



**Wango v Tai Savings & Credit Ltd (Cause 1225 of 2018)  
[2022] KEELRC 13474 (KLR) (6 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13474 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1225 OF 2018  
AN MWAURE, J  
DECEMBER 6, 2022**

**BETWEEN**

**ANASTACIA WANGARI WANGO ..... CLAIMANT**

**AND**

**TAI SAVINGS & CREDIT LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The present claim was instituted by the memorandum of claim dated the July 19, 2018 and filed on the same date. The issue in dispute is said to be wrongful termination, unfair dismissal and refusal to pay dues the claimant could have earned if she could have worked to retirement.

**Claimant's Case**

2. The claimant says that she was employed in the year 2001 as Credit Supervisor by the respondent for 17 years. She avers that she worked dutifully and diligently until the 23<sup>rd</sup> of January 2018 when she was terminated from her duties on grounds of allegedly insulting her employer, insubordination, breach of communication and inciting staff members.
3. She avers that her termination was unlawful and unfair and claims her dues from the respondent as follows;
  - a. A declaration that the claimant's termination was unlawful and unfair
  - b. Severance pay at the rate of one month's salary for each year worked
  - c. General damages for loss of income for 19 years.
  - d. Freeze of loan payment and interest accrual in her account No 4650
  - e. Damages for unlawful and unfair termination.



- f. Interests on (2, 3, and 5) above

### **Respondent's Case**

4. The respondent whilst admitting employing the claimant at Kshs 57,278.40/- denies that she was illegally, unjustifiably or unconstitutionally dismissed from the respondent's employment. The respondent added that the claimant was terminated through summary dismissal and hence not entitled to any other benefits/ terminal benefits.
5. The respondent avers that it was for the good of the institution and the employees that the claimant be summarily dismissed otherwise she would have caused irreparable loss and damage had the claimant been allowed to continue inciting her fellow employees.

### **Claimant's Case**

6. The parties tendered evidence in the claim by way of the affidavits. In the attached affidavit dated the June 13, 2022, the claimant says that the respondent's employees including herself were taken for benchmarking trip around the country to enable them emulate the good traits they would find.
7. The claimant deposes that they were thereafter called for a meeting at Nairobi where the chairman of the respondent urged them to write their suggestions anonymously on how they thought the respondent could be made better.
8. The claimant states that she did write a letter dated the December 15, 2017 addressed to the Directors of the respondent and a further letter dated the January 15, 2018 where she informed the Board of her concern and opinion as had been suggested by the chairman.
9. The claimant deposes that on the January 23, 2018 she received a dismissal letter which indicated that she was dismissed solely for writing the said letters. The claimant asserts that she was dissatisfied with the decision of the board to terminate her since she had done nothing wrong. She tendered documents in the list of documents exhibits and prayed to be awarded claimed remedies in the memorandum of claim.

### **Respondent's Case**

10. The respondent's in the affidavit dated the June 17, 2022 deposes that on November 21, 2016, it gave the claimant warning for reasons that the respondent had received complaints from their Kigumo branch about the claimant's rudeness to them and that the claimant was treating the respondent's customers as an irritation to her
11. The respondent further deposes that on the December 6, 2016, the respondent issued another letter to the claimant concerning her negotiation skills, challenges on conflict resolution and challenges on customer care. The respondent state that the claimant anonymously wrote another letter dated the December 17, 2017 stating that some members of the respondent's staff wished to be terminated from their employment and get work elsewhere.
12. The aforesaid letter also stated that if the respondent did not change its' mode of operation within one month, it would face consequences. The respondent says that on the 15<sup>th</sup> day of January 2018, the claimant again anonymously wrote another letter to the board of directors alleging that more than 30% of the respondent's staff were discontented and were not interested in working whereof they were looking forward to leaving employment. Apparently the claimant alleged that the discontented staff were waiting to be sacked in order to receive terminal benefits.



13. The witness deposes that on the January 22, 2018 the claimant was invited by the board of directors to explain the reason and justification of the two letters which the board considered inciteful and intended to undermine the smooth and profitable running of the respondent. The witness says the claimant admitted to authoring the said anonymous letters and, on the January 23, 2018, wrote a note to that effect. The witness states that on the meeting of the January 22, 2018 the chairman of the board was present but the claimant never made any reference to him
14. The witness says the claimant could not explain why as a senior member of the respondent she could not utilize the established structures rather than inciting her fellow employees and threatening the board of directors.

### **Claimant's Submissions**

15. The claimant submits that the letters written by the claimant contained her honest opinion and were meant to make good the relationship between the respondent and the employees and save costs by the respondent. Claimant avers that the three of the alleged incited members denied having been incited and acknowledged on allowances which were slashed during the restructuring process in the year 2016. The claimant also say they acknowledged that there had been discussions about retirement package from the staff members.

### **Respondent's Submissions**

16. The respondent submits that the claimant's allegation that more than 30% of the respondent's employees were on the verge of leaving employment was malicious and unfounded. The respondent submitted that it was quite clear that the claimant was inciting the other employees behind the scenes and was disrespectful to the respondent's management structures which she was part of.

### **Determination**

17. Having gone through the pleadings and the submissions, the court frames the following issues for determination
  - a. Whether the claimant was unfairly/unlawfully terminated
  - b. The reliefs, if any, the claimant is entitled to.
18. The *Employment Act 2007* stipulates on how a fair termination should be carried out. Sections 35, 40, 41, 43, 44 and 45 *inter alia* has the statutory provisions on termination of employment. As has been held by the courts, for a termination to be deemed fair, it must be substantively and procedurally fair. The reason(s) for termination must not only be valid but fair as must be the procedure employed by the employer. (See *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR).
19. Section 43(1) provides that – (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. Section 43(2) provides that – (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.
20. The termination letter of the January 23, 2018 lists insubordination, insult to the employer, breach of communication channels and incitement to other staff members as coming out from two letters said to have been written by the claimant to the respondent's directors. What the court gets from the deposition of the claimant is that she appears to be stating in the letter what she perceived to be views



of other employees concerning the various steps taken on, among others, the deduction of salaries by the respondent. The letters in themselves cannot be said to be evidence that the claimant incited other employees. The court also finds that the letter whilst admittedly not properly addressed falls short of being an insult or insubordinate to the directors of the respondent.

21. Indeed looking at the letters referred to dated December 15, 2017 and January 15, 2018 respectively, they are seemingly politely coached letters addressed to the Board of Directors. The author or authors are writing in regard to their settlement benefits. There is nothing rude or insulting in these letters and the court finds their contents are not likely to incite other staff members. The authors may have been bold and may be a bit misguided but cannot be accused of using abusive or insulting language.
22. The staff members who were interrogated in the meeting held on January 22, 2018 being Alex Mwaniki, John Njumbi and Daniel Ngatia all denied they were incited by the alleged letters written by the claimant. Indeed they did not even seem to be aware of such letters. The letters were addressed to the Board not to the staff.
23. Since in her termination letter she was informed the letters were an insult to the employer and inciting to staff members this is not brought out in the letters. Therefore the court can only find that in accordance to section 45(1) of the *Employment Act* the respondent did not establish a valid reason to terminate the claimant's employment. Section 45(1) of the *Employment Act* provides: "No employer shall terminate the employment of an employee unfairly". There are myriad of authorities which provide that no employer can now terminate the employment of his employee without a valid reason which reason must be communicated to the employee.
24. The employer must also invite the employee to a disciplinary hearing and inform them to bring along a fellow worker of their choice or a shop floor union representative to be present during his explanation. If the employer fails to follow these twin mandatory provisions, they then will be held to have terminated the employment of their employee unlawfully and wrongfully. Section 41 (1) of the *Employment Act 2007* provides as follows:

"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"
25. The court has also seen the previous warning letters that touched on the claimant's performance of her work. The court finds that there is no evidence prior to the hearing leading to the dismissal that the claimant since the last warning letter had been issued in 2016 had not improved on the areas of concern leading to the issuance of the said warnings.
26. There was no notice to show cause issued to the claimant informing her of the particulars of the charges against her and the right to have a representative at the hearing. The decision to terminate therefore fell foul of section 41 of the *Employment Act 2007*.
27. The importance of both substantial and procedural fairness in all forms of termination have been emphasised in myriad decisions including *Mary Chemweno -vs- Kenya Pipeline Ltd* (2014) eKLR and *Walter Ogal Anuro -vs- Teachers' Service Commission* (2013) eKLR. In the latter case court noted that for termination to be shown to be fair there was not only substantive justification for the termination but also procedural fairness must be proved. Further that section 43 of the *Employment Act* obligated an employer to prove the reason for termination of employment and where the employer failed to do so the termination was deemed to have been unfair.



28. In this case it follows the respondent did not establish a valid reason to terminate the claimants employment. The procedure to terminate her was also flawed. She was not informed upfront what transgressions she had committed and was not advised to invite a fellow workmate of her choice during her explanation or a shop floor union representative.
29. The court finds the respondent in view of the foregoing failed to prove a case for fair termination on a balance of probability and therefore logically it follows the claimant was unfairly terminated. Judgment is entered therefore in her favour.
30. That being the position the court proceeds to award her the following remedies:

#### **Remedies**

- a. Severance pay is not merited as this was not termination by redundancy and so is declined.
- b. General damages for 8 months and so is  
Kshs 57,278.40 x 8= Ksh 458, 227.20
- c. Loss of earnings for 19 years is not premised on law and so is no merited so is declined.
- d. Freeze on loan repayment is not specified and is not proved – so is declined.
- e. Claimant is awarded costs of the suit and interest at court rates from the date of this judgment.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF DECEMBER, 2022.**

**ANNA NGIBUINI MWAURE**

**JUDGE**

#### **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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 has 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 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.

A signed copy will be availed to each party upon payment of court fees.

**ANNA NGIBUINI MWAURE**

**JUDGE**

