



**Wallington v Uplands Crops Limited (Cause 518 of 2014)
[2022] KEELRC 13428 (KLR) (6 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13428 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 518 OF 2014
HS WASILWA, J
DECEMBER 6, 2022**

BETWEEN

MICHAEL WALLINGTON CLAIMANT

AND

UPLANDS CROPS LIMITED RESPONDENT

JUDGMENT

1. The Claimant instituted this suit against the Respondent *vide* a Memorandum of Claim dated 15th October, 2014 which was amended on the 4th December, 2019, for the alleged unlawful and unfair termination of his employment and refusal to pay his terminal dues. He avers that he was employed by the Respondent *vide* an employment contract dated 27th December, 2012 as Chief Operation Officers at a monthly salary of Kshs 500,000. This employment commenced in January, 2013.
2. He avers that he worked for the Respondent until May, 2014 when his employment was terminated with a one-month notice instead of the three-month notice indicated in the employment contract. That even though notice of termination was given no reason was advanced for the said termination, neither was he subjected to any disciplinary hearing.
3. During the pendency of his employment, he purported to have disbursed the sum of Kshs 250,995 from his account to be used by the Respondent as petty cash, which monies have not been refunded to date. That he also spent Kshs 110,000 from his pocket to secure work permit for Mr. Singh at the behest of the Respondent, which amount is yet to be refunded. At the time of termination, he had only taken 10 leave days for the year 2013 leaving a balance of 11 days and having worked for more than 5 months in 2014, he was entitled to 9 leave days which cumulatively adds up to 20 pending leave days. He also maintained that he was not a member of any pension scheme including NSSF as such he claims that he is entitled to gratuity which was not paid.
4. The Claimant prays for:-



- a. The sum of Kshs. 500, 000.00/= being the Claimant's salary for the month of May, 2014.
 - b. The sum of Kshs. 1,500,000.00/= being payment due to the Claimant from the Respondent by virtue of the Respondent's failure to give a three (3) months' notice of termination of the contract.
 - c. The sum of Kshs. 250,995.00/= being the petty cash balance owed to the Claimant by the Respondent.
 - d. The sum of Kshs. 333,333.34/= being payment due to the Claimant equivalent to twenty (20) days of annual leave not taken.
 - e. The sum Kshs. 110, 000.00/= being the amount payable by the Claimant for and on behalf of the Respondent for securing work permit for a Mr. Singh.
 - f. The sum of Kshs. 250, 000.00/= being service pay due to the Claimant.
 - g. An order directing the Respondent to issue a Certificate of Service to the Claimant within such period as this Honourable Court may deem fit.
 - h. The sum of Kshs. 6,000,000.00 being 12 months salary as compensation under section 49(1) (c) for unlawful termination of services.
 - i. Interest on (a), (b), (c). (d), (e) and () above at Court rates.
 - j. Costs of this cause.
5. In reply, the Respondent filed a Response dated 28th November, 2014 denying that it unfairly terminated the Claimant's employment. It avers that the Claimant was summarily terminated for gross incompetence and negligence which was exhibited in the way he carried out his duties leading to the Respondent sustaining loss of Kshs 188,619,982 in the first year of its operations despite massively investing in the said business. It maintained that all expenses footed by the Claimant were fully catered for by the Respondent as appearing in the annual report and financial statement of 31st December, 2013.
 6. During hearing the Claimant testified as CW-1 and adopted his statement dated 3rd December, 2019. He also testified that he has accounted for all the expenses incurred in his documents filed on 21st October, 2014. He denied being negligent at work or being incompetent. He maintained that he established and handled the project with a lot of professionalism and thus was unfairly terminated.
 7. Upon cross examination, he testified that he had worked on similar projects in Uganda and had experience of 14 years. He testified that he signed a contract on probation for three months and never signed any other contract afterwards though he continued working for the Respondent. He confirmed that there was loss in the said year as crops failed due to lack of rain.
 8. The Respondent summoned its' Director, Suni Narshi Shah, who testified as RW-1 and adopted his statement of 19th June, 2015 which basically narrated the fact that the Respondent gave more input than output as such traded at a loss, when they had relied on the expertise of the Claimant in leasing the various acres of land and planting of the said crops which gave Kshs 17,218,338 against investment of Kshs. 126,881,960 put into the said farming business. He objected to the documents produced by the Claimant alleging that all their documents are in their letter heads, duly signed before dispatch. He stated also that their accountants are DKF limited based in Nairobi. He maintained that they summarily terminated the services of the Claimant because the Company encountered losses. He also



added that the Claimant was the one that handled all the funds for the Respondent in the said farm and on incurring the losses, the Claimant failed to account for the money given and cause for the loss.

9. Upon cross examination he admitted that he absorbed the Claimant fully to employment upon lapse of the probation period, which absorption was done verbally. He admitted that clause 8 of the employment contract provided for 3 months' notice, though he gave the Claimant only one-month notice. He also admitted that he did not issue him with any warning letter or subjected him to disciplinary hearing. He testified further that the employment contract did not provide for any targets for the Claimant. He also admitted that the Respondent has more than 60 employees and the Claimant cannot be blamed solely for the loss. He testified further that, the Claimant was tasked with identifying areas where rain was reliable. He also stated that he raised the issue of poor performance with the Claimant via email but the Claimant did not do anything to alleviate the situation.

Claimant's Submissions.

10. The Claimant submitted from the onset that an employer has to comply with the procedures for terminating an employee's employment as provided for under section 41 of the [Employment Act](#). He also argued that the employer, as provided for under section 43 of the [Employment Act](#), must give reasons for terminating an employee, failure to which the termination will be deemed unfair as contemplated under section 45 of the [Employment Act](#).
11. On whether the Claimant was an employee of the Respondent, the Claimant submitted that having served the Respondent past the probation period, his employment converted to that of an employee defined under section 2 of the [Employment Act](#), as such the termination process ought to have been strictly followed. To support this he relied on the case of [Omusamia v Upperhill Springs Restaurant](#) (Cause 852 of 2017) [2021] KEELRC 3 (KLR) (5 October 2021) (Judgment) where the Court held that;

“The factors to consider in determining whether one was an employee and therefore under a contract of service was where: the servant agreed to provide his own work and skill by providing services for that matter, in consideration of wages or other remuneration, The servant agreed that in the performance of that service they would be subject to the master's control. Control included the power of deciding the things to be done, the way in which they had to be done, the means to be employed and in doing them, the time and place where they were to be done and the contract of service complied with the terms of an employment agreement. That entailed complying with the statutory requirements in the [Employment Act](#) including minimum wage, provision for leave and payment of income tax.”
12. It was submitted that the grounds of termination being poor performance and negligence of duty was not subjected to any appraisal or test to confirmed the alleged performance and therefore to terminate the employee on that ground failed the substantive test. He argued further that the Claimant ought to have been subjected to disciplinary hearing before the said dismissal as was held in the case of [Alphonse Maghanga Mwachanya V Operation 680 Limited](#) [2013] eKLR.
13. Similarly, that having given a notice of one month instead of Three months provided for under the employment contract and failing to subject the Claimant to disciplinary process, the termination was unfair and he urged the Court to find as such and allow the claim as prayed with costs.



Respondent's Submissions.

14. The Respondent on the other hand submitted that it had a valid reason for terminating the Claimant's services. On the reasons for termination, the Respondent submitted that the Claimant abdicated his duties by failing to provide weekly reports on expenditure in relation to crop management, failed to provide details analysis of input for the year 2012/2013 season which was greatly affected by the losses and proceeding for leave without communicating the state of affairs of the company and how they will be handled in his absence. It was argued that these actions cumulatively led to the Respondent believe that the Claimant was negligent in his duties, an act of sheer gross misconduct as captured in section 44(4) of the *Employment Act* and a recipe for termination.
15. On whether the Claimant was accorded procedural fairness, it was argued that the reason for termination as stipulated is one that attracted summary termination as such disciplinary hearing would not precede the termination as stated under section 44 of the *Employment Act*. Additionally, it was argued that an employee can be summarily dismissed on other grounds not captured under section 44 of the *Employment Act* as was stated in *Pheoby Aloo Inyanga V Stockwell One Homes Management Limited and another* [2022] eKLR, where the Court held that;

“Section 44 (4), provides for actions and inactions of an employee that may amount to gross misconduct to attract the sanction of a summary dismissal against the employee. However, it is imperative to state that the list. Therein is not an exhaustive list. An employer can summarily dismiss an employee on an account outside those in the catalogue for as long as the account has the characteristics such as I will demonstrate shortly hereinafter.”
16. Similarly, it was argued that the Claimant caused immense loss on the Respondent, a justification of the summary termination. Furthermore, that clause 7 and 8 of the Employment Contract provided for summary termination as such that the Respondent exercised its right under the contract of employment in terminating the Claimant's services.
17. It was further argued that the Claimant was issued with a hearing notice via email dated 4th December, 2013 which he ignored, forcing the Respondent to terminate his services without subjecting him to any hearing. To support this argument, it relied on the case of *Ayub Kombe Ziro v Umoja Rubber Products Limited* [2022] eKLR where the Court held that;

“If the employee: fails to resume duty or respond to the notice to show cause; or is not traced by the employer despite diligent effort; or responds to the employer but the reasons for his absence are considered unjustifiable, then the employer may proceed to terminate such employee for unauthorized absenteeism. These principles are well articulated in a series of decisions by this Court including *Joseph Nzioka v Smart Coatings Limited* [2017] eKLR and *Julius Kyalo Malonza v Ruth Osolo t/a Eraeva Catering Services* [2021] eKLR.”
18. On the reliefs sought, the Respondent submitted that the Claimant is the one that is tasked with proving his claim for unfair termination and proving the reliefs claimed which he failed and therefore not entitled to any of the reliefs sought. The Respondent in conclusion urged this Court to dismiss the claim with costs.
19. I have examined all the evidence and submissions submitted before this Court from both parties.
20. It is not in dispute that the Claimant was an employee of the Respondents on permanent and pensionable basis after the period of probation expired. Despite the fact that the Respondents didn't



communicate to the Claimant expressly this fact, the Claimants' employment became permanent and pensionable upon expiry of the 3 months' probation period indicated in the employment contract.

21. The Respondents have indicated that they terminated the Claimant fairly due to gross incompetence and negligence.
22. The Claimant agrees that during the period when loss was incurred by the Respondent, the failure was attributed to loss of rain which cannot be attributable to him as negligence.
23. As the Respondents indicate that the Claimant was fired due to negligence and incompetence, I wish to refer to Section 41 of the [Employment Act](#) which states as follows;
 - “ 41. Notification and hearing before termination on grounds of misconduct
 - (1) 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.
 - (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”.
24. The law envisages that any employee who being dismissed for incompetence or negligence as the case may be, the employee is still entitled to be given an opportunity to explain why he should not be terminated on that account.
25. An opportunity for such explanation would require a hearing where targets set out by the employer to the employee are considered against the actual performance.
26. This is what was held in the case of [Mary Chemweno Kiptui Vs Kenya Pipeline Co. Ltd](#) (2014) eKLR submitted by the Respondents herein.
27. There is no indication that the Claimant was ever issued with any notice of intention to terminate his services on account of gross incompetence and he was not given any opportunity to be heard.
28. The Respondents have indicated that the Claimant was summarily dismissed and so was not entitled to procedural fairness.
29. This definitely cannot be the true position of law because summary dismissal falls under Section 44(4) of the [Employment Act](#) 2007 and the Claimant did not commit any of the offences warranting summary dismissal.
30. In any case, a right to be heard is a rule of natural justice which cannot be ousted by virtue of summary dismissal.
31. Having found that the Claimant was dismissed without following due process, I now delve into the validity of reasons for the dismissal.



32. Section 43 of the *Employment Act* 2007 provides as follows;

“ 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.”

33. In essence, an employer is duly bound to establish reasons for termination were valid. The best way to determine this validity is to take an employee through a fair disciplinary process which is lacking herein.

34. Other than fair process, the Respondents have not demonstrated that there were certain performance targets the Claimant was to fulfil and that he failed to fulfil these targets thus a candidate of gross incompetence or negligence.

35. It is my finding that the Respondents have not established that they had valid reasons to terminate the services of the Claimant.

36. Section 45 (2) of the *Employment Act* 2007 states as follows;

“ 45.

- (1)
- (2) 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”.

37. In view of my finding that the Claimant was not subjected to a fair disciplinary process and that no valid reason for termination have been established, I find the termination of the Claimant unfair and unjustified and I declare it so.



38. On remedies, the Claimant has sought various payment. Firstly, the Claimant has submitted and Respondent admitted that they gave him 1 months' notice instead of 3. The Claimant is therefore entitled to:-
1. 2 months (not paid) notice period = 2 x 500,000 = 1million
 2. The Claimant also sought to be paid the May 2014 salary which he avers he was not paid. I award him this amount at 500,000/=
 3. The Claimant has also sought to be paid 25,099,500/= as petty cash. There is no express authority to Claimant to expend this cash and I therefore find the prayer not payable.
 4. The Claimant sought to be paid for leave of 20 days not taken amounting to 333,333.34/=. Indeed there is no evidence that he took this leave nor was paid for it and so I award him the same as prayed at kshs.333,333/=.
 5. On issue of work permit, the RW1 admitted that the Claimant secured for him his work permit and so I allow the Claimant 110,000/= used to secure RW1's work permit by the Claimant.
 6. I also award Claimant 10 months' salary as compensation for the unfair and unlawful termination which comes to 10 x 500,000/= = 5million
Total = 6,943,333/=
Less statutory deductions
 7. The Respondent will issue Claimant with a Certificate of Service.
 8. The Respondent will pay costs 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:

Akinyi for Respondent – present

Cheloti for Claimant – present

Court Assistant - Fred

