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Case Action:	Judgment
Judge:	Jacob Kariuki Gakeri
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Advocates:	-
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**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1919 OF 2017**

*(Before Hon. Justice Dr. Jacob Gakeri)*

**MICHAEL KARANJA WANGURU.....CLAIMANT**

***VERSUS***

**SAFARICOM KENYA LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant initiated this suit by a memorandum of claim dated 25<sup>th</sup> September 2017 and filed on 26<sup>th</sup> September 2017 alleging unfair and unlawful dismissal from employment and refusal by the Respondent to pay terminal dues.

2. The Claimant prays for –

(i) A declaration that the Claimant’s dismissal from his employment was unlawful and illegal.

(ii) The Claimant be paid his full terminal benefits totalling to Kshs.6,719,290/- as particularised below:

a. Salary for June 2017 Kshs.347,000

b. One month salary in lieu of notice Kshs.347,000

c. 12 months gross salary for unfair and unlawful termination 347,000 x 12 months Kshs.4,164,000

d. Leave not taken 2 x 347,000 Kshs.694,000

e. Car allowance 2 x 50,000 Kshs.100,000

f. Vehicle searches done for Safaricom Kshs.4,000

g. Benefits accrued for the period of suspension Kshs.53,000

h. Bonus pay for the year as per the employment contract Kshs.1,010,290.50

i. Certificate of service

**Total amount Kshs.6,719,290.50**

(iii) The Respondent be ordered to compensate the Claimant for wrongful termination at the equivalent of 12 months’ salary.

(iv) That the Court do issue such orders and give such directions as it may deem fit to meet the ends of justice.

(v) The Respondent to issue a certificate of service to the Claimant in accordance with Section 51 of the Employment Act.

(vi) The Respondent to pay the costs of this suit and

(vii) Interest on the above at Court rates.

3. The Respondent did not enter appearance or file a defence. However, there is no affidavit of service on record. The foregoing notwithstanding the suit proceeded as undefended.

### **Claimant's Case**

4. The Claimant's case is pleaded as follows:

5. The Claimant avers that he was employed by the Respondent on or about 1<sup>st</sup> April 2014 as a Principal Officer Fraud Detection and Analysis at Kshs.347,000/- per month.

6. It is further averred that when the Claimant reported to work on 11<sup>th</sup> May 2017, he was summoned to the Head of Department's Office where he was questioned about Mpesa agent till numbers and was kept for about 7 hours and was thereafter given a suspension letter.

7. The suspension was to run for 30 days during which time he would receive full salary and benefits. That thereafter the Claimant was issued with a summary dismissal letter.

8. It is the Claimant's case that the summary dismissal was unfair and unlawful as he was not given audience to respond or mount his defence to the allegations made against him which were falsehoods and lies by the Respondent.

9. That the dismissal was contrary to the principles of natural justice and the provisions of the Employment Act.

10. The Claimant also states that he served the Respondent faithfully and diligently from 1<sup>st</sup> April 2014 to 25<sup>th</sup> November 2017 and was dismissed without being accorded an opportunity to be heard.

### **Evidence**

11. The Claimant adopted the written statement dated 25<sup>th</sup> September 2017. The statement rehashes the contents of the memorandum of claim in detail by adding the names of the Supervisor Mr. Emmanuel Ndibo and the Head of Department, Mr. Patrick Kinoti. He also testifies that he was requested to dial number 0795 098 777 and his phone was grabbed by Mr. Ndibo who left the office and only got it back at 8.00 pm.

12. It is the Claimant's testimony that on or about 25<sup>th</sup> May 2017 he contacted the Human Resource Manager, Nancy Wafula to follow upon on several issues and was informed that he had been invited for a hearing on Monday 22<sup>nd</sup> May 2017. That the invitation letter had been sent to his old email address which he rarely used but the office had his mobile phone number.

13. It is the Claimant's testimony that he thereafter visited the office in an attempt to have a rescheduled hearing but without success.

14. That on 26<sup>th</sup> May 2017 he was invited to Mr. Kinoti's office who interrogated him and thereafter policemen were brought in to arrest him. The Claimant does not explain whether he was arrested and what transpired thereafter.

15. Finally, the Claimant states that he was dismissed with a letter of summary dismissal on 27<sup>th</sup> June 2017.

16. In his oral testimony, the Claimant states that the Respondent owed him Kshs.4,000/- for some work he had done as well as a bonus.

17. That although the Respondent was served on 3<sup>rd</sup> October 2017, it did not respond.

#### **Claimant's Submissions**

18. The Claimant identifies three issues for determination as follows:

- (i) Whether the Claimant was unfairly and illegally terminated;
- (ii) Whether the Claimant had proved his case on a balance of probabilities;
- (iii) Whether the Claimant is entitled to terminal dues.

19. As to whether the Claimant's termination was unlawful reliance is made on Section 41(2) of the Employment Act to urge that the prescribed procedure had not been complied. The decisions in **Mary Chemweno Kiptoi v Kenya Pipeline Co. Ltd [2014] eKLR**, **Gilbert Mariera Makori v Equity Bank Limited [2016] eKLR** and **Janet Nyandiko v Kenya Commercial Bank Limited [2017] eKLR** are relied upon to underscore the need for substantive justification and procedural fairness in the termination of employment contracts.

20. As regards the standard of proof, the Claimant relies on Section 107(1) of the Evidence Act to underline the principle that he who alleges must prove.

21. The decision in **Kenya Akiba Micro Financing Limited v Ezekiel Chebii & 14 Others [2012] eKLR** is used to urge that a statement made on oath should as a matter of fact be expressly denied on oath. If not challenged, it remains a fact and the truth for that matter.

22. That the Claimant's testimony was not challenged by the Respondent.

23. The decisions in **Karuru Munyororo v Joseph Ndumia Murage [1988] eKLR** and **Interchemie E. A. Limited v Nakuru Veterinary Centre Limited [2001] eKLR** are relied upon to urge that if the Respondent tenders no evidence the Claimant or Plaintiff's evidence stands uncontroverted.

24. The Claimant tendered no submission on the reliefs sought.

#### **Analysis and Determination**

25. After careful consideration of the pleadings, evidence on record, submissions and the law, the issues for determination are: -

- i) Whether the termination of the Claimant's employment contract was unfair and unlawful;
- ii) Whether the Claimant is entitled to the reliefs sought.

26. As regards summary dismissal and termination of employment, the provisions of the Employment Act, 2007 are explicit on the essentials.

27. Section 45 is the bedrock of fair termination. The provisions of Section 45 lay bare the requirements of a fair termination of an employment contract. In summary, the employer must prove that it had a valid and fair reason to terminate the employee's employment based on the employee's conduct, capacity or compatibility or operational requirements of the employer and the employment must have been terminated in accordance with fair procedure.

28. Other critical provisions are Section 44 on summary dismissal. This Section exemplifies what constitutes gross misconduct though not exhaustively. Section 43 of the Act elaborates on the reason(s) for termination, while 47(5) deals with the burden of proof of the employer and employee.

29. Finally, Section 41 of the Act sets out the mandatory procedural tenets to be complied with in normal terminations and summary dismissal.

30. In sum, a fair termination of a contract of employment has two ingredients namely substantive justification and procedural fairness.

31. These requirements were eloquently explained by the Court of Appeal in **Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR** as well as **Naima Khamis v Oxford University Press [EA] Ltd [2017] eKLR**.

32. Relatedly, in the words of Ndolo J. in **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR**

*“...For a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”*

33. Having laid down the law, I will now proceed to apply the same to the facts of the instant case.

#### **Reason(s) for Termination**

34. The Respondent’s letter of summary dismissal dated 31<sup>st</sup> May 2017 states that investigations had established that the Claimant:

(i) Failed to follow the Mpesa agent penalty guidelines in freezing and unfreezing of accounts.

(ii) Assisted a third party in irregular Mpesa tills of which he received funds contrary to the Safaricom Risk Management Code of Ethics.

(iii) Regularly accessed customer and agent accounts against procedures and shared the information with a third party in contravention of Safaricom policies and customer confidentiality.

(iv) Through a colleague you irregularly checked customers registration, calls, location and Mpesa information on behalf of third parties for financial gain.

(v) You, together with a colleague conspired to influence the outcome of an investigation carried out by Ethics and Compliance on irregularly created tills.

35. The Claimant was suspended on 11<sup>th</sup> May 2007 to pave way for “*conclusive investigation*”. The ground of suspension was that the Claimant was involved in various conflict of interest dealings involving Safaricom Mpesa agents.

36. The suspension letter was exceedingly general and did not require any response by the Claimant. It was not a notice to show cause and no such letter is on record. The Claimant never received a specific narrative on the allegations made against him.

37. The results of the alleged investigation are also not on record nor is there evidence that a copy of the report was sent to the Claimant.

38. Evidently, the Respondent may have had good reason to terminate or dismiss the Claimant but did not pursue the process to its logical conclusion.

39. Section 43(2) of the Employment Act 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.**

40. The Respondent led no evidence on the alleged reason for the summary dismissal of the Claimant.

### **Procedure**

41. As adverted to elsewhere in this judgment, Section 41 of the Employment Act, 2007 prescribes the procedure employers are required to follow in the conduct of a termination or dismissal of an employee.

42. The specific requirements of Section 41 of the Employment Act were tabulated by the Court of Appeal in **Kenya Postal Corporation of Kenya v Andrew K. Tanui [2019] eKLR**, as follows:

*“Four elements must thus be discernible for the procedure to pass muster: -*

*(i) An explanation of the grounds of termination in a language understood by the employee.*

*(ii) The reason for which the employer is considering termination.*

*(iii) Entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made.*

*(iv) Hearing and considering any representation made by the employee and the person chosen by the employee.”*

43. In the instant case the Claimant testified that he was not taken through any disciplinary hearing before dismissal by letter dated 31<sup>st</sup> May 2017 but reached the Claimant on 27<sup>th</sup> June 2017, almost one month later. The notice of summary dismissal is categorical that the summary dismissal from employment was *“with immediate effect”*. The letter was signed by the Acting Director, Resources Mr. Joseph Ogutu on 13<sup>th</sup> June 2007 and by the Chief Executive Officer on 19<sup>th</sup> June 2017.

44. The Claimant, however, testified that he had been invited for a disciplinary hearing slated for 22<sup>nd</sup> May 2017 but did not receive the notice on time and thus did not attend the hearing and the same was not rescheduled. In the absence of the Respondent’s evidence on the issue, the Claimant’s evidence remains uncontroverted as held in **Karuru Munyororo v Joseph Ndumia Murage (supra)**.

45. From the evidence on record, it is clear that the Respondent invited the Claimant for a hearing by email but did not call him or notify him in other ways to ensure that he attended the hearing. The Respondent was duty bound to ensure that the Claimant had notice of the proposed hearing but did not apply itself to that end. It would be injurious to punish the Claimant for the nonattendance of the hearing.

46. It is the finding of the Court that the Claimant was not afforded the procedural safeguards provided by Section 41(1) of the Employment Act hereby denying the dismissal process the requisite procedural fairness within the context of Sections 45 of the Employment Act.

47. The upshot of the foregoing is that the summary dismissal of the Claimant by letter dated 31<sup>st</sup> May 2017 was unfair, and unlawful for want of a substantive justification and procedural fairness. Having so found, I now proceed to determine the reliefs available to the Claimant.

### **Reliefs**

48. Having found that the termination of the Claimant’s employment was unfair, a declaration to that effect is hereby issued.

#### **(b) Terminal dues Kshs.6,719,290.50**

49. Before delving into the specific prayers, it is important to indicate that the fact that the claim is undefended does not lessen the burden of proof on the part of the Claimant. It is trite law that special damage must not only be pleaded but must also be proved.

Both the Court of Appeal and this Court have numerously emphasised that even in undefended claims, the Claimant is bound to discharge the burden of proof. See **Monica Karimi Mutua v Al-Arafat Shopping Centre and Another [2018] eKLR**.

**(i) Salary for June 2017 Kshs.347,000.00**

50. Although the letter of dismissal is dated 31<sup>st</sup> May 2017 and alludes to salary for days worked in May having been paid, it was not released to the Claimant until 27<sup>th</sup> June 2017, which became the effective date of dismissal consistent with the wording of immediate effect. The Respondent was bound to pay the Claimant for the 27 days worked in the month of June 2017.

51. The Claimant is awarded salary for the 27 days worked in June 2017.

**(ii) One month's salary in lieu of notice Kshs.347,000**

52. In light of the findings above, the Claimant is awarded one month's salary in lieu of notice, the sum of **Kshs.347,000/-**.

**(iii) Leave not taken Kshs.694,000**

53. The Claimant tendered no evidence on the necessary particulars

for the sustenance of this prayer. The Claimant has not demonstrated the number of days in question, when they fell due, his leave entitlement per year and how the amount due was arrived at. The prayer lacks particulars and is **declined**.

**(iv) Car allowance Kshs.100,000**

54. The Claimant led no evidence on this prayer. The pay slip on record shows that the Claimant's monthly salary includes a car allowance of Kshs.50,000/-. It is unclear to the Court whether this is another car allowance or part of the monthly salary. If it is, then no evidence was led nor is it documented in the contract dated 25<sup>th</sup> November 2015. The prayer is **declined**.

**(v) Vehicle searches done for Safaricom**

55. The Claimant led no evidence on how the sum of Kshs.4,000/- was arrived at as well as its basis. Was it some additional tasks he undertook at the behest and was there a promise to pay and how much"

56. In the absence of the necessary particulars on how the sum of Kshs.4,000/- arose. The prayer is **declined**.

**(vi) Benefits accrued for the period of suspension Kshs.53,000**

57. Neither the written statement of claim nor the oral evidence make reference to this prayer and what it actually entails. The prayer is **declined**.

**(vii) Bonus pay for the year as per the employment contract Kshs.1,010,290.50**

58. A copy of the appointment letter dated 25<sup>th</sup> November 2015 has no provision for bonus pay. Regrettably, the Claimant made no submissions on this specific reliefs nor were they tabulated in the witness statement for evidential purposes.

59. The prayer makes reference to the employment contract, a copy of which is not on record. The Claimant did not testify on when and how and in what circumstances the bonus was payable. The prayer is **declined**.

**(viii) 12 months' gross salary for unfair termination (347,000 x 12) Kshs.4,164,000**

60. Having found that the termination of the Claimant's employment contract was unfair, the Claimant becomes entitled to the remedies provided by Section 49(1)(c) of the Employment Act subject to compliance with Section 49(4). In arriving at the level of

compensation due to the Claimant, the Court has taken the following factors into consideration:

- i) The Claimant had been an employee of the Respondent for a duration of about three years and two months and wished to continue.
- ii) The Claimant had served the Respondent diligently.
- iii) The Claimant did not appeal the summary dismissal or contest it.
- iv) It is unclear how the Claimant contributed to the termination though the allegations made against are extremely serious and he alludes to the fact that police were called to arrest him.

50. In the circumstances the equivalent of five months' gross salary is fair, **Kshs.1,735,000/=**.

**(c) Certificate of Service**

51. The Respondent to issue a certificate of service to the Claimant.

52. In conclusion, judgment is entered for the Claimant against the Respondent in the following terms:

- (i) one month's salary in lieu of notice**
- (ii) Salary for 27 days for June 2017**
- (iii) Equivalent of five (5) months' gross salary as compensation**
- (iv) Costs of this suit.**
- (v) Interest at Court rates from the date of judgment till payment in full.**
- (vi) Certificate of service.**

53. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 21<sup>ST</sup> DAY OF APRIL 2022**

**DR. JACOB GAKERI**

**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 Civil 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.

**DR. JACOB GAKERI**

**JUDGE**



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