



**Kwemboi v MGS International Kenya (Cause 285 of 2016)
[2022] KEELRC 13404 (KLR) (6 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13404 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 285 OF 2016
HS WASILWA, J
DECEMBER 6, 2022**

BETWEEN

CALEB KWEMBOI CLAIMANT

AND

MGS INTERNATIONAL KENYA RESPONDENT

JUDGMENT

1. This suit was instituted by a Memorandum of Claim dated July 27, 2016 and filed in this Court on the July 29, 2016. The Claimant alleged that the Respondent unfairly terminated his services and thus sought for the following reliefs;
 - a. A declaration that the termination of the employment of the Claimant is contrary to the *employment Act* and the Respondent be ordered to reinstate him with full payments of his salaries up to date.
 - b. In the alternative, the Claimant be paid Kshs 2,220,420 being dues as calculated under paragraph 9 of the claim.
 - c. Three months' notice pay.
 - d. Underpayments
 - e. Overtime.
2. The Respondent entered appearance and filed a defence to claim dated September 27, 2017 asserting that the Claimant was terminated for gross misconduct and fraud from the Respondent which compromised the integrity of the Respondent causing its loss. That he was subjected to due process and upon termination he was to clear before receiving his dues, which he failed and thus his dues are pending payment.



Claimant's case.

3. The Claimant was employed by the Respondent on the August 1, 2008 as a station Manager at monthly salary of Kshs 20,000 which was raised to Kshs 53,720 on March 26, 2013 a sum which he earned till his termination.
4. That he was suspended on the November 5, 2013 and later terminated without any notice or disciplinary hearing.
5. He testified in the hearing held on the July 20, 2022 as CW-1 and reiterated the claim and in addition stated that the suspension was indefinite and that he was not expressly terminated. He testified that he was suspended on allegation that he had received money from a client who had not paid for the products from the company.
6. Upon cross examination, he testified that he was suspended for fraud. He added that the fraud was for allegedly releasing vehicles which had not paid for the company products causing the company to incur a debt of more than a million. He stated that in his letter of October 18, 2013, he took responsibility and admitted to the wrong though that he did it under duress and admitted to paying for a customer called Sava because all the other customers had paid up their debt and Sava had a balance of Kshs12,000.
7. He admitted that he was summoned to the head office to explain some issues sometimes in May/ June 2013 before he was suspended later on November 5, 2013. He also testified that once he was suspended, he was unable to follow up the debt with the customers as he was barred from working for the Respondent. He further testified that he never received the termination letter and only came to know his job status about 2 to 3 years later when a colleague informed him that a termination letter was in his file.
8. On re-examination he testified that he was suspended in November, 2013 for releasing the trucks before payment when the said action was collectively agreed upon and endorsed by his supervisor. He also stated that he was working with George, whom Millicent had recommended for discipline but no letter of warning was issued on him, neither was he suspended rather that he was transferred to Nakuru and promoted to be the Depot manager a clear show of discrimination and witch-hunt.
9. He also stated that he was suspended when all customers had paid up their debts save for Sava who had a balance of Kshs 12,000 which he agreed to pay to keep his job only to be suspended after paying and later terminated.

Respondent's Case

10. The Respondent stated that by a letter of October 14, 2013 it issued a warning letter to the Claimant notifying him that he had failed to adhere to the Respondent's policy by releasing trucks with outstanding balance and misleading the Transit manager and the Managing Director that the trucks had not been released. Further that the Claimant offered credit facilities to the customers without any authorization.
11. The Respondent avers that the Claimant admitted to the wrongs by the letter of October 18, 2013. He was then suspended from service by a letter of November 5, 2013 without any pay.
12. Before the Claimant was suspended, the Respondent conducted investigation and established that the Claimant had directed customers to deposit money in his own personal account, Mpesa and at times collected cash. When he was summoned to give his side of the story, he gave incorrect information



- but finally admitted to his mistake and the company granted him ample time to make good the loss incurred by the company. His services were officially terminated by a letter of November 30, 2013.
13. During defence hearing, Fregustus Musyoka, the Respondent's Managing Director, testified as RW-1, adopted his witness statement of May 5, 2022 which reiterated the defence to the claim.
 14. Upon cross examination, the witness testified that the Claimant was a good employee and even got promoted by the letter of June 6, 2011. That on November 5, 2013, the Claimant was suspended for misrepresenting facts and breaching the code of practice by releasing trucks before receiving payment. He admitted that the Claimant is not the only one that can release trucks but since he was the Depot manager all responsibility fell on his shoulders. He also testified that the said George was found culpable and terminated as well.
 15. Upon further cross examination, RW-1 admitted that the only arrears left by customer was Kshs 12,000 at the time the Claimant was suspended which amount was deducted from the Claimant's salary. He further clarified that the Claimant was terminated for Fraud but admitted that even though fraud is a criminal offense they never reported to the police station.
 16. On re-examination the witness testified that the Claimant was in charge of Kisumu depot. He then testified that the termination letter was send to the Claimant's last known address.

Claimant's Submissions.

17. The Claimant submitted from the onset that he was terminated without any valid reason, neither was he subjected to any disciplinary hearing as envisaged under the law. It was argued that the warning letter, which he disputes receipt, provided in part that;

“be advised that should there be another incident on the above mentioned issues and or any other related to non-compliance with the company policy, management will not hesitate to take severe disciplinary action against you including terminating your services with Mogas.”
18. Based on the above letter, the Claimant submitted that the warning letter expressly provided that the Claimant was warned against the act of releasing the trucks which had not cleared their payment with the company. That no other act occurred to warrant the suspension of the Claimant and subsequent termination. It was argued that the Respondent ought to have adhered to the warning letter and only take action against the Claimant on acts and omission outside the ones that had occurred and subjected to the warning of October 14, 2013. On the contrary that the Claimant was suspended and terminated from the same action of releasing the truck that had not paid an accumulative sum of Kshs 1,268,200 which was neither intimated in the various Email correspondences produced or in the letters therein. Accordingly, it was submitted that the reason for termination was not justified in the circumstances in light of the warning letter already issue over the issues.
19. On whether due process was followed, the Claimant submitted that he was suspended from employment and directed to collect debt from customers a fact which was impractical in the circumstances. It was further argued that having been suspended indefinitely he was never subjected to any disciplinary hearing; neither was the suspension lifted as such he learned of the termination after about 3 years informing the decision to file this claim. In the termination letter, the reason for termination was for directing customer to deposit money in his account and Mpesa and collecting cash, a fact which was never ascertained by any evidence.



20. In conclusion, the Claimant submitted that the termination was unfair in the circumstances and urged this Court to find in his favour and order for the reliefs sought in the claim. He relied on the case of *Josphat Njeru Njue and another v Unga Farm Care East Africa Limited* [2022] KEELRC 3773 (KLR).
21. No submission were filed by the Respondent at the time of writing this Judgement.
22. I have examined the evidence of the parties and submissions filed herein. From the evidence tendered by the Claimant he was send on suspension vide a letter dated November 5, 2013.
23. The letter in question was send to his last known address of 45 Cheptais. The letter further indicated that the Claimant was to remain suspended until he recovers 1,268,200/= from customers.
24. It is also admitted by RW1 that the amount was recovered and the only amount that was still outstanding was 12,000/= which the Claimant paid.
25. In regard to this suspension, on November 7, 2013 the Claimant wrote to the Managing Director of the Respondent indicating that he had not received his October 2013 pay and that he couldn't access the office and know when company debtors had cleared the debt.
26. On October 14, 2013 the Claimant had been issue with a warning letter and was advised that if there was another incident on the issues of giving customers credit without authorization, severe disciplinary action including termination would follow.
27. From this moment on, there is no evidence that the Claimant was taken through any disciplinary process. There is actually no evidence that he was even invited to such disciplinary process.
28. No minutes of such disciplinary process have been exhibited by the Respondents at all. The Respondents submissions that the Claimant was subjected to a fair process is therefore not correct.
29. The Respondents aver that they terminated the Claimant vide a letter dated November 30, 2013. The letter was sent to Box 45 Cheptais. The Claimant denies receiving this letter. No certificate of posting has been attached. It therefore follows that the Claimant after being placed on suspension remained so suspended and was never informed of the Respondent's decision to terminate his services.
30. Section 45 (2) of the *Employment Act* 2007 states as follows;
 - “ 45.
 - (1) A termination of employment is unfair if the employer fails to prove-
 - (a) that the reason for the termination is valid;
 - (b) that the reason for the termination is a fair reason-
 - (i) related to the employee's conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure”.
 31. In the case of the Claimant, there is no evidence that he was subjected to any disciplinary process. There is also no evidence that the accusations leading to his termination if at all were subjected to any subjective test to prove their validity.



32. In this regard, this Court makes a finding that the termination of the Claimant was unfair and unjustified and I declare that so.
33. In terms of remedies as sought by the Claimant, I find for the Claimant and I award him as follows;
1. Salary for October 2013 = 53,720/=
 2. 1 month salary in lieu of notice = 53,720/=
 3. In view of the unfairness of keeping him on suspension without pay for a long period of time, the maximum 12 months salary as compensation for the unfair termination = $12 \times 53,730 = 644,760/=$
Total = 752,200/=
Less statutory deductions.
 4. The Respondent will pay cost of this suit plus interest at Court rates with effect from the date of this Judgment.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 6TH DAY OF DECEMBER, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mboga for Claimant - present

Respondent – absent

Court Assistant – Fred

