue is whether the termination was unfair. The claimant testified to support his case and the respondent's witness (RW) was Hannah Wanjiku Ndegwa, Human Resource Consultant.
6. The claimant's case is that he was dismissed without the two weeks' notice per clause 4 of the contract of service. Further the summary dismissal was prior to due investigations and a hearing, warning or notice. Further, he was dismissed without having done anything wrong.
7. For the respondent it was pleaded the termination was in accordance with the law, justice and equity and was not unfair, unprocedural or unlawful.
8. AS relates to the procedure, the respondent served the claimant an internal memo being a show cause notice stating that a recent stock take report of June 14, 2019 showed stocks worth 342, 591 had been found missing. The claimant was required to explain how the stocks in his assigned warehouse had gone missing yet he was the custodian of the warehouse keys and he was to supervise any entrance. He was also to explain why the stocks at the warehouse had not been reconciled and, why stocks were being lost with no paper or system trail yet he held the keys to the warehouse and he was to restrict entry. He was to reply by June 17, 2019 at 10.00am. The claimant testified that he subsequently attended the disciplinary meeting and signed for the minutes but on a date not indicated and, changing by stating that he signed the minutes on July 8, 2019. He confirmed he wrote the letter dated May 27, 2019 submitting to the disciplinary hearing. He testified that he wrote another letter on June 3, 2019 submitting to the disciplinary hearing. He stated that he delivered the letters to the respondent by email and physically. He confirmed in his testimony that from June 2019 to the hearing on July 8, 2019 he had been submitting his responses. He attended the hearing accompanied by his representative one Dan Tindi and agreed to the hearing to proceed in English. By that evidence, the Court returns that the respondent complied with section 41 of the *Employment Act*, 2007 on notice and hearing in event of alleged misconduct or poor performance.
9. On whether the reason for termination was valid and fair as envisaged in sections 43 and 45 of the Act, the Court returns that the answer would be in the affirmative but for the respondent's operational deficiencies as was reported by the claimant but not actioned at all.
10. The claimant confirmed signing the minutes of the disciplinary hearing. Of those minutes he testified thus, "I see minutes at 3.0. I have read the response as per minutes. It is not accurate. It says I left keys on desk for anyone to access store whether I was present or not. I deny that was my response." The Court



returns that having signed the minutes of his own volition, the claimant cannot belatedly run away from their content and accuracy as purportedly done belatedly in his cross-examination. The Court finds that the main reason the stocks got lost is because the claimant, by his own admission, he failed to secure the keys to the stores. The minutes of the disciplinary hearing on July 8, 2019 stated as follows, “It was further noted that he stated that he would leave the keys on top of his desk to allow anyone who wanted to access the warehouse to do so whether he was there or not. Further, he confirmed that there were stock losses at the branch and said that the same losses were bound to happen again.”

11. It is true that the claimant wrote complaining that there were weaknesses at the warehouse that could lead to loss. He confirmed he had been assigned two warehouses and which made it impossible to be effective. Further, the respondent issued instructions stating that the manager was responsible for the losses. The Court finds that the claimant’s positions as stated was very well true. In the opinion of the Court, such operational deficiencies exculpated the claimant from culpability of the losses on the established account that he failed to take care of the keys to the stores. On a balance of probabilities, the respondent has not established that the reason for termination was valid per section 43 as at time of summary dismissal. Further, it cannot be said that the reason was fair because, in view of the operational deficiencies, the reason cannot be found to have properly related to the claimant’s conduct, capacity, compatibility and the respondent’s operational requirements per section 45 of the Act. In consideration that the claimant had raised deficiencies in the respondent’s operational system, the deficiencies impacted and vindicated the claimant from the main concern that he failed to take care of the warehouse keys. Thus the Court finds that the reported operational deficiencies vitiated the claimant’s culpability in the instant case.
12. By way of evidence on record, the Court highlights the following operational deficiencies that acted as to seriously exculpate the claimant in the circumstances of the ensuing disciplinary process:
  - a. By letter dated May 15, 2019, the claimant reported to the Head of Human Resources about violent harassment and intimidation from Joseph Odenyo who had on the afternoon of that date involved the claimant in the loss of 15 batteries that came and left to Nyali without the claimant’s consent and when the claimant went to his office for clarification, Joseph Odenyo refused to listen to him. The letter stated that instead Odenyo violently pushed the claimant threatening to beat him up. The letter also stated that there had been systematic harassment and intimidation from Odenyo after the recent cases of stock losses which the claimant viewed as pushing him hard on the wall so as to quit the job. The claimant lamented that the behaviour amounted to unhealthy work environment inconsistent with team work. The Head of Human Resource replied stating all parties would be accorded a fair and just hearing leading to conclusion of the matter. It appears the disciplinary proceedings were initiated without the claimant’s grievance being investigated at all yet, the grievance went to the root of the allegations against the claimant, stock losses.
  - b. On February 13, 2019 the claimant wrote to respondent’s Hassan Awadh stating that the workload was too much with two warehouses in different locations making the job very challenging and the claimant requested the management to address the issue.
  - c. On March 18, 2019 the claimant wrote stating the challenges were many and many risks had not been addressed and even offered to quit the job instead of being heavily surcharged for stock losses.
  - d. On March 21, 2019 the claimant wrote stating that the management should investigate the real causes of loss and propose measures that will help tighten the loose ends and prevent future occurrences.



13. The flow of events shows that the respondent maintained a defective operational system and the claimant kept on doing his best but the losses continued. He was heavily surcharged in previous cases of losses but there is no evidence that the respondent seriously addressed the deficiencies that were reported by the claimant. RW testified that disciplinary action was taken against the claimant but his manager was not subjected to disciplinary action. Further, security was involved in every exit of goods from the stores but no disciplinary action was taken against any of the security personnel. RW also testified thus, “The claimant informed the respondent he managed two stores and there was a chance for losses. He was assigned one station and still responsible for the other store. He requested stock review be done when he was assigned two stores but am not clear whether it was done....”
14. The Court has considered the evidence and returns that the respondent maintained a defective operational system and it cannot be found that in such circumstances, the reason for termination related to respondent’s operational requirements as envisaged in section 45 of the Act.
15. The Court further finds that in the circumstances, it was unfair for the respondent to dismiss the claimant whereas the stock losses were largely attributable to its own internal deficient operational systems and policies within which, the claimant as an employee was struggling to do his best in the respondent’s best interest. The claimant took steps to report the deficiencies but the respondent appears not to have acted with remedial measures. The Court upholds its opinion in [\*Grace Gacheri Muriithi –versus- Kenya Literature Bureau\*](#) (2012) eKLR thus,

“To ensure stable working relationships between the employers and employees, the court finds that it is unfair labour practice for the employer to fail to act on reported deficiencies in the employer’s operational policies and systems. It is also unfair labour practice for the employer to visit upon the employee adverse consequences for losses or injury to the employer attributable to the deficiency in the employer’s operational policies and systems. The court further finds that it would be unfair labour practice for the employer to fail to avail the employee a genuine grievance management procedure. The employee is entitled to a fair grievance management procedure with respect to complaints relating to both welfare and employer’s operational policies and systems. The court holds that such unfair labour practices are in contravention of Sub Article 41(1) of [\*the Constitution\*](#) that provides for the right of every person to fair labour practices. Further the court holds that where such unfair labour practices constitute the ground for termination or dismissal, the termination or dismissal would invariably be unfair and therefore unjust.”
16. The Court has considered the factors in section 49 of the Act. As submitted for the respondent, no exceptional circumstance has been established as per section to justify an order of reinstatement. Indeed, the claimant’s submissions were silent on that prayer suggesting it was abandoned. In any event, if the claimant had wished to be released from the contract of service in view of the overwhelming surcharge, reinstatement is found not suitable in the present case.
17. As submitted for the respondent, it is trite that special damages are specifically pleaded and then strictly proved. The particulars of special damages were not pleaded and the prayer will collapse.
18. As submitted for the respondent the claimant submits on award of 12 months’ salaries for unfair and unlawful termination without having prayed for the same. Further, in making the submission there is no guidance based on the factors in section 49 of the Act for an award as submitted. In the circumstances, the Court finds that such award would be outside rules of pleading and an ambush to the respondent.



19. The Court has considered the margins of success and finds that the respondent will pay only 50% of the claimant's costs of the suit.
20. In conclusion the suit is determined and judgment entered for the claimant for orders:
  1. The declaration that the termination of the contract of service was unfair or unlawful.
  2. The respondent to pay only 50% of the claimant's costs of the suit.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 4<sup>TH</sup> NOVEMBER, 2022.**

**BYRAM ONGAYA**

**JUDGE**

