



**Karani v Judicial Service Commission (Cause E191 of 2022)
[2024] KEELRC 1175 (KLR) (17 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1175 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E191 OF 2022**

**SC RUTTO, J
MAY 17, 2024**

BETWEEN

VIOLET JEDIDA KARANI CLAIMANT

AND

JUDICIAL SERVICE COMMISSION RESPONDENT

JUDGMENT

1. It is common cause that the Claimant was employed by the Respondent as a Senior Subordinate Staff with effect from 30th July 2001. According to the Claimant, she worked diligently and faithfully since her appointment and had a clean record of employment. She further avers that due to her excellent performance, she rose through the ranks to the position of Supervisor of support staff.
2. The Respondent opines otherwise and contends that throughout her employment, the Claimant lacked diligence and had been warned severally for various offences such as insubordination, chronic absenteeism, and harassment of members of the public and her colleagues.
3. From the record, the employment relationship between the Claimant and the Respondent was terminated through a letter dated 4th January 2021. The Claimant contends that her dismissal from service was actuated by malice, flawed process, and bias from the Respondent’s Executive Officer and Regional Human Resource Officer, Bungoma. As such, the Claimant has prayed for an order of reinstatement as Office Assistant with payback from 21st July 2020.
4. On the other hand, the Respondent avers that the Claimant’s dismissal from employment was based on justifiable grounds and the disciplinary process she was subjected to was as envisaged by Sections 41, 43 and 44 of the *Employment Act*. That the Claimant is therefore not entitled to reinstatement. In this regard, the Respondent has asked the Court to dismiss the Claimant’s claim with costs.
5. The matter proceeded for hearing on 12th February 2024, during which both sides called oral evidence.



Claimant's Case

6. The Claimant testified in support of her case and to start with, she sought to adopt her witness statement and the list and bundle of documents filed together with the Memorandum of Claim to constitute her evidence in chief.
7. It was the Claimant's evidence as per her witness statement that between 1st December 2019 to 7th December 2019, she was indisposed and was diagnosed with severe pneumonia. She verbally communicated the reasons for her absence from duty to the Executive officer by the name Mr. Stephen Mwanzi of Bungoma Law Courts.
8. That from 1st March 2020 to 5th March 2020, she was admitted at Kuria West Sub County Hospital due to severe malaria.
9. Through a letter dated 10th December 2019 from the Regional Human Resource Officer- Bungoma, she was asked to show cause why disciplinary action should not be taken against her on account of absence from duty without permission from 2nd December 2019 to 6th December 2019.
10. The Claimant averred that during the period in issue, she was indisposed and the same was accounted for vide a letter dated 9th February 2021 from the Medical Superintendent Kuria West Sub County Hospital.
11. By a letter dated 21st July 2020, she was served with a Notice to Show Cause for gross misconduct on two (2) counts being Chronic absenteeism and threatening staff at the station that she would contaminate their tea with urine, poison or acid. She denied the allegations in their entirety.
12. The Claimant further averred that by a letter dated 11th August 2020, a disciplinary hearing date was communicated to her. She attended the hearing but contends that the same was flawed and biased.
13. That by a letter dated 4th January 2021, she was dismissed from service. She filed an appeal which was declined vide a letter dated 28th June 2021. It is her contention that no sufficient grounds were advanced.
14. The Claimant further averred that the letter communicating the outcome of the appeal did not address her grounds of appeal as the panelists merely approved the recommendations of the Human Resource Disciplinary Advisory Committee without observing the disciplinary principles procedures for gross misconduct stipulated at clause D.7.2.1 & D.7.2.2 of the Respondent's Human Resource Policies and Procedures Manual.
15. She further contended that her dismissal was wrongful, unfair, unlawful and unconstitutional.
16. She had 15 years to attain the retirement age from service and having been wrongly terminated from service illegally, she asked the Court to reinstate her into service with back pay as she did not commit any offence against her employer.

Respondent's Case

17. The Respondent called oral evidence through Mr. Stephen Mutua who testified as RW1. He identified himself as Assistant Director-Human Resource and Administration at the Respondent Commission. Similarly, he adopted his witness statement to constitute his evidence in chief. He proceeded to produce the Respondent's initial list and bundle of documents as well as the supplementary list and bundle of documents as exhibits before Court.



18. It was RW1's evidence that at the time of dismissal, the Claimant was working as the supervisor of support staff at Busia Law Courts. That while working at Bungoma Law Courts station, the Claimant was absent from duty without permission from 2nd December 2019 to 6th December 2019.
19. Following the said absenteeism, the Respondent wrote to her on diverse dates of 10th December 2019 and 13th February 2020 asking her to explain why she absented herself from duty without permission for five (5) days.
20. The Claimant after disregarding the letters from her supervisors dated 10th December 2019 and 13th February 2020, once again absented herself from duty without permission from 2nd March 2020 to 9th March 2020, a period of six (6) working days.
21. Due to the unexplained instances of chronic absenteeism, the Human Resource Officer at the station summoned the Claimant to explain the numerous days of absenteeism to which she responded that she was ready to take her life and that of the Human Resource Officer and the whole station by contaminating their tea with poison, urine and acid.
22. The Executive Officer and the Human Resources Officer reported the matter to the police on 16th March 2020 and the same was booked at Bungoma Police Station vide OB No.73/16/03/2020.
23. According to RW1, the aforementioned acts by the Claimant were in contravention of the Respondent's Human Resource Policies & Procedures Manual and further constituted valid grounds for summary dismissal.
24. RW1 further averred that the instances of absenteeism by the Claimant and the threat to poison her colleagues' tea constituted gross misconduct that could lead to summary dismissal. The Respondent therefore initiated disciplinary proceedings against her.
25. The Claimant was issued with letters from the Bungoma Human Resource Officer dated 10th December 2019 and 13th February 2020 asking her to explain the reason for her absence from work without permission from 2nd December 2019 to 6th December 2019. She failed, ignored and neglected to respond to the said letters.
26. She was issued with a show cause/suspension notice dated 21st July 2020 requiring her to show cause why disciplinary action should not be taken against her on account of; chronic absenteeism; threatening staff; and failing to respond to the show cause letter addressed to her at station level on 10th December 2019.
27. The Claimant responded to the show cause/suspension letter through a letter dated 5th August 2020 in which she admitted to threatening staff at the station but said that the threats had been taken out of context. She further failed to provide a sufficient explanation for her absenteeism.
28. The Respondent considered the Claimant's response to the Show Cause Letter and found it unsatisfactory. She was invited to a disciplinary hearing through a letter dated 11th August 2020.
29. The letter inviting the Claimant to the disciplinary hearing advised her to scan and forward to the Commission all the supporting documents she would wish to rely on during the hearing via email at least three (3) days before the hearing. She was also informed of her right to have a judicial staff representative of her choice present during said hearing to support her.
30. On 9th September 2020, the Claimant attended the disciplinary hearing where she elected, on her own volition, not to have a representative present or call a witness during the said hearing. All the charges she was facing were read to her and in turn, she was allowed to respond to each of them.



31. The Human Resource Management Advisory Committee considered the presentations made by the Claimant and found her culpable of the offences against her. The findings were forwarded to the Human Resource Management Committee.
32. The Human Resource Management Committee considered the findings of the Advisory Committee and recommended that the Claimant be dismissed from service on account of absence from duty without leave. The recommendation was approved by the Respondent.
33. The Claimant appealed the dismissal through a letter dated 9th February 2021, and the same was disallowed vide a letter dated 28th June 2021 for insufficient grounds.
34. She requested for a review of the decision disallowing her appeal vide a letter dated 10th August 2021. The same was considered and vide a letter dated 5th November 2021, the Respondent's Human Resource Management Committee disallowed the review for lack of advancement of sufficient grounds.
35. RW1 contended that the Claimant was dismissed from service on the premise of valid and substantive grounds. That further, the Respondent followed the proper procedure as required under the Constitution, statutory and employment legal framework.
36. In RW1's view, an employer has the power to discipline its employees for any misconduct recognized by law or labour practices and such power should not be unnecessarily interfered with since such interference will render employers helpless and embolden errant employees. He urged the Court to dismiss the Claimant's claim with costs to the Respondent.

Submissions

37. On her part, the Claimant submitted that the entire disciplinary process was flawed, irregular, unfair and wrongful. She further argued that the only remedy to cure it is to declare her dismissal irregular and unconstitutional ab initio and for her to be reinstated into service forthwith with back pay.
38. It was the Claimant's further submission that the Respondent ignored the provisions of Articles 41, 47 and 50 of the Constitution of Kenya and Fair Administrative Actions Act and transgressed her rights.
39. The Claimant stated in further submission that her evidence is watertight and no plausible defence and/or evidence has dislodged her evidence and therefore, the flow of the river of Justice should tilt towards her direction.
40. In the Claimant's view, the defence and evidence of the Respondent's witness statement was a replica of attempted due process without minutes, witnesses, findings, written reasons of rejection of appeal and recommendations of the disciplinary panel as what was deemed as a hearing was an interview.
41. In the same vein, the Claimant contended that the Respondent's witness was neither an investigator nor a member of the disciplinary panel and therefore his evidence was based on hearsay which is worthless and/or inadmissible in law. She argued that that was the reason she did not cross-examine him as he was not a crucial witness in the matter.
42. The Claimant further posited that she accounted for 13 days of absence and the same was recovered from her monthly salary prior to dismissal. According to her, the subsequent resurrection of the closed matter was based on malice.



43. In support of her case, the Claimant invited the Court to consider the cases of Supreme Court of Kenya Petition No. 34 of 2014 Gladys Boss Shollei vs JSC, Robi Stephen Nyamohanga vs JSC (2017) eKLR and Nairobi Court of Appeal C.A. N0.486 of 2019 JSC vs Lucy Muthoni Njora.
44. On the Respondent's part, it was submitted that the Claimant was in breach of both Section 44(3) and (4) (a) of the *Employment Act* and Section D.7.2 (iii) & (iv) of its Manual as she was absent without permission, and did not bother to communicate the alleged reason for her absenteeism as soon as was reasonably possible. Therefore, there was a substantive reason to summarily dismiss her from employment.
45. The Respondent further urged that the outpatient card and the discharge summary, are not sufficient proof of illness for four reasons; first is that they were availed one (1) year after the fact when the Claimant was appealing her dismissal; second, during the hearing of the case, the Claimant did not call the maker thereof to produce the same; thirdly, the outpatient card dated 1st December 2019 is in respect of a day she was not absent; and lastly, the said documents cannot be considered Certificates of incapacity to work as provided for in Section 30(1) & (2) of the Act and Section E.1.6 of the manual.
46. In support of the Respondent's argument, reliance was placed on the case of Bakery, Confectionery Food Manufacturing and Allied Workers Union vs Norda Industries Limited (2021) eKLR.
47. The Respondent further submitted that the Claimant did not communicate the reason for her unauthorized absenteeism within a reasonable time. That the Respondent extended an olive branch to the Claimant and accorded her numerous opportunities to explain herself and present evidence but she chose to ignore them. The Respondent maintained that it was justified in dismissing her from employment for unauthorized absenteeism.
48. Referencing the case of John Jaoko Othino vs Intrahealth International (2022) eKLR, the Respondent submitted that the process of the Claimant's dismissal was procedurally fair.
49. With respect to the Claimant's assertions that she was not furnished with the disciplinary proceedings, the Respondent posited that she did not request for, nor pay for the same.
50. Citing the case of Solidarity Obo K Oelofse and Armscor (SOC) Ltd, Commissioner W Kruger N.O & Another (2018), the Respondent further submitted that the Claimant has misconstrued the concept of double jeopardy. According to the Respondent, the Claimant was not subjected to more than one disciplinary proceeding in respect of the charge of absenteeism.
51. The Respondent further argued that it would be a waste of taxpayers' money to pay the Claimant for the days she was absent from work without permission since she not only violated the terms of employment, but also did not offer any services to the Respondent, and the public at large for the days she was absent.
52. The Respondent urged that the concept of double jeopardy ought to be used sparingly in employment matters as the test for a claim of unfair dismissal is strictly twofold; whether there was procedural and substantive fairness.

Analysis and Determination

53. I have considered the pleadings filed by the parties, the evidentiary material on record together with the rival submissions, and the following issues stand out for determination: -
 - i. Whether the Respondent had a fair and valid reason to dismiss the Claimant from employment;



- ii. Was the Claimant accorded procedural fairness prior to being terminated from employment?
- iii. Is the Claimant entitled to the reliefs sought?

Valid and fair reason?

54. Section 43(1) of the *Employment Act* (Act) requires an employer to prove the reasons for termination of employment and failure to do so renders such termination unfair. Connected to that, Section 45 (2) (a) and (b) provides that 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; ...
55. In the instant case, it is apparent that the Claimant's dismissal from service was on grounds of absenteeism. This can be discerned from the Claimant's letter of summary dismissal which is partly couched: -
- “This is to convey the Judicial Service Commission's decisions of its meeting held on 10th December 2020 that you be summarily dismissed from the service on account of absence from duty without leave. This is in relation to absence from duty from 2nd to 6th December 2019 and from 2nd to 9th March 2020. The dismissal is with effect from 21st July 2020, being the date, you were suspended from duty.”
56. Refuting the claims of absenteeism, the Claimant has stated that between 1st December 2019 to 7th December 2019, she was indisposed and had been diagnosed with severe pneumonia. It was her contention that she verbally notified the Executive Officer of Bungoma Law Courts as much. She further averred that from 1st March 2020 to 5th March 2020, she was admitted at Kuria West Sub County Hospital due to severe malaria.
57. Fundamentally, the Claimant's case is that her absence from work was on account of ill health.
58. In support of her case, the Claimant exhibited a copy of a medical report dated 9th February 2021, from Kuria West Sub County Hospital, indicating that she was treated at the outpatient clinic with severe pneumonia from 1st to 7th December 2019 and later admitted at the same facility with severe malaria from 1st March to 5th March 2020.
59. The Claimant further exhibited a copy of an outpatient attendance card dated 1st December 2019 from Kuria West Sub County Hospital and a discharge summary indicating that she was admitted at the said facility on 1st March 2020 and discharged on 5th March 2020.
60. Pursuant to Section 30 (1) of the Act, an employee is entitled to sick leave of at least seven days with full pay and thereafter, to sick leave of seven days with half pay, subject to production of the requisite certificate of incapacity to work signed by a duly qualified medical practitioner.
61. Worthy to note is that subsection (2) of Section 30 provides that “For an employee to be entitled to sick leave with full pay under subsection (1), the employee shall notify or cause to be notified as soon as is reasonably practicable his employer of his absence and the reasons for it.”



62. In support of its case, the Respondent exhibited a copy of its Human Resource Policies and Procedures Manual (HR Manual) which provides for sick leave entitlement at Clause E.1.6. Notably, the Manual provides that the medical certificate should be submitted to the Head of Directorate/Station/Unit through the supervisor or immediate senior officer within two days of absence.
63. In light of the foregoing statutory and procedural requirements, the question that begs for an answer is whether the Claimant notified the Respondent of her illness and the need for sick leave from her end.
64. Further, and more importantly, did the Claimant forward the medical report to the Respondent in line with the statutory requirements under Section 30(2) of the Act and Clause E.1.6 of the HR Manual? I must say that this is not evident from the record.
65. It is also worth pointing out that during cross-examination, the Claimant stated that she notified the Respondent of her absence from work and that she forwarded the medical reports together with her Appeal against the dismissal.
66. What manifests from the foregoing is that it is clear that at the time of her dismissal from employment, the Claimant was yet to formally notify the Respondent of the reasons for her absence from duty and or forward the medical report as appropriate.
67. Further, it is interesting to note that in her response dated 5th August 2020, to the Notice to Show Cause, the Claimant did not indicate, much less suggest that her absence from duty was on account of ill health. As such, one wonders why the Claimant would omit this crucial information if indeed her absence from duty was occasioned by ill health. Indeed, it is at that juncture that the Claimant would have notified the Respondent of her ill health and forwarded the relevant medical report.
68. What's more, it is notable that the medical report exhibited by the Claimant was authored on 9th February 2021, which is close to one (1) year after her treatment and admission. Moreover, this was close to one (1) month after the Claimant's dismissal from employment on 4th February 2021. Again, I cannot help but question why the Claimant would go ahead and procure the medical report long after the fact.
69. If it is indeed true that the Claimant was unwell and received treatment from the aforementioned medical facility, it follows that the medical report she now places reliance on would have been within her reach hence she should have been in a position to avail the same at the drop of a hat.
70. As it is, the Claimant was duty-bound to notify the Respondent of her medical condition and her readiness, or otherwise, to report to work. As I have stated herein, the Claimant did not prove that she did this. Accordingly, she did not act as required under the Act as well as the Respondent's HR Manual, and for that reason, her absence from work from 2nd to 6th December 2019 and from 2nd to 9th March 2020 was unexplained and amounted to absence from work without lawful authority.
71. Pursuant to Section 44(4) (a) of the Act, absence from work without leave or lawful cause is one of the grounds for summary dismissal. Further under Clause D.7.2 of the Respondent's HR Manual, absenteeism constitutes gross misconduct.
72. Therefore, the mere fact that the Claimant was absent from work with no leave or lawful authority, availed the Respondent a fair and valid reason to terminate her employment.



Procedural fairness?

73. Under Section 45 (2)(c) of the Act, an employer is required to prove that in terminating the employee's employment, it acted in accordance with fair procedure. The specific requirements encompassing a fair procedure are provided for under Section 41(1) of the Act.
74. In this regard, an employer is required to notify an employee of the intended termination in a language he or she understands. The employee should also be given an opportunity to present his or her defence in response to the allegations levelled against him or her and in so doing, the employee is entitled to have another employee or a shop floor union representative of his choice present.
75. In the present case, the Claimant was asked by the Respondent's Human Resource Officer Bungoma County, to explain her absence from duty between 2nd December 2016 to 6th December 2016, through a letter dated 10th December 2019.
76. From the record, the Claimant did not respond to the said letter hence she was issued with another letter dated 13th February 2020 through which she was notified of her refusal to respond to the letter of 10th December 2019. She was further notified that the matter was being escalated to the Director of Human Resources and Administration.
77. The record bears that the Claimant responded to the letter of 13th February 2020, through hers of 13th March 2020 in which she apologized for her absence from duty.
78. It would seem that the matter did not rest there as the Claimant was once again cited for absenteeism between 2nd to 9th March 2020.
79. In this regard, through a letter dated 21st July 2020, the Claimant was asked to show cause why she should not be dismissed from service on account of gross misconduct. The allegations against the Claimant were detailed in the Notice to Show Cause as being chronic absenteeism and threatening of staff at Bungoma Law Courts that she would contaminate their tea with urine, poison and acid. She was advised to tender her response within 14 days. Through her letter dated 5th August 2020, the Claimant responded to the Notice to Show Cause denying the allegations set forth against her.
80. Through a letter dated 11th August 2020, the Claimant was invited to attend a virtual disciplinary hearing scheduled for 1st September 2020. Through the said letter, she was advised to forward all supporting documents through the email address provided. She was further advised of her right to have a witness or any other representative of her choice to support her in the matter. From the record, the disciplinary hearing was rescheduled to 9th September 2020 due to technical hitches.
81. According to the record of the disciplinary hearing exhibited by the Respondent, the Claimant appeared before the disciplinary committee on 9th September 2020 and she was allowed to make her representations.
82. She was subsequently dismissed from service on 4th January 2021 on account of absence from duty without leave. Seemingly, the allegation of threatening staff at Bungoma Law Courts was dropped.
83. It is also notable that the Claimant was notified of her right of appeal which she exercised.
84. Impugning the disciplinary process, the Claimant has contended that she was not given the disciplinary proceedings to allow her prepare her grounds of appeal. Despite the Claimant's assertions, there is no evidence that she requested for the disciplinary proceedings and that the Respondent unreasonably withheld the same. Therefore, the Respondent cannot be faulted for not furnishing the Claimant with the disciplinary proceedings.



85. The Claimant has further contended that she was punished twice for the same offence as she was dismissed from service and salary recovery effected for the 13 days she was absent from duty.
86. On this score, it is notable that the Claimant did not dispute that she was absent from duty on the dates indicated in the Notice to Show Cause and letter of summary dismissal. Further and as the Court has found, the Claimant's absence from duty was without lawful authority from the Respondent.
87. Therefore, it would be unconscionable that the Claimant would be allowed to retain the salary paid to her whereas she did not render any service to the Respondent during the period in question. If I may add, the salary recovery was a natural consequence of her absenteeism. She cannot therefore aver that she was subjected to double jeopardy.
88. In Considering the import of Section 41 of the Act, the Court of Appeal had this to say in *Postal Corporation of Kenya vs Andrew K. Tanui* [2019] eKLR:

“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 representations made by the employee and the person chosen by the employee.”

89. Applying the above determination to the instant case, I am satisfied that the Respondent complied with the minimum requirements stipulated under Section 41 of the *Employment Act*.
90. In the circumstances, I find that the Claimant was accorded procedural fairness as she was informed of the allegations levelled against her and given an opportunity to be heard on her explanation to the allegations. She was further informed of her right to be accompanied to the disciplinary hearing by a representative of her choice. To this extent, the Respondent cannot be said to have acted contrary to the statutory requirements under Section 41 aforesaid.
91. In the end, the Court finds that the Claimant's termination was neither unfair nor unlawful.

Reliefs?

92. As the Court has found that the Claimant's termination was not unfair and unlawful, her claim for reinstatement with back pay cannot be sustained.

Orders

93. The total sum of my consideration is that the Claim herein is hereby dismissed in its entirety with an order that each party bears its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MAY, 2024.

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STELLA RUTTO

JUDGE



In the presence of:

For the Claimant In person

For the Respondent Ms. Aduke

Court Assistant Millicent Kibet

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 15th March 2020 and subsequent directions of 21st 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 had 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.

STELLA RUTTO

JUDGE

