



**Simotwo v Kenya Seed Company Company (Cause 253 of 2018)
[2022] KEELRC 13457 (KLR) (7 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13457 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE 253 OF 2018
NJ ABUODHA, J
DECEMBER 7, 2022**

BETWEEN

STEPHEN CHEPSOS SIMOTWO CLAIMANT

AND

KENYA SEED COMPANY COMPANY RESPONDENT

JUDGMENT

1. The claimant filed a memorandum of claim in court on August 23, 2018 against the respondent seeking for the following reliefs;
 - i. A declaration that the claimant's services were unprocedurally, unlawfully and unfairly terminated and in the circumstances the claimant is entitled to compensation of his terminal dues.
 - ii. Reinstatement of the claimant to his position
 - iii. The sum of Kshs 18,336,980.
 - iv. Certificate of service
 - v. Cost of the suit and interest at court rates from the time of filing the suit until payment in full
 - vi. Any other relief that this honourable court may deem fit to grant.
2. In that memorandum of claim, the claimant avers that he was employed by the respondent on April 11, 1994 as a junior staff doing general duties and was promoted on September 8, 2000 to the position of senior clerk .
3. He further averred that on December 14, 2001, he was promoted to the position to job group 7 at a salary of Kshs 35,000 per month and house allowance of Kshs 4,500 per month. He maintained that



- he was supposed to earn Kshs 50,000 as per the promotion letter issued to him on August 31, 2009 but the basic salary remained at Kshs 43,000.
4. The claimant further stated that between November 2008 to May 2009, he was entitled to a responsibility allowance having acted as a supervisor which remains unpaid to date and that *vide* a letter dated October 11, 2013, the respondent informed him that his designation had been changed from store supervisor II to stocks officer and later on July 23, 2014 to stocks officer without an expected basic pay rise as legitimately expected.
 5. The claimant avers that on August 19, 2015, he received an interdiction letter on allegation of misappropriation of client accounts and on October 2, 2015 a letter of dismissal followed.
 6. According to the claimant, his dismissal from employment was malicious and well calculated.
 7. The claimant faulted the procedure adopted in dismissing him from employment and averred that the termination was unfair because the respondent did not act in accordance with the rules of natural justice.
 8. The respondent filed a memorandum of response on January 31, 2020 and denied the claim. It averred that the claimant was dismissed from employment on October 2, 2015 after having been subjected to a disciplinary process and informed of the outcome thereof and that as such the said letter was consequential and procedural.
 9. It was the respondent's case that the interdiction letter dated May 11, 2015 was issued after it was established that the claimant was involved in serious malpractices in respect of handling of some customer's account with the specific amounts suspected to be misappropriated and that the incident was reported at Kitale Police station where the claimant was charged alongside another, one John Otieno Owiti with the offence of stealing by servant contrary to section 281 of the [Penal Code](#) in Kitale Criminal Case No 2933 of 2018.
 10. It was averred that the claimant was accorded a fair hearing at the disciplinary and even notified of his right to be accompanied by a representative of his choice and that further, the disciplinary hearing committee was properly constituted as required by law and the respondent's Human Resource Policy.
 11. The respondent maintained that there was a valid reason to dismiss the claimant and due process was followed leading up to his dismissal hence the dismissal was lawful and rightful.

Evidence

12. CWI, the claimant testified on July 14, 2022 and relied on his witness statement recorded on August 23, 2018 as his evidence in chief. He stated that he was employed by the respondent in April 1994 and that by the time he left, his salary was Kshs 87,500.
13. The claimant stated that he was dismissed from employment on November 2, 2015 and recalled in 2018 he was arrested and charged with the offence of stealing by servant where he was later acquitted.
14. The claimant faulted the disciplinary proceedings and stated that he was not given a chance to defend himself and that further, he was called to a hearing where there was no quorum.
15. He also stated that he was not advised by the respondent to be accompanied by anyone and as a result he appeared before the disciplinary hearing alone.



respondent's case

16. The respondent called one Mr Stephen Malakwen its Human Resource Manager who testified as RW1. He adopted his witness statement recorded on January 6, 2020 as his evidence in chief.
17. RW1 stated that the claimant was terminated from employment by the respondent after it was established that there were irregularities in the performance of his work.
18. It was contended that the basis for the dismissal was the variances in some accounts which were under claimant and that during the investigations conducted, he was unable to explain the discrepancies.
19. As regards the issue of quorum in the disciplinary committee, the respondent's witness explained that the disciplinary committee is usually chaired by any manager within the management and that from the claimant's disciplinary hearing, there was quorum.
20. RW1 conceded that the claimant was not paid his terminal dues as he is yet to clear with the respondent.
21. He also stated that the claimant was charged with the criminal offence 3 years after being dismissed from work and on cross examination, RW1 confirmed that indeed the claimant was dismissed in August 2015 and arrested in 2018 with the offence of stealing by servant
22. The parties closed their respective cases and the court directed for filing of written submissions. The claimant's submissions were filed on July 22, 2022 while the respondent's submissions were filed on August 1, 2022. I have considered the submissions by the parties.

Determination

23. From the pleadings on record, the evidence of the parties and the submissions filed, the issues that arise for determination in this case are as follows:-
 - i. Whether the claimant's employment was terminated unlawfully
 - ii. Whether the procedure followed was in accordance with section 40 of the *Employment Act*.
 - iii. Whether the reliefs sought are merited
24. In the instant case, the claimant has stated that his employment was terminated unlawfully as the respondent did not issue him with a notice nor a hearing and that he came to learn of the accusations leveled against him through the interdiction letter.
25. He also contended that the respondent did not prove the reasons for his termination.
26. On its part, the respondent maintained that following an audit and reconciliation of the seeds shops accounts, it was established that the claimant and the other implicated employees failed to regularize the client's accounts as a result of which the respondent lost a lot of money.
27. It was further averred that from the investigation carried out, it was established that there were discrepancies in the accounts under the claimant and that as a result, he was interdicted *vide* a letter dated May 14, 2015 and invited for a disciplinary hearing on August 12, 2015 *vide* a letter dated August 7, 2015.
28. In dealing with issues similar to the one before me, section 45(2) of the *Employment Act* is to the effect that an employer should not terminate contract of employment of an employee except where there are valid and fair reasons.
29. Were the reasons advanced by the respondent for the termination of the claimant's employment valid?



30. Section 43 of *Employment Act* 2007 ;

“ 43. Proof of reason for termination

- (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or 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.
- (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee”.

31. In the case of *British Leyland UK Ltd v Swift (1981) IRLR 91* Lord Denning described the test of reasonableness in the following words: -

“The correct test is; was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered in all these cases that there is a band of reasonableness, within which an employer might reasonably take one view; another quite reasonably takes a different view. One would quite reasonably dismiss the man. The other quite reasonably keeps him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him.”

32. Flowing from the above, I find that the respondent had valid reasons and was justified in terminating the claimant’s employment as allegation of theft by servant is a valid reason for termination of employment.

33. The next issue that I need to address myself to is whether due process was followed before the claimant was terminated from employment.

34. Section 41 of the *Employment Act* provides:-

“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.”

35. The claimant in his testimony alleged that procedural fairness was not adhered to in the termination of his employment. He argued that the disciplinary hearing was not well constituted and that he was unable to present his witnesses as they were threatened and thus could not appear before the said panel.

36. In response to this allegations, the respondent contended that the claimant was accorded an opportunity to account for the malpractices in the customer accounts and that even at the disciplinary hearing, he was given a chance to defend himself but according to the respondent the explanation was not satisfactory. As regard the allegation that his witnesses were threatened hence could not appear before the disciplinary hearing, the respondent maintained denied the said allegation and averred that the claimant did not indicate that he had witnesses.



37. I have analyzed the evidence before me and it is quite clear that there was procedural fairness in the events leading to the claimant's termination. As to the allegation that his representatives were threatened hence could not appear before the disciplinary hearing, I find that this allegation was not substantiated as the claimant proceeded with the hearing without raising this issue.
38. It therefore follows that the claimant was subjected to a fair disciplinary process and I make a finding that the dismissal of the claimant was fair and just in the circumstances
39. As regards the reliefs the claimant is seeking, I note that the claimant had worked for the respondent for almost 21 years. The claimant averred that he was not paid his terminal dues and this position was not rebutted by the respondent. Infact, the respondent stated that it was willing to pay the claimant his terminal dues but that the claimant had not made any effort to clear with it.
40. In the end, despite finding that the termination of the claimant from employment was merited and that due process was followed, it is in the interest of justice that I make an order that the claimant upon clearing with the respondent be paid his terminal dues within 30 days from the date of this judgment.
41. I make no orders as to costs

DATED AND DELIVERED AT ELDORET THIS 7TH DAY OF DECEMBER, 2022

ABUODHA NELSON JORUM

JUDGE ELRC

