



**Ng’etich v Kenya Breweries Limited (Cause E829 of 2022)
[2024] KEELRC 1177 (KLR) (17 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1177 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E829 OF 2022**

SC RUTTO, J

MAY 17, 2024

BETWEEN

ROBERT NG’ETICH CLAIMANT

AND

KENYA BREWERIES LIMITED RESPONDENT

JUDGMENT

1. It is not in dispute that the Claimant was employed by the Respondent as a Fire Officer with effect from 2nd October 2014 and was confirmed to the said position vide a letter dated 8th May 2015. Vide another letter dated 13th March 2018, the Claimant was appointed to the role of Quality Analyst. That is the position he held as of 26th May 2021 when he was terminated from employment by the Respondent.
2. From the record, the employment relationship started to go downhill when the Claimant was issued with a Notice to Show Cause through which he was required to respond to allegations of bribery. The ensuing disciplinary proceedings culminated in the termination of the Claimant’s employment. The Claimant has termed his termination malicious, unfair, unlawful, irregular and in breach of the rules of natural justice, *the Constitution*, the *Employment Act* and the Fair Administrative Actions Act. On this account, the Claimant prays for the sum of Kshs. 3,423,615.50 being notice pay, compensation for unlawful termination, severance pay, and unutilized leave days for the year 2021.
3. Opposing the Claim, the Respondent contends that throughout the disciplinary process, the Claimant was accorded substantive and procedural fairness in accordance with *the Constitution*, the *Employment Act* and its internal policies. According to the Respondent, the Claim is frivolous, an abuse of the court process and should be dismissed.
4. The matter proceeded for hearing on 7th February 2024, during which both sides called oral evidence.



Claimant's Case

5. The Claimant testified in support of his case and at the outset, sought to adopt his witness statement to constitute his evidence in chief. He further produced the documents filed alongside the Memorandum of Claim as exhibits before Court.
6. The Claimant stated that on 12th April 2021, he received a Notice to Show Cause from the Respondent requiring him to answer to bribery allegations made by a third-party contractor (Q-Sourcing) against him. The allegations were that around 26th January 2021, he allegedly offered a bribe of Kshs. 400/= to the third-party employee in exchange for a favour in the recruitment of his alleged fronted candidates. He denied the allegations.
7. It was the Claimant's evidence that the Respondent held a disciplinary hearing on 3rd May 2021 via zoom where he denied the allegations. That by a letter dated 26th May 2021, the Respondent terminated his employment. He appealed the decision but he was informed, months later, that the decision to terminate his employment had been upheld.
8. The Claimant contended that the Respondent's action to terminate him from employment was unfair and unlawful as there was no valid reason for termination and neither was due process followed in the termination.
9. He further denied engaging in bribery or engaging in any misconduct at all to warrant the termination.
10. That he was not paid his dues despite several requests and demand letters. He averred that the Respondent purported to pay him one month's salary in lieu of notice on 7th October 2022 after his lawyers wrote a demand letter to them. The Claimant maintained that the rest of the dues remain unsettled.
11. He believes his employment was terminated without due process and without regard to the relevant employment laws. That further, the Respondent treated him unfairly despite having served the company diligently for about 8 years.
12. In closing, the Claimant prayed for compensation for unfair termination of his employment.

Respondent's Case

13. The Respondent called oral evidence through Ms. Purity Kariuki who testified as RW1. She identified herself as the Head of Rewards, East Africa Breweries PLC & South Africa. RW1 sought to adopt her witness statement to constitute her evidence in chief. She further produced the documents filed on behalf of the Respondent as exhibits before Court.
14. It was RW1's evidence that according to the contract of employment, the Claimant's employment was subject to the Company's Policies. That in particular, the Claimant was expected to comply with the Code of Business Conduct.
15. RW1 stated that the Code makes reference to a number of policies including the Company's Anti-Bribery and Corruption Policy that prohibits employees from offering and receiving bribes while carrying out their duties.
16. It was RW1's evidence that on or about 26th January 2021, the Company received a complaint from an employee of a third-party Contractor (an outsourced labour recruitment agency) about a possible breach by the Claimant of the Code and the Anti-Bribery and Corruption Policy.



17. According to the complaint, it was alleged that the Claimant had offered a bribe of Kshs. 400/= to the employee of the third-party Contractor in exchange for a favour in the recruitment of the Claimant's fronted candidates.
18. The complaint was investigated and on 11th February 2021, the Claimant submitted a handwritten statement wherein he admitted sending the said sum to the employee of the third-party Contractor upon the latter's request.
19. Upon conclusion of the investigations and through a letter dated 12th April 2021, the Claimant was asked to show cause why disciplinary action should not be taken against him for contravening the Code and the Anti-bribery and Corruption Policy as well as the Bribery Act of Kenya by offering a bribe of Kshs. 400/= in exchange for recruitment favours.
20. The Claimant responded through a letter dated 12th April 2021 wherein he admitted sending Kshs.400/= to the employee of the third-party Contractor, which he alleged was sent for airtime at the request of the third-party Contractor's employee.
21. RW1 stated that the Respondent considered the Claimant's explanation and found it to be unsatisfactory. Consequently, through a letter dated 26th April 2021, the Claimant was invited to a virtual disciplinary hearing on 3rd May 2021. In the letter, the Claimant was notified of his right to be accompanied to the hearing by a fellow employee of his choice and of his right to call witnesses to support his case.
22. That the disciplinary hearing was conducted as scheduled on 3rd May 2021 and the Claimant chose to attend the hearing unaccompanied.
23. During the hearing, the Claimant among other things admitted sending the money to the third-party Contractor's employee in order to facilitate the recruitment of his fronted candidates.
24. The Disciplinary Committee, after considering the Claimant's written and oral representations, concluded that the allegations against him had been satisfactorily proved and recommended termination of his employment.
25. The Claimant was notified of the decision to terminate his employment through a letter dated 26th May 2021, and of his right to appeal against the said decision.
26. According to RW1, the termination was based on the ground that there was evidence to conclude that there was an intent to use the monies sent to the employee of the third-party Contractor to influence the hire of the candidates referred by the Claimant.
27. RW1 further stated that through a letter dated 29th May 2021, the Claimant appealed against the termination to the Respondent's Human Resource Director.
28. Through a letter dated 25th June 2021, the Human Resource Director, after considering the appeal, upheld the decision of the Disciplinary Committee. The Human Resource Director found that the Claimant had been accorded a fair hearing and that the appeal did not raise any new facts that warranted a fresh hearing.

Submissions

29. It was the Claimant's submission that the Respondent had no valid reason to terminate his employment on account that his accuser who was the employee of the third-party contractor, did not appear at the disciplinary meeting and neither did he record a statement. That further, during the



- disciplinary hearing the Respondent did not provide evidence of the alleged bribery and neither did they provide evidence of the alleged persistent calls. The Claimant further argued that there was no reason why the employee of the third-party contractor was not called to explain the circumstances and that there was no evidence that the alleged fronted candidates were recruited or hired.
30. The Claimant further submitted that his termination contravened Section 4 of the *Fair Administrative Action Act*, No. 4 of 2015 as the allegations against him were very serious, yet the accuser did not write a statement for use at the disciplinary proceedings, and was not called in Court to give evidence. It was his position that he had no opportunity to see the evidence or to cross-examine the accuser. The Claimant contended that the termination was clearly based on an invalid ground.
 31. In support of his submissions, the Claimant placed reliance on the cases of *Evans Angwenyi v Nairobi City Water & Sewerage Company Limited* [2020] eKLR, *Raustus Avua Odioko v China Wu Yi Company Limited* [2021] eKLR and *Said Haitham v Ready Consultancy Company limited* [2022] eKLR.
 32. The Respondent on the other hand submitted that it is incorrect to state that there was no evidence of a valid reason for termination. It was the Respondent's position that in the circumstances, sending money to a recruiter who has been given names of potential candidates could create the perception of obligation on the recruiter's part to hire the recommended candidates. According to the Respondent, such a gesture can be seen as a form of bribery, potentially undermining the integrity of the hiring process.
 33. The Respondent further submitted that it had a legitimate basis for genuinely believing that the Claimant had violated its policies by attempting to bribe the third-party employee to influence the hiring of his recommended candidates considering the numerous admissions by the Claimant and the circumstances surrounding the transfer of money to the third-party employee.
 34. Referencing the case of *Bamburi Cement Ltd v Farid Aboud Mohammed* [2016] eKLR and *Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR, the Respondent submitted that the Claimant's action demonstrated a breach of its policies. It was the Respondent's position that the Claimant failed to conduct himself with the highest degree of integrity, honesty and sincerity.
 35. The Respondent stated in further submission that it utilised a fair procedure in effecting the Claimant's termination as required by the law.
 36. Placing reliance on the case of *Fredrick Oduor Lamba v Kenya Electricity Generating Company PLC* [2023] KECA 118 (KLR), the Respondent further submitted that the Claimant was well aware of the allegations he was facing throughout the disciplinary process and made several admissions in his written responses and verbal representations before the Disciplinary Committee.

Analysis and Determination

37. Having considered the pleadings on record, the evidentiary material before Court, as well as the rival submissions, the following issues stand out for determination:
 - i. Whether the Respondent has proved that there was a valid and fair reason to terminate the employment of the Claimant;
 - 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?

38. Sections 43(1) and 45 (2) (a) and (b) of the Employment Act (Act) are key in determining this issue. To start with, an employer is required to prove the reasons for an employee's termination from employment and failure to do so, such termination is deemed to be unfair. In terms of Section 45 (2) (a) and (b) of the Act, an employee's termination from 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 employees conduct, capacity or compatibility; or
 - ii. based on the operational requirements of the employer; ...
39. As can be discerned from the letter of termination dated 26th May 2021, the Claimant was terminated from employment on grounds that he offered a bribe of Kshs. 400/= to a third-party employee in exchange for a favour in the recruitment of his fronted candidates.
40. Revisiting the record, it is apparent that in his statement dated 11th February 2021, the Claimant stated that he knew a person by the name Faustin Kasuva and that they had been friends since 2019. He further stated that in January 2021, he requested the said Faustin to assist a certain girl from his village. In turn, Faustin asked him to avail certain documents. That on 26th January 2021, Faustin requested him to send airtime of Kshs 100/=. He sent him Kshs 400/= through Mpesa.
41. According to the Claimant, Faustin returned the said amount of Kshs 400/= the same day. Upon enquiry, Faustin informed him that "they are prohibited to do so." Thereafter, the Claimant texted Faustin, "Hi Mr. Kasuva. How is the progress". Faustin did not reply and declined to pick up his calls.
42. In his response to the Notice to Show Cause, the Claimant stated in part:
- "That before 21/2/2021 the contractor called me on 25/9/2019 that they will be recruiting some staff in their place and told me to forward the names of the people I wish to be recruited. I therefore forwarded two names of...On 22/1/2021 the contractor called me that they are recruiting some staff and there is available slot and he sent the job requirements through sms...Of which I send the names of...None of the person was hired and I don't have any other person who has been hired by Q-sourcing.
- On 26/2/2021 at around 1700 hrs the Q sourcing contractor called me and said he doesn't have credit that I kindly assisted him so that he can communicate with his boss. I sent him the money immediately through Mpesa and called him to confirm if he has received but his phone went off. At 1921 hrs the same contractor called me and said you were to send via Mpesa you needed to top it direct. At 1921 hrs I wrote him a text (evidence on phone sms) that am sorry brother God bless you. He refunded the same money at around 2000 hrs... I agree I did send the monies but it wasn't meant for any kind of inducement, bribery or any other ulterior motives but for the airtime as he requested...On 26/1/2021 as indicated on (c) above I apologized by not topping up directly as he wished but by sending through Mpesa. Reversal was done at around 2000hrs."
43. What manifests from the foregoing is that the Claimant did not deny sending the third-party contractor the sum of Kshs 400/= through Mpesa. That further, he had forwarded names of persons he had requested the third-party contractor to consider in the upcoming recruitment.



44. According to the Claimant, he sent the money upon the request of the recruiting contractor. Indeed, I find it rather odd that the said contractor would reverse the transaction and send the money back to the Claimant if at all he had placed a request to the Claimant to send the money. This casts doubt on the Claimant's version that he sent the money following a request for airtime by the third-party contractor.
45. It is also apparent that the Claimant was sending the money in connection with the ongoing recruitment process by the third-party contractor. As such, it is not possible to disconnect the Claimant's action of sending the money to the recruiting contractor and the recruitment process. If anything, the Claimant stated in his response to the Notice to Show Cause that the money was airtime to enable the recruiting contractor communicate with his boss. This further confirms that the purpose for which the Claimant was sending the money was closely connected with the recruitment process. This can be construed as a facilitation fee of sorts.
46. In light of the foregoing, the Respondent had reasonable grounds to believe that by sending the money to the recruiting contractor, the Claimant's intention was to influence the recruitment of the candidates whose names he had forwarded to him.
47. In support of its case, the Respondent exhibited a copy of its Code of Business Conduct which enumerates some of the key principles when dealing with Non-Government Business Partners as being:

“Never to offer anything of value where you know that the person is not permitted by their employer to receive it.

Never offer or accept anything of value where there is an intention of improperly influencing a business decision.”
48. In light of the foregoing principles, it is apparent that the actions of the Claimant were in breach of the provisions of the Respondent's Code of Business Conduct.
49. The Claimant testified during re-examination that the sum of Kshs 100/= could not be used to bribe somebody for a job. In as much as the amount of money in question may appear to be quite insignificant, it is my considered view that the main issue here is the context in which the money was sent and more importantly, the motive for sending the money and what the money represents.
50. The Claimant has further contended that the third-party contractor who was his accuser, failed to attend the disciplinary hearing or record a statement. This argument leads me to revisit the applicable standard of proof in cases of termination of employment. Addressing this question, the Court of Appeal in the case of Kenya Revenue Authority vs Reuwel Waithaka Gitahi & 2 others [2019] eKLR, held that the standard of proof required is on a balance of probability and not beyond reasonable doubt, and all the employer is required to prove are the reasons that it “genuinely believed to exist,” causing it to terminate the employee's services.
51. Applying the above determination to the case herein as well as the provisions of Section 43(2) of the Act, the Respondent was only required to prove that the reasons for which the Claimant was terminated from employment were matters that it genuinely believed to exist at the time of the termination. In this case, the said matters touched on the Claimant's level of integrity.
52. The bottom line is that the Claimant's conduct was improper and as such, he availed the Respondent a valid and fair reason to terminate his employment.



Procedural fairness?

53. The requirement for fair procedure is generally provided for under Section 45 (2) (c) of the Act. Further, Section 41 (1) of the Act makes specific requirements in regards to the process to be complied with by an employer. This entails notifying the employee of the allegations levelled against him or her and thereafter granting him or her the opportunity to make representations in response to the said allegations in the presence of a fellow employee or a shop floor union representative of own choice.
54. As per the record, the process commenced when the Claimant was invited to record a statement in answer to the allegations levelled against him. The Claimant submitted a written statement dated 11th February 2021 and through a letter dated 12th April 2021, he was asked to show cause why disciplinary should not be taken against him on allegations of bribery.
55. The Claimant responded to the Notice to Show Cause through his letter dated 12th April 2021. Through a letter dated 26th April 2021, the Claimant was invited to attend a virtual disciplinary hearing scheduled for 3rd May 2021. He was further advised of his right to be accompanied by a colleague of his choice to provide moral support and or advice during the hearing. Equally, he was advised that he could call any witnesses to testify on his behalf.
56. The record of the disciplinary hearing confirms that the Claimant appeared for the hearing and made his representations on the allegations levelled against him. It was subsequent to this that the Claimant was terminated from employment.
57. In light of the foregoing and bearing in mind the statutory requirements under Section 41 of the Act, I cannot help but find that the procedure for termination as applied by the Respondent, met the threshold under the law.
58. To this end, it is the finding of this Court that the Claimant was accorded procedural fairness as he was informed of the allegations levelled against him and given an opportunity to be heard on his explanation to the allegations. Further to note, is that the Claimant was given the right to appeal the decision to terminate his employment and he exercised the said right.
59. To this extent, the Claimant's termination from employment was procedurally fair.
60. In the end, the Court finds that the Claimant's termination from employment was neither unfair nor unlawful.

Reliefs?

61. As the Court has found that the Claimant's termination from employment was not unfair and unlawful, the reliefs sought in the Memorandum of Claim cannot be sustained.
62. It is also worth mentioning that the Claim for severance pay is misplaced seeing that the Claimant was not declared redundant. As such the remedy does not lie in light of the provisions of Section 40(1) (g) of the Act.

Orders

63. In the final analysis, I dismiss the Claim in its entirety with an order that each party bears their 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 Ms. Akinyi

For the Respondent Mr. Weru

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

